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A TREATISE

ON THE LAW AND PRACTICE OF

Foreclosing Mortgages

ON REAL PROPERTY, AND OF REMEDIES COLLATERAL THERETO, WITH FORMS

BY

CHARLES HASTINGS WILTSIE

OF THE ROCHESTER BAR

WITH ADDITIONAL CHAPTERS ON

MORTGAGE REDEMPTIONS

BY

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IN TWO VOLUMES

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PREFACE.

For nearly a quarter of a century Mr. Wiltsie's treatise on the *Law and Practice of Foreclosing Mortgages* on real property has been used and referred to as an authority by judges and lawyers throughout the several states of the Union. The authors of this revision have, therefore, as far as possible, followed the general plan and style of the first edition; and the same original and exhaustive investigation which was given to the subject by Mr. Wiltsie has been devoted to the subject as modified by the decisions of the last sixteen years.

The lapse of time since the publication of the second edition has made it necessary to modify nearly every section of the work. It has also been necessary to introduce new sections to cover certain phases of the subject not covered in the former editions. It was therefore necessary, in order to bring this edition within the space of two volumes, that certain portions of the former editions be compressed, and others entirely eliminated. The editors have used great care, however, not to compress or eliminate, where it would in any way lessen the usefulness of the work. Among the sections eliminated were those dealing with Loan Commissioners mortgages. This was made possible by the repeal of Chap. 150 of the Act of 1837 authorizing the loan by certain commissioners of moneys belonging to the United States, deposited with the state of New York for safe keeping. The repeal was effected by § 110, Chap. 413 of the Laws of 1897 (State Finance Law § 110).

The search necessary for the preparation of this edition covered a period of sixteen years from 1897 to 1912 inclusive, and all cases used have been tested and retested to make the three thousand new citations of the utmost value to the pro-

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fession. All parallel citations in the National Reporter System, Lawyers' Reports Annotated, American Decisions, American Reports and American State Reports have been added to the state reports. A parallel table of sections has been compiled to enable the practitioner with a citation or reference to the former edition of Wiltsie or Kerr's supplement to find the section cited in this edition.

The editors wish to acknowledge the valuable assistance rendered by Maurice G. Ellenbogen Esq. in searching the subject as covered by this revision.

Henry C. Spurr.
Hiram M. Rogers.

February, 1913.

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§ 821	§ 958	§ 865	§ 1002
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§ 823	§ 960	§ 867	§ 1004
§ 824	§ 961	§ 868	§ 1005
§ 825	§ 962	§ 869	§ 1006
§ 826	§ 963	§ 870	§ 1007
§ 827	§ 964	§ 871	§ 1008
§ 828	§ 965	§ 872	§ 1009
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MORTGAGE FORECLOSURES.

CHAPTER I.

NATURE AND OBJECT OF FORECLOSURE.

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§ 1. Definition.—The foreclosure of a mortgage is one of the remedies of the mortgagee, to enforce the payment of his debt, and has been defined in general terms as "the process by which the mortgagee acquires or transfers to a purchaser an absolute title to the property of which he has previously been only a conditional owner, or upon which he

has previously had a lien or incumbrance." [1] Justice Holmes [2] says, "Properly speaking, the right to foreclose means the right to cut off a right to redeem given by equity, when, by the condition of the mortgage, the mortgagee's estate has become absolute at law." [3]

When it is familiarly said that a foreclosure invests the mortgagee with the title and interest of the parties foreclosed, a practical effect is described rather than a legal proposition defined. As between the parties plaintiff and defendant an action or proceeding for foreclosure passes the mortgagor's title as effectually as a judicial sale, because it extinguishes his entire title and interest. All that is formally accomplished however, is the extinction of a right and the interposition of a perpetual bar against the parties foreclosed; the decree only professes to close a door which equity had before kept open, not to confer a right or to pass a title. It has been said for this reason that the foreclosing creditor by his action succeeds to nothing, acquires no estate, and purchases no right.[4] The decree merely extinguishes the mortgagor's equity of redemption, and does not affect a title superior to the mortgage.[5] But a statute giving perfect titles to purchasers upon mortgage foreclosure sales does no injustice to general creditors,[6] and is not necessarily contrary to the general principles of equity.

Every foreclosure has a point of time at which the title to the mortgaged premises is transferred absolutely from the mortgagor and his subsequent lienors to a purchaser or to a party who sustains the relations of a purchaser to the premises,

[1] 2 Hill. Mort. 1. See *Packer* v. *Rochester & S. R. R. Co.* 17 N. Y. 283, 287; *Goodman* v. *White,* 26 Conn. 317, 322; *McCormick* v. *Wilcox,* 25 Ill. 274; *Weiner* v. *Heintz,* 17 Ill. 259; *Campbell* v. *Carter,* 14 Ill. 286.

[2] *Shepard* v. *Richardson,* 145 Mass. 32, 11 N. E. 738.

[3] See *Koch* v. *Briggs,* 14 Cal. 256, 262, 73 Am. Dec. 651; *Sampson* v. *Pattison,* 1 Hare, 533, 536.

[4] *Goodman* v. *White,* 26 Conn. 317, 322.

[5] *McCormick* v. *Wilcox,* 25 Ill. 274, 276.

[6] *Cook* v. *Detroit G. H. & M. Ry. Co.* 43 Mich. 349, 5 N. W. 390.

whether the foreclosure be conducted by action and judicial sale, entry and possession, advertisement or otherwise. The principal object of a foreclosure is accomplished only when such a transfer has been effected. Other ends may also be sought, as a personal judgment of deficiency, but the extinguishment of the mortgage and the production of a perfect title is the first purpose of every method of foreclosure.

§ 2. History.—The process of foreclosure has been coordinate in development with the law of mortgages. Some writers find traces of the principles of hypothecation, redemption and foreclosure among the early Israelites. But the civil law of the Roman lawyers is the earliest known system of jurisprudence in which the rights connected with pledges were fully and accurately defined.

Civil Law Doctrines.—*Pignus* was the technical term for a pledge which passed into the possession of the creditor, and gradually came to be applied only to movables or chattels; while *hypotheca* referred to a pledge which continued to be held by the debtor, and was applied only to immovables or landed property. These were the two methods known to the Roman law for the transfer of property as collateral security. No title to the property passed. Failure of payment at the appointed time did not work a forfeiture. Principles of equity favored the debtor so that his misfortune should not become the fortune of his creditor. A well regulated procedure or practice of foreclosure, founded upon notice to parties interested, open decrees of court and publicity of sale or entry, grew up with the law of pledges, so that the loss to both debtor and creditor would be the least possible.[7] The civil law of *pignus* and *hypotheca* is the root of the law of mortgages and of the procedures for foreclosure among all the Latin races of the present time.

Common Law Doctrines.—The ablest historians are at variance as to whether the Anglo-Saxons recognized pledges

[7] Story's Eq. Jur. §§ 1005, 1009–1024.

of real property. The law of fueds and tenures was decidedly opposed to mortgages. The Norman conquest and the apportionment of the kingdom of England by the Conqueror rendered them practically impossible until the reign of Edward I., when tenures and alienations of land were greatly simplified.

With the later development of the common law and its doctrines of landed estates, two kinds of realty pledges came to be recognized. The *vivum vadium* contained a continuous right of redemption, and permitted the creditor to enter into immediate possession and to collect the rents and profits for the reduction and payment of the debt; the debtor could re-enter at any time on liquidation of the debt. This form of mortgage never came into general use. The *mortuum vadium* was always made upon definite and exact terms of forfeiture; and if the conditions were not punctually kept, the title passed absolutely and forever from the debtor to the creditor. This form of landed security was extremely severe and often grossly unjust to the debtor. The spirit of the common law was inexorable, and allowed no redress to the unfortunate debtor. It firmly held that contracts of hypothecation with definite terms of forfeiture should be enforced, and it allowed no remedy to restore the debtor to his estate or to have the estate sold at public vendue to the highest bidder. But with the appearance of the courts of chancery these severe rules were greatly modified and ultimately fell into entire disuse.[8]

Growth of Equity.—The *mortuum vadium* is doubtless the root from which our modern mortgage has grown. Its severity and unjustness, however, rendered it odious and unpopular until the appearance of that new jurisdiction which was exercised by the learned chancellors of England. These jurists sought continually to engraft the enlightened and equitable principles of the civil law of mortgages upon the severe rules of the common law. It is believed that the first

[8] Coote on Mortgages, 4–22.

encroachments by the courts of chancery were in the reign of Queen Elizabeth; but their powers were not fully exercised until the time of James I. Great confusion resulted from these concurrent jurisdictions for a number of years, but the justness and equity of the decrees of the chancellors gradually came to be recognized by the courts of common law and were acquiesced in by them. The rule came to be fixed and settled as part of the law of the Kingdom, that "once a mortgage, always a mortgage," and that no mortgage could be enforced without a decree of the chancellors. The common law courts waived entirely their former exclusive jurisdiction over mortgages, and the "equity of redemption" became a fixed right in every mortgagor. To foreclose or extinguish this right, the earliest method used was entry and possession, and from it have been developed the various procedures and practices used in the several states.[9]

§ 3. **Methods of foreclosure.**—There are four principal methods by which mortgages may be foreclosed in the United States, all depending upon equitable principles in their origin and proceeding upon equitable principles in their practice. 1. *Foreclosure by entry and possession* originally required the actual entry upon and possession of the mortgaged premises; this procedure has been greatly assisted by the writ of entry, which is much in the nature of an equitable action, though nominally an action at law. Foreclosure by entry, however, is mainly confined to the New England and a few of the southern states. 2. *Strict foreclosure,* or foreclosure without a sale, was a procedure greatly used in England at one time, and its purpose was to perfect in the mortgagee an absolute title, instead of to obtain a decree of sale; the courts in most states recognize this method, but allow its use only in exceptional cases, owing to its severity upon the rights of the owner of the equity of redemption. 3. *Statutory foreclosure, or*

[9] Coote on Mortgages, 4–22; 4 Kent. Com. 158.

foreclosure by advertisement, is a procedure provided in nearly every state by its legislature, all the steps in which are specifically prescribed by statute. Owing to its extreme technicality and insufficiency of remedy, it is seldom practiced where an equitable action is allowed. 4. *An equitable action* is now the almost universal procedure among the English-speaking races, for the foreclosure of a mortgage. So broad and comprehensive is the process of foreclosure by an equitable action, that a consideration of foreclosures with reference to that procedure, will also cover the subject where the procedure is by entry and possession or by strict foreclosure, so that attention need not be given separately to those two methods; while in statutory procedure special provisions are made as to each step. Where no provisions are made, equitable rules control. The subject of this work is thus reduced substantially to mortgage foreclosures by equitable action. Such variations as may exist in the other methods [10] will be noticed in their proper connections.

[10] In *Delaware* the only remedies by which a mortgagee may enforce the mortgage are by judgment upon *scire facias* in the superior court, and by a bill in the court of chancery for a foreclosure. *Fox* v. *Wharton,* 5 Del. Ch. 200.

Under the *Montana* statute declaring that the mortgagee shall not "recover possession without foreclosure and sale," a provision in a mortgage, giving the mortgagee or trustee authority to enter upon the possession of the premises, is invalid. *First Nat. Bank of Butte* v. *Bell Silver & Copper Mining Co.* 8 Mont. 32, 19 Pac. 403. See *post,* § 710. And the provision of the Montana statute (Mont. Comp. Stat. § 371, p. 161) that a "mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable an owner of the mortgage to recover possession of the real property without foreclosure and sale," does not prevent giving to the mortgagee a power to sell the premises upon default. *First Nat. Bank of Butte* v. *Bell Silver & Copper Mining Co.* 8 Mont. 32, 19 Pac. 403.

It is held in *New York* that the parties to a mortgage may, by an agreement, provide the method for the enforcement of their rights, where the property mortgaged is situated out of the state and beyond the jurisdiction of its courts, unless contrary to some statutory requirement. *Farmers' L. & T. Co.* v. *Bankers & M. Teleg. Co.* 44 Hun (N. Y.), 400, 406.

But under the *Oregon* code

§ 4. **Foreclosure by entry and possession.**—The earliest procedure under this form of foreclosure required an open and visible entry and possession by the mortgagee or his agent, upon the premises in the presence of witnesses, but the present practice requires only a constructive entry. The purpose of the entry, whether actual or constructive, is to give *notice* to the mortgagor, and others interested, that the equity of redemption will be extinguished unless the debt secured is paid and the terms of the mortgage are fulfilled. Constructive entry is now generally made by recording a certificate or declaration of entry in the proper public office and by publishing notice of the same in a newspaper. At the expiration of from one to three years of undisputed peaceable possession, the title of the mortgagee becomes an absolute fee.

In form this procedure is a suit at law, though controlled by equitable rules, except where statutory provisions have prescribed an exact practice. The various details of practice in the several states will be noticed in their proper connections.

§ 5. **Strict foreclosure.**[11]—This is a practice of estoppel upon the mortgagor. It is technically and literally a foreclosure or extinguishment. It permits neither a sale nor redemption; it requires payment of the debt within a certain time after notice or the absolute and final forfeiture of the title. It is the severest of all processes upon the mortgagor; strictly legal, rather than equitable principles, control the practice. It is rarely used in those states where courts of equity have a strong influence. Indeed, it is a serious question in New York whether strict foreclosures have not been abolished by the Code of Civil Procedure.[12]

(Hill's Oreg. Code, § 414) which provides that all liens, other than those of judgments, shall be foreclosed by suit, a provision in a mortgage, or other instrument creating a lien on land, stipulating for foreclosure in any other manner, is void. *Thompson* v. *Marshall,* 21 Oreg. 171, 27 Pac. 957. In *California* the same rule, it is thought, prevails. See *Barbieri* v. *Ramelli,* 84 Cal. 154, 23 Pac. 1086.

[11] See *post,* Chap. xxxv.

[12] N. Y. Code Civ. Proc. § 1626.

In most states, where allowed at all, the practice is used only to remedy defective foreclosures, as where necessary parties have been omitted in an equitable action. The decree is generally to the effect that the defendants shall redeem within a certain time fixed by the court, or be absolutely barred of every interest in the property and of all right to redeem.

§ 6. **Statutory foreclosure.**[13]— Nearly every state prescribes in its statutes a method of foreclosure by advertisement and sale, pursuant to the power of sale contained in nearly all mortgages. This is in addition to the procedure by an equitable action which is practiced in nearly every state.

In colonial times sale under power contained in the mortgage was the only practice employed, and so deeply rooted did it become in the real estate law and titles of that period that it has ever remained as a method of foreclosure. The statutes regulating the practice have varied greatly at different times and are alike in no two of the states. The procedure is generally simple and cheap, but not so quick and certain in results as an equitable action. Being statutory it is extremely technical and liable to produce defective titles. It is employed most frequently in pioneer sections and in localities where real estate has but little value and is of slow sale.

§ 7. **Action in equity.**—An equitable action is now the almost universal procedure in the United States for the foreclosure of a mortgage.[14] It is the most direct and certain

[13] See *post,* Chap. XXXIV.

[14] Where the complainant seeks to foreclose an equitable mortgage given as security for a sum of money admitted to be due the action is properly brought in equity. *Bullowa* v. *Orgo,* 57 N. J. Eq. 428, 41 Atl. 494.

It is thought that in all states a person who has taken an absolute deed as security for a loan must file a bill in order to cut off the debtor's right to redeem, and is obliged to accept the amount due and re-convey the property, when such amount is properly tendered at any time before the right to redeem is cut off. *McSorley* v.

practice, affords the largest opportunities for the adjustment and enforcement of the rights of all parties interested, is the quickest in final results, produces the strongest and firmest titles, and does the greatest justice to both mortgagor and mortgagee. The law of mortgages and of equitable foreclosures is, indeed, as has been remarked by Chancellor Kent, "one of the most splendid instances in the history of our jurisprudence of the triumph of equitable principles over technical rules, and the homage which those principles have received by their adoption in the courts of law." [15]

The history of equitable foreclosures is the history of mortgages. Every development and advancement in the principles of equity law and practice have resulted in corresponding improvements in equitable foreclosures.

It is to this method of foreclosure that this work will be principally devoted.

§ 8. Same—Nature of proceedings.—Foreclosure proceedings in equity are of the nature of proceedings *in rem;* [16] are not ordinarily intended to act *in personam;* [17] and it is

Hughes, 58 Hun (N. Y.), 360, 12 N. Y. Supp. 179.

In an action merely to foreclose a mortgage and asking for a judgment for a deficiency, being in equity, the mortgagee is not entitled, upon defeat, because of the invalidity of the mortgage, to direct a judgment on the bond, but will be left to his remedy at law. *Dudley* v. *Congregation of Third Order of St. Francis,* 65 Hun, 21, 19 N. Y. Supp. 605. See *post,* § 11. See also *Germania Life Ins. Co.* v. *Potter,* 124 App. Div. 814, 109 Supp. 435; *Weary* v. *Wittmer,* 77 Mo. App. 546; *Bieber* v. *Goldberg,* 133 App. Div. 207, 117 Supp. 211.

As to foreclosure action being a legal action see *White* v. *Black,* 115 Mo. App. 28, 90 S. W. 1153; *State ex rel. Wyandotte Lodge No. 35 I. O. O. F.* v. *Evans,* 176 Mo. 310, 75 S. W. 914. See also *Rubey* v. *Missouri Coal & Mining Co.* 21 Mo. App. 159; *Brim* v. *Fleming,* 135 Mo. 597, 37 S. W. 501.

The mere fact that there is a prior lien to that of a deed of trust will not confer equity jurisdiction to entertain a suit by a trustee to enforce the trust. *Ware* v. *Hewett,* 63 W. Va. 47, 59 S. E. 756.

[15] 4 Kent Com. 158.

[16] *State ex rel. Biddle* v. *Superior Court of King County,* 63 Wash. 312, 115 Pac. 307.

[17] *Burges* v. *Souther,* 15 R. I. 202, 2 Atl. 441.

held that as regards a purchaser from the mortgagor, an action for foreclosure of a mortgage is not to be regarded as a mere action for possession, as in ejectment, so as to make the rule that the plaintiff may obtain an order for delivery of possession applicable to a case in which the mortgage sought to be foreclosed is void because of illegal or immoral consideration.[18]

§ 9. Same—Jurisdiction.—All matters pertaining to foreclosure of mortgage, to the protection and preservation of mortgaged property, and to relief against fraud, are of equitable jurisdiction,[19] and a resort to proceedings in equity for the purpose of foreclosing a mortgage is necessary when the property is inadequate to pay the debt, the mortgagor is insolvent, and the mortgagee is not given the right to purchase at a sale under the power.[20] In such cases the court has power, for the best interests of all parties concerned, to decree a sale of mortgaged premises for the payment of the mortgage debt, upon the prayer or assent of mortgagee in his answer or cross-bill, although the relief prayed for in the petition is for the appointment of a receiver to manage the property and apply the proceeds on the debt.[21]

§ 10. Statutory regulations—Terms of mortgage contravening.—All of the above methods of foreclosure are greatly modified in the different states by statutory provisions. Where such provisions are in force, a power of sale or other agreement in the mortgage, that it shall be foreclosed in any other manner than that prescribed by the statute, will be void;[22] the statute in such cases must be strictly followed.[23]

[18] *Clark* v. *Hager,* 22 Can. S. C. 510.

[19] *McCormick* v. *Hartley,* 107 Ind. 248, 6 N. E. 357; *Butters* v. *Butters,* 153 Mich. 153, 117 N. W. 203.

[20] *American Freehold Land Mortgage Co.* v. *McCall,* 96 Ala. 200, 11 So. 288.

[21] *Brown* v. *Chesapeake & Ohio Canal Co.* 73 Md. 567.

[22] *Chase* v. *McLellan,* 49 Me. 375, 378.

[23] *Sherwood* v. *Reade,* 7 Hill (N.

§ 11. Concurrent remedies.—In most states a mortgagee after default has three remedies,[24] any one or two or all of which he may pursue concurrently. These remedies are (1) an action at law to recover the debt, being usually an action on the bond or note, (2) an action in ejectment to obtain possession, and (3) the action of foreclosure;[25] but when he pursues these remedies concurrently, each must be governed by the rules of law applicable to the forum in which it is brought.[26] In some states, however, the action of ejectment can no longer be maintained by the mortgagee for the recovery of the mortgaged premises.[27]

As a general rule the holder of a note or bond secured by mortgage cannot, while prosecuting an action in equity for foreclosure, in which he asks that execution may be awarded to him for any balance left unpaid by the proceeds of the sale of the mortgaged land, maintain an action at law on the note or bond,[28] except in extraordinary cases, and by express per-

Y.), 431; *Williamson* v. *Doe,* 7 Blackf. (Ind.) 12; *Pease* v. *Benson,* 28 Me. 336; *Robbins* v. *Rice,* 73 Mass. (7 Gray) 202.

[24] In Illinois the mortgagee may also proceed by *scire facias* upon the record, where the mortgage is recorded. *Brown* v. *Schintz,* 109 Ill. App. 598.

[25] *Jackson* v. *Hull,* 10 Johns. (N. Y.) 481; *Jones* v. *Conde,* 6 Johns. Ch. (N. Y.) 77; *Dunkley* v. *Van Buren,* 3 Johns. Ch. (N. Y.) 330; *Hughes* v. *Edwards,* 22 U. S. (9 Wheat.) 489, 6 L. ed. 142; *Allen* v. *Pierce,* 163 Ala. 612, 136 Am. St. Rep. 92, 50 So. 924.

In *Ohio,* the mortgagee after condition broken may elect to bring an action for foreclosure or ejectment. *Bradfield* v. *Hale,* 67 Ohio St. 316, 65 N. E. 1008.

In *Georgia,* the grantee in a security deed may either reduce the debt to judgment and levy on the land or sue to recover possession of the land. *Clark* v. *Havard,* 122 Ga. 273, 50 S. E. 108.

[26] *Tyson* v. *Weber,* 81 Ala. 470, 2 So. 901.

[27] *Hubbell* v. *Moulson,* 53 N. Y. 225, 13 Am. Rep. 519; *Fiedler* v. *Darrin,* 50 N. Y. 437, 444; *Faulkner* v. *Cody,* 45 Misc. 64, 91 N. Y. Supp. 633; *Carr* v. *Carr,* 52 N. Y. 251; *Horn* v. *Ketcltas,* 46 N. Y. 605; *Murray* v. *Walker,* 31 N. Y. 399; *Clark* v. *Henry,* 2 Cow. 324.

Contra: *Haggart* v. *Wilczinski,* 143 Fed. 22, 74 C. C. A. 176.

[28] *Van Vrankin* v. *Roberts,* 7 Del. Ch. 16, 29 Atl. 1044; *Anderson* v. *Pilgram,* 30 S. C. 499, 9 S. E. 587, 4 L.R.A. 205, 14 Am. St. Rep. 917. See *Nichols* v. *Smith,* 42 Barb. (N. Y.) 381; *Marx* v. *Davis,* 56 Miss. 745; *Hargreaves* v. *Menken,* 45 Neb. 668, 63 N. W. 951;

mission of the court.[29] And where there is an action pending at law on the note or bond, the bringing of an action in equity to foreclose the mortgage will stay all proceedings in the former suit, except in those cases where the special permission of the court to proceed with the action at law is obtained,[30] because the commencement by the mortgagee of an action in equity to foreclose his mortgage is a constructive abandonment of his other proceedings.[31] But an action of foreclosure may be commenced after a suit on the bond, provided it is brought before judgment in such suit. The consequences of bringing a suit to foreclose while one is pending on the note or bond,

Moore v. *Anglo-American Dry Dock Co.* 81 Hun (N. Y.), 389, 31 N. Y. Supp. 110, 63 N. Y. S. R. 380; *Tobn* v. *Smith* (Ohio Dec.), 1 Ohio N. P. 75.

A judgment recovered in a State court against a railroad company before commencement of a foreclosure suit, by a creditor who was not made a party on foreclosure, is unaffected by the decree and sale. *Stewart* v. *Wheeling & L. E. R. Co.* 53 Ohio St. 151, 41 N. E. 247.

[29] 2 N. Y. Rev. Stat. 191, 199, § 153; N. Y. Code Civ. Proc. §§ 1628–1630. See *Nichols* v. *Smith,* 42 Barb. (N. Y.) 381; *Suydam* v. *Bartle,* 9 Paige Ch. (N. Y.) 294; *Williamson* v. *Champlin,* 8 Paige Ch. (N. Y.) 70, 1 Clarke Ch. (N. Y.) 9; *Marx* v. *Davis,* 56 Miss. 745; *Maxwell* v. *Home Fire Ins. Co.* 57 Neb. 207, 77 N. W. 681.

[30] *Cushman* v. *Leland,* 93 N. Y. 652. See *Schaaf* v. *O'Brien,* 8 Daly (N. Y.) 181, 183; *Gillette* v. *Smith,* 18 Hun (N. Y.), 10, 12.

As cases may arise in which a resort to an action at law is necessary to fully protect the parties, power is conferred upon the court to permit such a proceeding. *Equitable L. Ins. Society* v. *Stevens,* 63 N. Y. 341, 345; Collins' Petition, 6 Abb. (N. Y.) N. C. 227, 232; *Ogden* v. *Padle,* 2 Duer (N. Y.) 611; *Engle* v. *Underhill,* 3 Edw. Ch. (N. Y.) 249; *Suydam* v. *Bartle,* 9 Paige Ch. (N. Y.) 294.

The reason why a mortgagee is allowed to sue at law on the bond, and at the same time prosecute his action for foreclosure in a court of equity, is because one is a proceeding *in rem* and the other *in personam.* Chancellor Kent in *Jones* v. *Conde,* 6 John. Ch. (N. Y.) 77.

Judgment for deficiency in an action to foreclose a mortgage was refused by Chancellor Kent in the case of *Dunkley* v. *Van Buren,* 3 John. Ch. (N. Y.) 330, upon the ground that "such a suit is not intended to act *in personam,*" but that the mortgagee in such an action "is confined in his remedy to the pledge." See *Anderson* v. *Pilgram,* 30 S. C. 499, 9 S. E. 587, 4 L.R.A. 205, 14 Am. St. Rep. 917.

[31] *Van Vrankin* v. *Roberts,* 7 Del. Ch. 16, 29 Atl. 1044.

will be to stay all proceedings in the former suit, unless special permission of the court, to proceed, is obtained.[32] The remedies provided by the terms of a bond and mortgage or trust deed are not exclusive of the other remedies.[33]

Under the statutes of some states, however,[34] foreclosure by suit is the only method by which a mortgage debt can be collected;[35] and where there is such a statutory provision, a stipulation in the mortgage, or other instrument creating the lien, for a foreclosure in any other manner, is void.[36] Such a provision being imperative, it is held, in some states, that the mortgagee cannot waive the security without foreclosure because it is worthless, and bring an action on the indebtedness.[37]

§ 12. Same—Action for debt.—An action to recover the amount due on the interest coupons of bonds secured by a mortgage providing that upon failure to pay the interest coupons for a designated period after they become due the principal shall become due, cannot be brought until after foreclosure and sale of the mortgaged premises under the New Jersey act of March 23, 1881,[38] which provides that

[32] See *Engle* v. *Underhill,* 3 Edw. Ch. 249; *Suydam* v. *Bartle,* 9 Paige Ch. (N. Y.) 294; *Shufelt* v. *Shufelt,* 9 Paige Ch. (N. Y.) 137, 37 Am. Dec. 381; *Williamson* v. *Champlin,* 8 Paige Ch. (N. Y.) 70, 1 Clarke Ch. (N. Y.) 9; *Pattison* v. *Powers,* 4 Paige Ch. (N. Y.) 549; *Cushman* v. *Leland,* 93 N. Y. 652.

In Iowa under § 3493 and § 4288 of the Code in a proper case action on the note may be brought in one county while an action to foreclose is brought in another county. *McDonald* v. *Second National Bank,* 106 Iowa, 517, 76 N. W. 1011.

[33] *Rothschild* v. *Rio Grande W. R. Co.* 84 Hun (N. Y.), 103, 32 N. Y. Supp. 37; *Eslava* v. *New York National B. & Loan Assoc.* 121 Ala. 480, 25 So. 1013; *Reid* v. *McMillan,* 189 Ill. 411, 59 N. E. 948.

[34] Such as Cal. Code Civ. Proc. § 726; Hill's Oreg. Code, § 414.

[35] *Barbieri* v. *Ramelli,* 84 Cal. 154, 23 Pac. 1086; *First National Bank of Butte* v. *Bell Silver & Copper Mining Co.* 8 Mont. 32, 9 Pac. 403; *Thompson* v. *Marshall,* 21 Oreg. 171, 27 Pac. 857, *ante,* §§ 6, 7.

[36] *Thompson* v. *Marshall,* 21 Oreg. 171, 27 Pac. 957.

[37] *Barbieri* v. *Ramelli,* 84 Cal. 154, 23 Pac. 1086; *Bartlett* v. *Cottle,* 63 Cal. 366; *Ould* v. *Stoddard,* 54 Cal. 613.

[38] P. L. of 1881, p. 184 (Gen. Stat. p. 2112, § 47).

in all cases where a bond and mortgage have been given for the same debt, all proceedings to collect the debt shall be first to foreclose the mortgage and then to sue on the bond for any deficiency.[39] The statute, however, may be waived.[40] But in Pennsylvania a recovery may be had on corporate bonds, even though they are secured by a mortgage; and the production of the mortgage is not essential to the maintenance of a foreign attachment in assumpsit on the interest coupons, where the execution of the mortgage is not denied, and the defendant does not set up any substantive defense arising upon the mortgage.[41] And the general rule is that the personal liability of the maker of a note, absolute as to the date of payment, may be enforced prior to that date upon the happening of a contingency which, under the terms of a mortgage securing the note, entitles the mortgagee to elect to declare the whole amount due.[42] But it is thought that a plaintiff in an action to foreclose a mortgage, to whom foreclosure is denied by reason of invalidity of the mortgage, is not entitled to a judgment against the mortgagor upon the bond.[43] Yet, in those cases where the mortgagee issues a general attachment against the mortgagor upon the debt, and obtains a judgment thereunder, he does not *per se* waive his mortgage lien.[44]

It is said that a mortgagee may avail himself of any undertaking made with the mortgagor for the payment of the mortgage indebtedness, to the extent that the mortgagor might enforce such undertaking.[45]

[39] *Holmes* v. *Seashore, Electric R. Co.* 57 N. J. L. 16, 29 Atl. 429. *post*, § 273.

[40] *Andrus* v. *Burke*, 61 N. J. Eq. 297, 48 Atl. 228; *Crosby* v. *Washburn*, 66 N. J. L. 494, 49 Atl. 455.

[41] *Conshohocken Tube Co.* v. *Iron Car Equipment Co.* 161 Pa. St. 391, 28 Atl. 1119.

[42] *Grand Island Sav. & L. Assn.* v. *Moore*, 40 Neb. 686, 59 N. W. 115. See *ante*, § 7.

[43] *Dudley* v. *Congregation of the Third Order of St. Francis*, 138 N. Y. 451, 34 N. E. 281, 53 N. Y. S. R. 192. See *ante*, § 7.

[44] *Lanahan* v. *Lawton*, 50 N. J. Ch. 276, 23 Atl. 476.

[45] *Episcopal City Mission* v. *Brown*, 43 Fed. 834.

§ 13. Results of foreclosure.—Two purposes are now generally sought to be accomplished in foreclosures; first, the extinguishment of the title in the mortgagee and the mortgagor, and those claiming under them, so as to offer a perfect title at the sale, or such a title as a court will compel a bidder to accept; this purpose aims at exhausting every remedy against the land for collecting the mortgage debt, and when foreclosures were merely actions *in rem,* as originally, they had no other purpose or result; second, the recovery of a personal judgment, for any deficiency that may remain after the proceeds of a sale are applied to the payment of the mortgage debt, against all who have in any way become liable for the money secured by the mortgage,—a purpose accomplished originally only in actions *in personam.* The union of these two results in one judgment is quite recent, and is allowed only by special statute. The effect of the first purpose is declared in most states by statute. In New York it is provided that "a conveyance upon a sale, made pursuant to a final judgment, in an action to foreclose a mortgage upon real property, vests in the purchaser the same estate only, that would have vested in the mortgagee, if the equity of redemption had been foreclosed. Such a conveyance is as valid as if it was executed by the mortgagor and mortgagee, and is an entire bar against each of them, and against each party to the action who was duly summoned, and every person claiming from, through or under a party, by title accruing after the filing of the notice of the pendency of the action, as prescribed in the last election." [46]

The title and possession remain in the mortgagor until such conveyance upon sale; the interest of the mortgagee remains until then that of a mere lienor. The commencement of a foreclosure gives him no title, as his mortgage is only a security for a debt; the title and seizure remain in the

[46] N. Y. Code Civ. Proc. § 1632.

mortgagor until the referee's deed upon sale is actually delivered to the purchaser.[47]

The natural result of a decree[48] against a mortgagor is to foreclose his interest in the mortgaged estate adverse to the mortgagee, held when the mortgage was executed, whether any particular interest was brought in issue or not;[49] and as long as the decree of foreclosure stands, the mortgagor cannot avoid its effect by averring want of knowledge, when he executed the mortgage on which the decree was taken, or the trust through which he derived title; and that the purchaser at the foreclosure and his assigns had knowledge of the trust.[50] In such a case whatever interest the mortgagor actually had in the land at the time of giving the mortgage,—whether derived as *cestui que trust,* under a deed to a third party and a contemporaneous letter declaring a trust in his favor, or through a deed from the trustee,—was conveyed by the mortgagee; and they are estopped, when parties to a foreclosure proceeding from asserting such interest while the judgment stands.[51] But a judgment in foreclosure does not bind the mortgagor who is not a party, although his grantee is, to whom he has conveyed the mortgaged premises.[52]

[47] *Gardner* v. *Heartt,* 3 Den. (N. Y.) 232; *Hubbell* v. *Moulson,* 53 N. Y. 225, 13 Am. Rep. 519; *Bryan* v. *Butts,* 27 Barb. (N. Y.) 503; *National Fire Ins. Co.* v. *McKay,* 5 Abb. (N. Y.) Pr. N. S. 445.

[48] The lien created by a decree of foreclosure is not subject to the limitations governing judgments at law, under the Illinois Chancery Act (Ill. Rev. Stat. c. 22, § 45) which provides that all chancery decrees shall be a lien upon all realty respecting which they are made, and that the court may order to be a lien upon realty or personalty or both any decree to perform any act other than the payment of money or to refrain from performing any act, and that such lien shall have the same force and effect and be subject to the same limitations of time as judgments at law. *Kirby* v. *Runals,* 140 Ill. 289, 29 N. E. 697.

[49] *Gaylord* v. *City of Lafayette,* 115 Ind. 423, 17 N. E. 899.

[50] *Gaylord* v. *City of LaFayette,* 115 Ind. 423, 17 N. E. 899.

[51] *Gaylord* v. *City of Lafayette,* 115 Ind. 423, 17 N. E. 899.

[52] *Everling* v. *Holcomb,* 74 Iowa, 722, 39 N. W. 117.

§ 14. Effects of foreclosure and sale on title.—The effect of a foreclosure by an equitable action and the sale of the premises is to bar the equity of redemption.[53] The deed passes to and vests in the purchaser the estate which would have passed to and vested in the mortgagee if there had been a strict foreclosure, no more and no less;[54] and a sale made pursuant to a decree or judgment of a competent court having jurisdiction of the subject-matter and of the parties, passes title to the purchaser even though the judgment should afterwards, on appeal, be set aside for error or irregularity.[55] The deed of the officer of the court conveying the property will be as valid as if it had been executed by the mortgagor and mortgagee, and will be an entire bar against each of them, and against all parties to the suit in which the decree for such sale was made, and against their heirs and representatives, and all parties claiming under them or their heirs,[56] as well as against an assignee in bankruptcy,[57] who has notice of a suit pending against the bankrupt to foreclose the mortgage, although he was not made a party to the action;[58] and such a deed will be a complete bar to the equity of redemption where the mortgagee becomes the purchaser the same as where the property is purchased by a stranger.[59] Foreclosure

[53] See *Palmer* v. *Mead,* 7 Conn. 149; *Broome* v. *Beers,* 6 Conn. 198; Anonymous, 2 Cas. in Ch. 24.

[54] *Lawrence* v. *Delano,* 3 Sandf. (N. Y.) 333.

[55] See *Blakeley* v. *Calder,* 15 N. Y. 617; *Holden* v. *Sackett,* 12 Abb. (N. Y.) Pr. 473; *Lewis* v. *Smith,* 11 Barb. (N. Y.) 152; *LeGuen* v. *Gouverneur,* 1 Johns. Cas. (N. Y.) 436, 1 Am. Dec. 121; *Breese* v. *Bangs,* 2 E. D. Smith (N. Y.) 474; *Wood* v. *Jackson,* 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; *Buckmaster* v. Carlin, 4 Ill. (3 Scam.) 104; *Bank of United States* v. *Voorhees,* 1 McL. C. C. 221.

[56] *Blakeley* v. *Calder,* 15 N. Y. 617; *Holden* v. *Sackett,* 12 Abb. (N. Y.) Pr. 473; *Breese* v. *Bangs,* 2 E. D. Smith (N. Y.) 474; *Wood* v. *Jackson,* 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; *Buckmaster* v. *Carlin,* 4 Ill. (3 Scann.) 104; *Bank of United States* v. *Voorhees,* 1 McL. C. C. 221, 2 N. Y. Rev. Stat. 192, § 158.

[57] Under Acts of Congress, 1841, 5 Stat. at Large, 446.

[58] *Cleveland* v. *Boerum,* 24 N. Y. 613.

[59] *Lansing* v. *Goelet,* 9 Cow. (N. Y.) 346.

and sale exhausts the mortgage lien as to the property sold;[60] and where the mortgagee becomes the purchaser[61] he cannot, after redemption by a junior incumbrancer, resell the land to enforce payment of an unsatisfied balance of the mortgage debt.[62] It is the universal rule that the foreclosure of a purchase-money mortgage given at the time of the delivery of the deed, by the person named as grantee therein, will extinguish an estate in remainder created only by the habendum, and not by the granting clause of the deed, although the remaindermen are not parties to the foreclosure.[63] But the title of a vendee who gives back a purchase-money mortgage conditioned to be non-transferable, and void upon payment of the note secured thereby, or upon the death of the mortgagee before such payment, is not divested by an attempted foreclosure void because of failure to comply with the statute.[64]

The effect of foreclosure is not only to divest the mortgagor of all interest in the property, but after a foreclosure sale and redemption, the mortgagee cannot institute a second foreclosure on the ground that an interest note was omitted in computation of the judgment.[65] Yet in some states a sale of mortgaged premises under foreclosure does not affect the right of a previous grantee who is not made a party to the foreclosure action, where the mortgagee has notice of the conveyance.[66] In such states the purchaser of a part of the mortgaged premises, who is not made a party to an action to foreclose the mortgage, although the mortgagee has notice of the conveyance, is not required to refund the purchase money as a condition of recovering the land sold to him.[67] But the gen-

[60] *Connor* v. *Connor,* 59 Fla. 467, 52 So. 727.

[61] See *post,* § 609.

[62] *Anderson* v. *Anderson,* 129 Ind. 573, 28 Am. St. Rep. 211, 29 N. E. 35.

[63] *Holmes* v. *Wintler,* 47 Fed. 257.

[64] *Hollis* v. *Hollis,* 84 Me. 96, 24 Atl. 581.

[65] *Hanson* v. *Dunton,* 35 Minn. 189, 28 N. W. 221.

[66] *Bradford* v. *Knowles,* 86 Tex. 505, 25 S. W. 1117.

[67] *Bradford* v. *Knowles,* 86 Tex. 505, 25 S. W. 1117.

eral rule is that a junior mortgagee, although not a party to a proceeding to foreclose a senior mortgage, cannot, without offering to redeem from the sale of the mortgaged property thereunder, maintain a bill to foreclose his mortgage against the purchaser at such sale, the mortgagor's equity of redemption thereunder being extinguished by the foreclosure and sale.[68]

§ 15. Who barred by foreclosure.—The foreclosure and sale will be a bar under the statute against those persons who were properly made parties to the action, that is, the mortgagor and the mortgagee, and all subsequent incumbrancers, and against such rights as were properly the subject of litigation in the action. It will not bar the rights of persons who were not properly made parties to the litigation, and whose rights are paramount to those of the mortgagor and mortgagee.[69] Thus a claim of dower in the premises was not barred by a foreclosure and sale under a mortgage executed by the husband alone during coveture, although the widow was made a party to the foreclosure suit, and the bill, which was taken as confessed against her, alleged that she claimed some interest in the premises "as subsequent purchaser, or incumbrancer, or otherwise."[70]

It is a general rule that a decree of foreclosure is conclusive against a tax title acquired by a defendant after summons, but before decree, and not set up, even though the purchase in the name of the defendant was made for others to whom the certificate was subsequently assigned.[71] But the holder of a prior mortgage whose priority is not drawn in question by a

[68] *Rose* v. *Walk,* 149 Ill. 60, 36 N. E. 555.

[69] *Lewis* v. *Smith,* 9 N. Y. 502, 41 Am. Dec. 706.

[70] *Lewis* v. *Smith,* 9 N. Y. 502, 41 Am. Dec. 706. See *Banks* v. *Walker,* 3 Barb. Ch. (N. Y.) 438; *Hallett* v. *Hallett,* 2 Paige Ch. (N. Y.) 15; *Devonsher* v. *Newenham,* 2 Schoales & Lef. 199.

[71] *Davis* v. *Barton,* 130 Ind. 399, 30 N. E. 512.

bill to foreclose a junior mortgage is not barred of his prior right by the ordinary decree of foreclosure against him.[72]

§ 16. Subsequent incumbrancers.—The decree of foreclosure and the sale thereunder, are a bar only against persons who were made parties to the action, their heirs and assigns, and those claiming under them;[73] consequently where the mortgage is foreclosed without joining the holder of a subsequent incumbrance upon or interest in the premises, whose title appears of record, the decree will not be binding upon such incumbrancer.[74]

A sale under a mortgage divests the lien of a second mortgagee whose description includes a portion of the land included in the prior mortgage, as to such portion, and passes a good title to the purchaser.[75]

§ 17. Foreclosure as payment of debt.—The principle is well settled that the foreclosure of a mortgage, by whatever method, operates as a payment of the mortgage debt,[76] to the extent of the value of the property;[77] and this is true even though the foreclosure is brought by an assignee, holding

[72] *Buzzell* v. *Still,* 63 Vt. 490, 22 Atl. 619, 25 Am. St. Rep. 777.

[73] 2 N. Y. Rev. Stat. 192, § 138; N. Y. Code Civ. Proc. § 1632.

[74] *Walsh* v. *Rutgers Fire Ins. Co.* 13 Abb. (N. Y.) Pr. 33. See *Vanderkemp* v. *Shelton,* 11 Paige Ch. (N. Y.) 28; *Slee* v. *Manhattan Co.* 1 Paige Ch. (N. Y.) 48.

[75] *Brundred* v. *Egbert,* 158 Pa. St. 552, 28 Atl. 142, 24 Pitts. L. J. N. S. 461.

[76] Under the Connecticut statute (Conn. Gen. Stat. § 3010) providing that the foreclosure of a mortgage shall be a bar to any further action upon the mortgage debt, note, or obligation, unless the person or persons who are liable for the payment thereof are made parties to such foreclosure, applies to all foreclosures, strict as well as by judicial sale, of mortgages on personalty as well as on real property. *Ansonia Nat. Bank's Appeal,* 58 Conn. 257, 18 Atl. 1030, 20 Atl. 394.

[77] See *Vansant* v. *Allmon,* 23 Ill. 30; *Wilson* v. *Wilson,* 4 Iowa, 309; *Hurd* v. *Coleman,* 42 Me. 182; *Southard* v. *Wilson,* 29 Me. 56; *Briggs* v. *Richmond,* 27 Mass. (10 Pick.) 391, 20 Am. Dec. 526; *Hunt* v. *Stiles,* 10 N. H. 466; *Paris* v. *Hulett,* 26 Vt. 308; *Lovell* v. *Leland,* 3 Vt. 581. Contra, *Strong* v. *Strong,* 2 Aik. (Vt.) 373.

only a part of the mortgage debt;[78] therefore, where a mortgagee forecloses his mortgage his debt becomes by that act extinguished to the extent of the value of the land at the time of the foreclosure, and whatever he may hold as collateral security for the debt in addition to the mortgage on the land, will thereby become discharged to the same extent.[79] Where the property is not sufficient to discharge the mortgage debt, the mortgagee may maintain an action at law for the debt after deducting the value of the premises or the amount for which they were sold;[80] because in such a case the foreclosure only extinguishes the debt to the extent of the money produced by the sale.[81] The reason is said to be the fact that the mortgage is but a mere security for the debt and collateral to it; that the debt has an independent existence and remains with all its original validity, notwithstanding a release of the mortgage; that the former is the principal and the letter an incident, though not an indispensable incident.[82] But where the value of the property mortgaged exceeds the amount of the debt, foreclosure will operate as full payment even at law.[83]

[78] *Johnson* v. *Candage*, 31 Me. 28. See *Brown* v. *Tyler*, 74 Mass. (8 Gray) 135, 69 Am. Dec. 239.

[79] *Smith* v. *Packard*, 19 N. H. 575.

[80] *Globe Ins. Co.* v. *Lansing*, 5 Cow. (N. Y.) 380, 15 Am. Dec. 474; *Porter* v. *Pillsbury*, 36 Me. 278; *Andrews* v. *Scotton*, 2 Bland. Ch. (Md.) 629; *Amory* v. *Fairbanks*, 3 Mass. 562; *Hatch* v. *White*, 2 Gall. C. C. 154; *Omaly* v. *Swan*, 3 Mason C. C. 474; *Briggs* v. *Richmond*, 27 Mass. (10 Pick.) 391, 396; *West* v. *Chamberlin*, 25 Mass. (8 Pick.) 336; *Lansing* v. *Goelet*, 9 Cow. (N. Y.) 346; *Case* v. *Boughton*, 11 Wend. (N. Y.) 106, 109; *Morgan* v. *Plumb*, 9 Wend. (N. Y.) 287, 292; *Spencer* v. *Hartford*, 4 Wend. (N. Y.) 384, 386; *Hughes* v. *Edwards*, 22 U. S. (9 Wheat.) 489, 6 L. ed. 142; *Aylet* v. *Hill*, 2 Dick. 551; *Took* v. ——, 2 Dick. 785; sub nom. *Tooke* v. *Hartley*, 2 Bro. C. C. 125; *Perry* v. *Barker*, 13 Ves. 198, 204; *Dashwood* v. *Blythway*, 1 Eq. Cas. Ab. 317, 4 Kent Com. 183.

[81] *Globe Ins. Co.* v. *Lansing*, 5 Cow. (N. Y.) 380, 15 Am. Dec. 474; *Dunkley* v. *Van Buren*, 3 Johns. Ch. 331; *Dearborn* v. *Nelson*, 61 N. H. 249.

[82] *Hatch* v. *White*, 2 Gall. C. C. 152, 154.

[83] *Bassett* v. *Mason*, 18 Conn. 131; *Perley* v. *Chase*, 79 Me. 519, 11 Atl. 418. See *Vansant* v. *Allmon*, 23 Ill. 30; *Wilson* v. *Wilson*, 4 Iowa, 309; *Hurd* v. *Coleman*, 42 Me. 182; *Briggs* v. *Richmond*, 27 Mass. (10 Pick.) 391, 20 Am. Dec. 526; *Smith* v. *Packhard*, 19 N. H. 575; *Hunt* v.

The foreclosure of a mortgage according to the mode prescribed by the New Hampshire statute[84] upon a part of the mortgaged premises, the value of which exceeds the amount due on the mortgage debt, frees the remainder,[85] which was not foreclosed from the mortgage lien. But it has been held by the Supreme Court of Missouri that a city which has purchased property under a deed of trust to itself, and surrendered the notes which the deed was given to secure, may still hold the property for reimbursement when the sale is declared void, the debt still remaining unpaid.[86] And after a foreclosure is perfected and the debt satisfied the validity of a mortgage executed to a foreign corporation, not having an office or known place of business in the state where the land is situated, can not be called in question.[87]

The effect of a judgment *in personam* against a payee of promissory notes, secured by a special mortgage, and in which there is a recognition of the mortgage and a decree for its enforcement is to merge the notes completely and perfectly, so that thereafter the judgment is the only evidence of the debt;[88] but such is not the case as to the mortgage. It retains the full force, effect and rank after the judgment that it had before.

Stiles, 10 N. H. 466; *Paris* v. *Hulett,* 26 Vt. 308; *Lovell* v. *Leland,* 3 Vt. 581; *Southard* v. *Wilson,* 29 Me. 56.

A contrary view seems to have been maintained in the early case of *Strong* v. *Strong,* 2 Aik. (Vt.) 379, but the doctrine of that case is not now the rule of the state in which it was rendered.

Foreclosure by an assignee will have the same effect, even though he holds only a portion of the mortgage debt. See *Johnson* v. *Candage,* 31 Me. 28; *Brown* v. *Taylor,* 74 Mass. 135, 69 Am. Dec. 239.

[84] N. H. Gen. Laws, c. 136, § 14.

[85] *Ray* v. *Scripture,* 67 N. H. 260, 29 Atl. 454.

[86] *City of St. Louis* v. *Priest,* 103 Mo. 652, 15 S. W. 988.

[87] *Craddock* v. *American Freehold Land Mortgage Co.* 88 Ala. 281, 7 So. 196.

[88] In Louisiana the judgment only renders the mortgage executory by ordinary *fieri facias,* but not precluding executory proceedings subsequently. *Lalane* v. *Payne,* 42 La. Ann. 152, 7 So. 481.

CHAPTER II.

COURTS, JURISDICTION AND VENUE.

§ 18. In General—Courts of equity.
§ 19. Foreclosure—Trial by jury.
§ 20. Decree by chancery—Fraudulent.
§ 21. Jurisdiction, of state courts—New York.
§ 22. Same—Missouri.
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§ 24. Same—Iowa.
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§ 26. Same—South Carolina.
§ 27. Same—Georgia.
§ 28. Jurisdiction of Federal Courts.
§ 29. Venue—Where the land lies within the state.
§ 30. Same—Debt payable in one county; Land in another.
§ 31. Same—Action brought in improper county.
§ 32. Same—Motion for change of venue.
§ 33. Same—Where property situated in two states.
§ 34. Same—Where the land lies out of the state.
§ 35. Same—Where the parties reside in another state.
§ 36. Transitory action.

§ 18. In general—Courts of equity.—Courts of equity have inherent original jurisdiction of actions to foreclose mortgages, and authority to render such judgment or decree as substantial justice between the parties may require. And although this power is conferred by statute upon courts of law in several states,[89] yet courts of equity, where they have not been suspended by codes of practice, doing away with all distinctions between actions at law and actions in equity, still

[89] Statutes regulating mortgage foreclosures have been enacted in California, Florida, Indiana, Iowa, Kansas, Kentucky, Minnesota, Missouri, Nebraska, Nevada, North Carolina, Ohio, Oregon, South Carolina and Wisconsin. And see *State Bank of Illinois* v. *Wilson*, 9 Ill. 57; *Warehime* v. *Carroll Co. Building Assoc.* 44 Md. 512; *Chouteau* v. *Allen*, 70 Mo. 290; *Byron* v. *May*, 2 Chand. (Wis.) 103.

have concurrent jurisdiction of the foreclosure of mortgages and are frequently resorted to in particular cases because, it is said, they afford a more complete and certain remedy.[90]

Where a mortgage contains a power of sale, such power will not deprive courts of equity of their jurisdiction to foreclose.[91] It is said that the reason for retaining jurisdiction in a court of equity is, that the mortgagee is incapable of purchasing at his own sale under a power in the mortgage,[92] but that at a sale made by an officer under a decree of foreclosure the mortgagee may become a purchaser.[93]

A condition in a deed of trust stipulating that the premises mortgaged shall not be sold under proceedings either at law or equity, but that the mode of sale provided by the mortgage shall be exclusive of all others, will not oust the jurisdiction of the courts. Only the grantor and his assigns can take advantage of this covenant; purchasers at a judicial sale cannot.[94]

It has been said that when the holder of a note and mortgage securing the same proceeds to the sale of the mortgaged

[90] *Shaw* v. *Norfolk Co. R. R. Co.* 71 Mass. (5 Gray) 162; *McElrath* v. *Pittsburgh & S. R. R. Co.* 55 Pa. St. 189.

[91] *Alabama Life Ins. & T. Co.* v. *Pettway,* 24 Ala. 544; *Carradine* v. *O'Connor,* 21 Ala. 573; *Warehime* v. *Carroll Co. Building Assoc.* 44 Md. 512; *Morrisson* v. *Bean,* 15 Tex. 267; *Walton* v. *Cody,* 1 Wis. 420; *Byron* v. *May,* 2 Chand. (Wis.) 103; *Martin* v. *Ward,* 60 Ark. 510, 30 S. W. 1041; *Dupee* v. *Rose,* 10 Utah, 305, 37 Pac. 567; *Jones* v. *Williams,* 155 N. C. 179, 36 L.R.A.(N.S.) 426, 71 S. E. 222; *McLarty* v. *Urquhart,* 153 N. C. 339, 69 S. E. 245; *Winter Loeb & Co.* v. *Montgomery Cooperage Co.* 169 Ala. 628, 53 So. 905; *Herrick's Admr.* v. *Teachout,* 74 Vt. 196, 52 A. 432.

A mortgagee may proceed in equity for a sale of the mortgaged premises immediately after default in payment, although the mortgage contains a power of sale which cannot be exercised until after the lapse of a named period. *Allan* v. *Manitoba & N. W. R. Co.* 10 Manit. Rep. 106.

[92] *Marriott* v. *Givens,* 8 Ala. 694; *McGowan* v. *Branch Bank of Mobile,* 7 Ala. 823.

[93] *Benjamin* v. *Cavaroc,* 2 Wood, C. C. 168.

[94] *Guaranty Trust & S. D. Co.* v. *Green Cove Springs & M. R. Co.* 39 U. S. 137, 35 L. ed. 116, 11 Sup. Ct. Rep. 512, 45 Am. & Eng. R. Cas. 689.

property, under a decree of foreclosure, he has submitted his claim to the equitable remedy; and when a court of equity has become possessed of the case, its authority continues, subject only to the appellate authority, until the matter is completely and finally disposed of; and no court of co-ordinate authority is at liberty to interfere with its action.[95]

§ 19. Foreclosure—Trial by jury.—In an action to foreclose a mortgage brought under a statute providing for such proceedings, the court may, in its discretion, direct a reference, or ask the aid of a jury [96] to inform its conscience, or it may decide the case without such aid; but the defendant can not ask as a matter of right to have the issues framed and tried at law.[97] And a jury trial can not be demanded as a matter of right in an action to recover upon a promissory note, and to foreclose a mortgage executed to secure the same, where the pleadings admit the right to recover the amount due upon the note, and nothing is left in controversy but the right to foreclose the mortgage, and to subject the property mortgaged to the payment of the amount admitted to be due.[98]

The fact that in an action to foreclose a mortgage, the sale of the mortgaged premises may result in a deficiency, for which a money judgment may be docketed against the defendant liable for such deficiency, does not entitle him, as a matter of right, to a jury trial; the action is in equity and is triable by the court.[99]

Should the court in such a case direct any matter of fact to

[95] *Shields* v. *Riopelle,* 63 Mich. 458, 30 N. W. 90.

[96] *Burns* v. *Haile,* 112 Ga. 721, 38 S. E. 76.

In Wyoming the statute (R. S. § 2518) empowers a court of equity to submit an action to foreclose a mortgage to a jury. *Chosen Friends Home Loan & Savings League* v. *Otterson,* 7 Wyo. 89, 50 P. 194.

[97] *Knickerbocker Life Ins. Co.* v. *Nelson,* 8 Hun (N. Y.), 21; *Carmichael* v. *Adams,* 91 Ind. 526; N. Y. Code Civ. Proc. §§ 968, 969.

[98] *Morgan* v. *Field,* 35 Kan. 162.

[99] *Carroll* v. *Deimel,* 95 N. Y. 252.

be tried by a jury as authorized by the New York Code of Civil Procedure,[1] and after such trial disregard the verdict and make its own findings, the case may be reviewed on appeal, on the findings and decisions of the court, the same as if there had been no submission of any fact to the jury.[2]

But it seems that where a mortgagee brings an action under the New York Code of Civil Procedure upon a covenant in a deed against the grantees of the mortgagor to recover the deficiency arising on the foreclosure of the mortgage, which they had in their deed covenanted to repay as a part of the purchase price, and demands a money judgment against them, the action is triable by a jury.[3]

Where an answer is filed to an interplea, to the effect that the mortgages under which the interpleader in the attachment proceedings claims the property were made to hinder, delay and defraud the creditors of the defendant, and were therefore void, raises an issue properly triable by a jury.[4]

The affidavits in an action for the foreclosure of a mortgage are sufficient to entitle the defendant to a trial by jury, where they show that the mortgage was executed while the mortgagors were unfitted to do business, and upon the representation of the common attorney of the mortgagors and the mortgagee that the mortgage would be held solely for the protection of one of the mortgagors against the creditors of her husband, the other mortgagor, and that in no event was the

[1] §§ 823, 971, 1003.

[2] *Carroll* v. *Deimel,* 95 N. Y. 252. Where, therefore, in such a case, upon the trial before the jury on which trial the same judge who made the findings presided, improper evidence was received under objection and exception, the appellant will be entitled to the benefit of the exception. Id.

[3] *Hand* v. *Kennedy,* 83 N. Y. 149, aff'g 45 N. Y. Super. Ct. (13 J. & S.) 385.

[4] *Caruth-Byrnes Hardware Co.* v. *Wolter,* 91 Mo. 484, 3 S. W. 865. See contra *Ray* v. *Atlanta Banking Co.* 110 Ga. 305, 35 S. E. 117.

As to when defendant in foreclosure action is entitled to a jury trial on the issues raised by a counterclaim, see *Herb* v. *Metropolitan etc.* 80 App. Div. 145, 80 Supp. 552.

mortgage to be resorted to until the exhaustion of other securities held by the mortgagee, and that such security has not been exhausted.[5] And where there are several important questions of fact bearing on the relations and obligations of the parties not fully developed in the statement and affidavit of defense, the case should go to a jury.[6]

§ 20. Decree in chancery—Fraudulent.— Where a mortgage is foreclosed in a court of equity the decree should determine the rights and liabilities of all the parties to the action.[7] And where a decree in chancery foreclosing a mortgage is obtained by fraud, it is void and will be so declared on a bill filed by the party whose rights are injuriously affected by it; a title founded upon such sale is also void.[8]

§ 21. Jurisdiction of state courts[8a]—New York.—The New York Constitution as amended in 1869,[9] vests the supreme court with general jurisdiction both in law and in equity; and this court thereby succeeded to the old chancery powers and therefore has jurisdiction in all actions for the foreclosure of mortgages. It is also given jurisdiction by the Code of Civil Procedure.[10]

It was recently held by the supreme court as regards mortgaged property situated within the state and subject to the jurisdiction of its courts, that the parties to the mortgage can not, by their agreement, deprive the courts of the jurisdiction,

[5] *First National Bank of Jamestown* v. *Scofield,* 168 Pa. St. 407, 31 Atl. 1016.

[6] *New York Trust Co.* v. *Langcliffe Coal Co.* 227 Pa. 630, 76 A. 736.

[7] Thus where a bill was filed to foreclose a mortgage executed by A. and wife and B. and wife, all of whom were made parties defendant, a decree directing the sale of the interest of A. alone was held erroneous. *Hurtt* v. *Crane,* 36 Md. 29. See *Contee* v. *Dawson,* 2 Bland. Ch. (Md.) 264, 292.

[8] *Eslava* v. *Eslava,* 50 Ala. 31, 32.

[8a] Besides the states classified in the text see for NEBRASKA: *Shold, as administrator, etc.* v. *Van Treek,* 82 Neb. 99, 117 N. W. 113. TEXAS: *Womble* v. *Harsey,* — Tex. Civ. App. —, 118 S. W. 764.

[9] Article 6, § 6.

[10] § 217.

which they would otherwise have, to enforce the rights acquired under the mortgage; but that they can by such agreement provide the method for the enforcement of their rights in those cases where the property mortgaged is situated out of the state and beyond the jurisdiction of its courts, unless such agreement is contrary to some statutory regulation upon the subject.[11]

The supreme court can also take jurisdiction of the foreclosure of a mortgage where a portion of the mortgaged premises lies in another state, and may order the mortgagor to execute a conveyance thereof in performance of the covenant in the mortgage; and also that such order, although not originally prayed, can be granted, even after report of sale, by way of amendment. [12]

By the provisions of the Code of Civil Procedure,[13] the county courts are given jurisdiction of actions for the foreclosure of mortgages, and for the collection of any deficiency on the mortgage which may remain unpaid after the sale of the premises has been made, where such mortgaged premises are situated in the county. County courts are not courts of general jurisdiction, but of limited statutory jurisdiction, and it must appear upon the face of the pleadings that the action is within their jurisdiction.[14]

But it has been held that where by mistake the land intended to be covered by the mortgage, is described so vaguely and uncertainly as to render it impossible to identify and locate it, a county court will not have jurisdiction of an action to reform the mortgage by correcting the error in the description and to

[11] *Farmers' Loan & Trust Co.* v. *Bankers' & M. Telegraph Co.* 44 Hun (N. Y.), 400.

[12] *Union Trust Co.* v. *Olmstead,* 102 N. Y. 729, 7 N. E. 822.

[13] § 340. See also Code Proc. § 30; Code of Rem. Just. § 340. See *Arnold* v. *Reese,* 18 N. Y. 57, 17 How. (N. Y.) Pr. 35; overruling *Hall* v. *Nelson,* 23 Barb. (N. Y.) 88.

[14] *Kundolf* v. *Thalheimer,* 12 N. Y. 593, aff'g 17 Barb. (N. Y.) 506; *Frees* v. *Ford,* 6 N. Y. 176. See *VanDeusen* v. *Sweet,* 51 N. Y. 378.

foreclose the mortgage as thus reformed, because such court has no jurisdiction of an action to reform a mortgage.[15]

§ 22. Same—Missouri.—In Missouri the circuit court has general jurisdiction over the foreclosure of mortgages, and objection to the jurisdiction of the court in any given action, based upon the fact that the mortgaged premises are not situated in the county where the suit is brought, must be taken by the proper plea, and will be waived by pleading to the merits.[16]

§ 23. Same—Louisiana.—In Louisiana, a probate court, which has not acquired jurisdiction over mortgaged property by an omission, or commission or laches of the mortgage creditor, whose contract contains the *pact de non alienando,* has no authority to order the sale of the property affected to him on terms different from those which he is entitled to fix, and which injuriously affect his right;[17] and where a mortgage creditor, under a *pact de non alienando,* who applies for executory process shortly after the maturity of his claim, before the death of his debtor, and within thirty days after the opening of the succession, is not dilatory, and jurisdiction in the probate court does not attach.[18] The *pact* authorizes the creditor to subject the property to payment of his claim, without regard to any subsequent alienation or incumbrances of the same.[19]

[15] *Avery* v. *Willis,* 24 Hun (N. Y.), 548; *Thomas* v. *Harmon,* 46 Hun (N. Y.), 75. See *Crosby* v. *Dowd,* 61 Cal. 603.

County courts have original jurisdiction only in certain specified cases. Constitution, articles 6, § 15; Code Civ. Proc. § 340. An action or proceeding to obtain the reformation of a defective deed, mortgage, or other instrument, is not among these specified cases, and the Code of Civ. Proc. § 348 does not cover it.

[16] *Chouteau* v. *Allen,* 70 Mo. 290.

[17] *Thompson's succession,* 42 La. An. 118, 7 So. 477.

[18] *Thompson's succession,* 42 La. An. 118, 7 So. 477.

[19] *Thompson's succession,* 42 La. An. 118, 7 So. 477.

§ 24. Same—Iowa.—It has been said that, under the Iowa code, the principle that when a court has no jurisdiction of the subject-matter it cannot be conferred by consent, does not apply to a sale of mortgaged property under the terms of a so-called decree of the Iowa superior court, which has jurisdiction of a suit to foreclose a mortgage, but cannot issue process for the sale, where the sale is made under an agreement of the parties that the court has jurisdiction, and the sale shall be made without right of redemption and convey all the interest of all the parties since the sale is not made by order of the court, but by consent of the parties.[20]

§ 25. Same—Pennsylvania.—In Pennsylvania under the Act of May 5, 1876 (P. L. 123), general power is conferred upon the courts of common pleas to entertain bills for the foreclosure of mortgages given by railroad companies.[21]

§ 26. Same—South Carolina.—In South Carolina the court of common pleas has jurisdiction in foreclosure.[22]

§ 27. Same—Georgia.—In Georgia, a city court has no jurisdiction to foreclose a mortgage on realty.[23]

§ 28. Jurisdiction of Federal courts.—The circuit courts of the United States have concurrent jurisdiction with the state courts over all suits of a civil nature in law or in equity where the United States is a party and the matter in dispute, exclusive of costs, exceeds the sum of $500, or where the parties to the suit are citizens of different states; and over all actions where an officer of the United States brings suit

[20] *International Trust Co.* v. *Keokuk Electric Street Railway & Power Co.* 90 Iowa, 90, 57 N. W. 712.

[21] *Old Colony Trust Co.* v. *Allentown & B. R. T. Co.* 192 Pa. St. 596, 44 A. 319.

[22] *Cole* v. *Ward,* 79 S. C. 573, 61 S. E. 108.

[23] *Scott* v. *Hughes,* 124 Ga. 1000, 53 S. E. 453.

under an act of Congress. They have jurisdiction of all suits in equity to enforce a mortgage or other equitable lien or claim against real or personal property within the district where the suit is brought when any defendant is not a resident of or found within such district.[24] And circuit courts of the United States have jurisdiction to foreclose mortgages where the mortgaged premises lie within the jurisdiction of the court and one of the parties to the action does not reside in the state.[25] This equity jurisdiction of the circuit courts of the United States to foreclose mortgages on lands lying within the district where the suit is brought will not be affected by the fact that the state legislature has conferred upon the courts of law of the state authority to enforce equitable rights by statutory proceedings, because the federal courts can not be interfered with in any degree by state legislation.[26] The constitution of the United States and the acts of Congress recognize and establish the distinction between law and equity; and the remedies in the United States courts are at law or in equity in accordance with the practice of the state courts and according to the principles of common law and equity as distinguished and defined in the country from which we derive our knowledge of these principles.[27] And although the state forms of practice may have been adopted in the circuit courts of the United States for the jurisdiction in which the states

[24] 17 U. S. Stat. 193.

[25] *Benjamin* v. *Cavaroc,* 2 Woods C. C. 168.

A federal court has jurisdiction of an action brought by trustees of a mortgage to foreclose the same where the necessary diversity of citizenship exists between the trustees and the mortgagors, although the beneficiary and the mortgagors are citizens of the same state, provided the beneficiary is not made a party to the action. *Allen-West Commission Co.* v. *Brashear,* 176 Fed. 119.

[26] *Case of Broderick's Will,* 88 U. S. (21 Wall.) 503, 520; sub nom. *Kelly* v. *McGlynn,* 22 L. ed. 599; *Thompson* v. *Central Ohio R. R. Co.* 73 U. S. (6 Wall.) 134, 137, 1 L. ed. 765; *Bennett* v. *Butterworth,* 52 U. S. (11 How.) 669, 674, 675. 13 L. ed. 859; *Benjamin* v. *Cavaroc,* 2 Woods C. C. 168.

[27] *Thompson* v. *Central Ohio R. R. Co.* 73 U. S. (6 Wall.) 134, 137, 18 L. ed. 765; *Robinson* v. *Campbell,* 16 U. S. (3 Wheat.) 212, 4 L. ed. 372.

lie, yet this adoption of the state practice does not confound the principles of law and equity as established in such courts.[28] The equity jurisdiction of the federal courts is the same in all states and the rule of decision is the same in all; their remedies are not regulated by the state practice, for they are independent of the local law of any state.[29]

After the commencement of an action in a United States court to foreclose a mortgage, and the acquiring of jurisdiction by that court of the subject and parties, an action can not subsequently be commenced in a state court to foreclose the same mortgage.[30] Thus where a creditor of a bankrupt, whose claim is secured by a mortgage, has gone into the United States district court as a court of bankruptcy, proved his claim and subjected it to the jurisdiction of that court; and the bankruptcy court has, by an order to which the creditor was a party, made on application of another creditor having a prior lien on the mortgaged premises, directed a sale of the premises, the proceeds thereof, beyond the sum admitted to be secured by the prior lien, "to abide a further hearing" between the two claimants; the mortgagee cannot, after the sale, foreclose his mortgage in a district court of the state, while the proceedings in respect to the disposition of the proceeds of the sale are still pending in the bankruptcy court.[31] The jurisdiction of a district court sitting in bankruptcy to sell the mortgaged property of a bankrupt is concurrent with that of a state court;[31a] and the property should be sold through the bankruptcy court where it is probable that a surplus over the mort-

[28] *Bennett* v. *Butterworth*, 52 U. S. (11 How.) 669, 674, 13 L. ed. 859.

[29] *Barber* v. *Barber*, 62 U. S. (21 How.) 582, 16 L. ed. 226; *Dodge* v. *Woolsey*, 59 U. S. (18 How.) 331, 347, 15 L. ed. 401; *United States* v. *Howland*, 17 U. S. (4 Wheat.) 108, 4 L. ed. 526; *Cropper* v. *Coburn*, 2 Curt. C. C. 465; *Gordon* v. *Hobart*, 2 Sumn. C. C. 401.

[30] *Levy* v. *Haake*, 53 Cal. 267.

[31] *Levy* v. *Haake*, 53 Cal. 267.

[31a] *In re Zehner*, 193 Fed. 787.

As to foreclosure in bankruptcy court, see: *New Orleans National Banking Ass'c.* v. *LeBreton*, 14 Fed. 646; *Lockett* v. *Hill*, 1 Woods. 552. See also: *In re Casey*, 10 Blatchf. 376; *Whitridge* v. *Taylor*, 66 N. C. 273; *Levy* v *Haake*, 53 Cal. 267; *Clark* v. *Norwalk Steel & Iron Co.* 188 Fed. 999.

Where a bankruptcy court has

gage debt will be realized.[31b] But where the property is abandoned by the trustee the bankruptcy court should grant the creditor permission to foreclose in the state court.[31c]

The attachment of a bond and mortgage, assigned during the pendency of an action in the United States court from which the warrant of attachment was issued, will not prevent the foreclosure of the mortgage by the assignee thereof in a state court.[32]

§ 29. Venue—Where the land lies within the state.—An action to foreclose a mortgage on real property must be brought and tried in the county in which the land is situated,[33]

first taken jurisdiction by ordering a sale of the mortgaged premises discharged of liens, it ousts the jurisdiction of the state court to enforce the mortgage. *In re Devore,* Fed. Cas. No. 3847 (7 Fed. Cas. p. 570).

In re Zehner, 193 Fed. 787, it is held that the mortgagee, where the property is sold in bankruptcy proceedings, should be given the right to purchase subject to his claim which will be off-set against the price.

The practice and procedure is the same where a mortgage on property of a bankrupt is foreclosed and the property sold in bankrupt proceedings, as it is in any court of equity jurisdiction, either state or federal. *In re Zehner,* 193 Fed. 787.

[31b] *In re Zehner,* 193 Fed. 787.

[31c] *In re Zehner,* 193 Fed. 787.

[32] *Johnson* v. *Stimmel,* 89 N. Y. 117. See *Thurber* v. *Blanck,* 50 N. Y. 80.

[33] *New York.*—Code Civ. Proc. § 982. See also *Gould* v. *Bennett,* 59 N. Y. 124, 49 How. Pr. 57.

South Carolina.—Code of Proc. Mortg. Vol. I.—3.

144 *et seq. Silcox & Co.* v. *Jones,* 80 S. C. 484, 61 S. E. 948.

Iowa.—Code, § 3493. *Brown* v. *Holden,* 120 Iowa, 191, 94 N. W. 482.

Utah.—Rev. Stat. 2928. *Sherman* v. *Droubay,* 27 Utah, 47, 74 Pac. 348; *Snyder* v. *Pike,* 30 Utah, 102. 83 Pac. 692.

Kentucky.—Where there is no personal representative, and no suit pending to settle the estate, an action to enforce a mortgage lien by a sale of decedent's land to satisfy the debt may be brought in the county where the land is situated. *Shields* v. *Yellman,* 100 Ky. 655, 39 S. W. 30. See also *Galloway* v. *Craig,* 122 Ky. 447, 92 S. W. 320.

California.—In the case of *Graham* v. *Stewart,* 68 Cal. 374, 9 Pac. 555, a complaint alleging that the mortgage was duly recorded in the office of the recorder of San Diago county, and describing the premises as Lot G in Block 93 in Horton's Addition to San Diago county, as per maps on file, etc., was held to sufficiently allege the situation of the property; and also that ju-

subject to the power of the court to change the place of trial in the cases provided for in the Code.[34] And this is true although the money may have been loaned and the mortgage executed in a county other than that in which the mortgaged premises are situated,[35] and although the mortgagor consents to the granting of a foreclosure decree in another county.[36] The appointment of a referee residing in a different county from that in which the venue is laid, will not necessarily change the place of trial; but the referee can not, without the consent of the parties, try the case elsewhere than in the county where the mortgaged premises are situated.[37] Where one mortgage covers land in two counties, action to foreclose may be brought in either county.[38]

§ 30. Same—Debt payable in one county; land in another.—Where a note made payable in one county is secured by a mortgage on land located in another county, the

dicial notice being taken there is but one such county, the supreme court of the county had jurisdiction. See also *Whitney* v. *Buckman,* 13 Cal. 536; *Tryon* v. *Sutton,* 13 Cal. 490.

Alabama.—In the case of *Reeves* v. *Brown,* 103 Ala. 537, 15 So. 824, it is said that in an action to foreclose a mortgage on land situated in another county than the one in which the mortgagor resides may, under the Alabama code (§ 3421), be brought in either county, at the will of the complainant.

Michigan.—*Wipfler* v. *Warren,* 163 Mich. 189, 128 N. W. 178, 17 Detroit Leg. N. 905.

[34] N. Y. Code Civ. Proc. § 987.

[35] *Miller* v. *Hull,* 3 How. (N. Y.) Pr. 325, 1 Code Rep. 113; *Vallejo* v. *Randall,* 5 Cal. 461; *Hackenhull* v. *Westbrook,* 53 Ga. 285; *Owings* v. *Beall,* 3 Litt. (Ky.) 103. Compare *Broome* v. *Beers,* 6 Conn. 198; *Caufman* v. *Sayre,* 2 B. Mon. (Ky.) 202.

[36] *Silcox & Co.* v. *Jones,* 80 S. C. 484, 61 S. E. 948.

[37] *Brush* v. *Mullany,* 12 Abb. (N. Y.) Pr. 344; *Wheeler* v. *Maitland,* 12 How. (N. Y.) Pr. 35; *Gould* v. *Bennett,* 59 N. Y. 124, 49 How. (N. Y.) Pr. 57.

In this case, a justice holding a special term in the county of Westchester, at which an action for the foreclosure of a mortgage upon real estate, situated in that county was upon the calendar, adjourned the term to his chambers in the county of Kings, and proceeded to try the action at the adjourned term against the objections of the defendant. This was held to be error.

[38] *Empire State Surety Co.* v. *Ballou,* 66 Wash. 76, 118 Pac. 923.

court of the county where the note is payable has no jurisdiction of an action to foreclose a mortgage [39] where the notice to the maker is served by publication only.[40] The action in such a case is strictly *in rem* and must be brought in the county where the land lies; but if such service is had upon the maker of the note and the action is so brought, as to enable the court of the county where the note is payable, to render a personal judgment against the maker thereof, under the Code,[41] then that court may also render a decree foreclosing the mortgage, although the land lies in another county.[42] This right, however, depends upon the particular provisions of the Code, and until its passage a different rule prevailed.[43]

§ 31. Same—Action brought in improper county.—Placing the venue and having the trial in a county different from that in which the property is situated, is not an irregularity,[44] because where the county designated in the complaint as the place of trial is not the proper county, the action may, notwithstanding, be tried therein unless the place of trial is changed to the proper county, upon the demand of the defendant, followed by the consent of the plaintiff or by the order of the court.[45] But where the county designated in the complaint as the place of trial is not the proper county, the defendant may demand, as a matter of right, that the trial be had in the proper county.[46]

[39] *Sherman* v. *Droubay,* 27 Utah, 47, 74 P. 348.

[40] *Iowa Loan & Trust Co.* v. *Day,* 63 Iowa, 459; *Equitable Life Ins. Co.* v. *Gleason,* 56 Iowa, 47.

[41] Iowa Code, § 2581.

[42] *Iowa Loan & Trust Co.* v. *Day,* 63 Iowa, 459; *Equitable Life Ins. Co.* v. *Gleason,* 56 Iowa, 47.

[43] *Iowa Loan & Trust Co.* v. *Day,* 63 Iowa, 459; *Chadbourne* v. *Gilman,* 29 Iowa, 181.

[44] *Brush* v. *Mullany,* 12 Abb. (N. Y.) Pr. 344; *Marsh* v. *Lowry,* 26 Barb. (N. Y.) 197; sub nom. *March* v. *Lowry,* 16 How. (N. Y.) Pr. 41.

[45] N. Y. Code Civ. Proc. § 985

[46] *Leland* v. *Hathorne,* 42 N. Y. 547, 9 Abb. (N. Y.) Pr. N. S. 97; *Bush* v. *Treadwell,* 11 Abb. (N. Y.) Pr. N. S. 27; *Stark* v. *Bates,* 12 How. (N. Y.) Pr. 465; N. Y. Code Civ. Proc. § 986.

§ 32. Same—Motion for change of venue.—The general rules of practice and procedure as to motions for change of venue apply to foreclosure actions.

§ 33. Same—Where property situated in two states.—It has been said that where mortgaged property is situated partly in one state and partly in another, that a court possessing equity jurisdiction may entertain a suit to foreclose the mortgage as to the whole of the property.[47] It seems, however, that the better practice is to bring a separate suit in each state for the foreclosure of the mortgage on the portion of the property located in that state.[48]

§ 34. Same—Where the land lies out of the state.—Where all the real property to which an action relates is situated without the state the action must be tried in the county in which one of the parties resides at the commencement thereof. If none of the parties reside in the state it may be tried in any county which the plaintiff designates for that purpose in the title of the complaint.[49]

§ 35. Same—Where the parties reside in another state.—Some courts have held that equity acts only *in personam* and not *in rem,* and that if a bill to foreclose be filed in the state and county where the mortgaged lands are situated, all the parties being citizens of another state, jurisdiction of the action can be acquired by proper personal service of the process;[50] but the better doctrine would seem to be that an action to foreclose is an action purely *in rem* and not *in personam,*

[47] *Mead* v. *New York H. & N. R. R. Co.* 45 Conn. 199, 223. See *Toller* v. *Carteret,* 2 Vern. 494; *Penn* v. *Baltimore,* 1 Ves. Sr. 444.

[48] *In re* U. S. Rolling Stock Co. 55 How. (N. Y.) Pr. 286. See *Farmers' L. & T. Co.* v. *B. & M. T. Co.* 44 Hun (N. Y.), 400.

[49] N. Y. Code Civ. Proc. §§ 982, 984. See *House* v. *Lockwood,* 40 Hun (N. Y.), 532.

[50] *Grace* v. *Hunt, Cooke* (Tenn.) 341.

and that the mortgage may be foreclosed and the property sold to satisfy the mortgage debt without personal service of process on the defendant or his appearance in court regardless of the residence of the parties. If, however, there has been no personal service within the jurisdiction of the court and no appearance, the court will have no jurisdiction over the person of the defendant, and a judgment for deficiency cannot, for that reason, be entered.[51]

§ 36. Transitory action.—Aside from statutory requirements an action to foreclose a mortgage is not a local but a transitory action, and a bill may be brought or a complaint filed wherever jurisdiction of the parties can be acquired.[52] And it has been said that a complaint for foreclosure of the equity of redemption in mortgaged lands, is transitory and that any court where a necessary defendant is served with process, has jurisdiction;[53] but that if a decree for sale only is asked the court of the county where the land lies is the only court that has jurisdiction.[54] Thus where six different mortgages were given upon distinct parcels of land laying in six

[51] *Ewer* v. *Coffin,* 55 Mass. (1 Cush.) 23, 48 Am. Dec. 587; *Phelps* v. *Holker,* 1 U. S. (1 Dall.) 261, 1 L. ed. 128; *Kilburn* v. *Woodworth,* 5 Johns. (N. Y.) 37, 4 Am. Dec. 321; *Robinson* v. *Exrs. of Ward,* 8 Johns. (N. Y.) 86, 5 Am. Dec. 327; *Bissell* v. *Briggs,* 9 Mass. 461, 468, 6 Am. Dec. 88; *Ocean Ins. Co.* v. *Portsmouth Marine Ry. Co.* 44 Mass. (3 Metc.) 420; *Danforth* v. *Penny,* 44 Mass. (3 Metc.) 564.

[52] *Bates* v. *Reynolds,* 7 Bosw. (N. Y.) 685; *Porter* v. *Lord,* 4 Duer (N. Y.) 682; *Varian* v. *Stevens,* 2 *Duer* (N. Y.), 635. See *Broome* v. *Beers,* 6 Conn. 198; *Finnegan* v. *Manchester,* 12 Iowa, 521; *Cole* v. *Connor,* 10 Iowa, 299; *Caufman* v. *Sayre,* 2 B. Mon. (Ky.) 202; *Newman* v. *Stuart,* Cooke (Tenn.), 339; *Kinney* v. *McLeod,* 9 Tex. 78; *Paget* v. *Ede,* L. R. 18 Eq. 118; *Toller* v. *Carteret,* 2 Vern. 494.

Contra: An action on a note and to foreclose a mortgage securing it, is local, not transitory although the plaintiff prays in his petition that the wrongful holder of such note and mortgage, who is a nonresident, be required to bring the same into court. *Mack* v. *Austin, as executor, etc.* 67 Kan. 36, 72 P. 551.

[53] *Caufman* v. *Sayre,* 2 B. Mon. (Ky.) 202. See also *Paget* v. *Ede,* L. R. 18 Eq. 118.

[54] *Chadbourne* v. *Gilman,* 29 Iowa, 181; *Owings* v. *Beall,* 3 Litt. (Ky.) 104; *Caufman* v. *Sayre,* 2 B. Mon. (Ky.) 202.

different counties, to secure a distinct portion of a promissory note therein described, and an action was brought in a county where one of the mortgaged tracts was located to forclose all six of the mortgages, it was held that as to the five mortgages on the lands lying in the counties other than that in which the action was commenced, the venue was wrong and that the court had no jurisdiction to try the issues arising thereon.[55] But in those cases where the land mortgaged consists of one tract laying in two or more different counties, a suit may be brought to foreclose in either of the counties in which the land is partly situated.[56] It is held in Connecticut, however, that a bill to foreclose a mortgage need not be brought in the county where the land lies, the title of the mortgagee not being in question.[57]

[55] *Chadbourne* v. *Gilman,* 29 Iowa, 181.

[56] *Owings* v. *Beall,* 3 Litt. (Ky.) 103; *Commercial National Bank* v. *Johnson,* 16 Wash. 536, 48 P. 267; *Empire State Surety Co.* v. *Ballou,* 66 Wash. 76, 118 Pac. 923 (Wash.).

[57] *Broome* v. *Beers,* 6 Conn. 198. In this case the court say: The title to the land was not in question under the plaintiff's bill of foreclosure; and such suits have always been considered transitory, citing *Austin* v. *Burbank,* 2 Day (Conn.), 474, 477, 2 Am. Dec. 119; *Owen* v. *Walter,* Superior Court Hartford County; *Owen* v. *Granger,* Superior Court Hartford County; Anon. 2 Chan. Cas. 244; Pow. Mort. 1043, 2 Swift's Dig. 197.

CHAPTER III.

WHEN FORECLOSURE MAY BE COMMENCED.

§ 37. Right to foreclose.
§ 38. When right to foreclose accrues.
§ 39. Same—Before debt due.
§ 40. Same—Abandonment of premises.
§ 41. Same—Failure to repair premises.
§ 42. Same—Failure to insure premises.
§ 43. Same—Interest clause—Default.
§ 44. Same—Death of mortgagor.
§ 45. Same—Corporation bonds—Request of holder.
§ 46. Same—Notice to quit.
§ 47. Same—Stipulation for delay and waiver.
§ 48. Same—Mortgage given for support.
§ 49. Previous demand—Necessity for.
§ 50. Effect of provision for foreclosure on breach of condition.
§ 51. Stipulation against forfeiture.
§ 52. Note payable on demand.
§ 53. Where the time of payment is not specified.
§ 54. Mortgage payable in installments.
§ 55. Same—Securing several notes.
§ 56. Failure to pay interest.
§ 57. Same—Set-off not a payment.
§ 58. Failure to pay taxes.
§ 59. Failure to pay insurance.
§ 60. Election of mortgagee that debt become due.
§ 61. Waiver of election.
§ 62. Demand and notice of election.
§ 63. Who may exercise option to declare the debt due.
§ 64. Power of court to relieve from forfeiture.
§ 65. Where mortgagee holds one mortgage securing several notes.
§ 66. Where mortgagee holds more than one mortgage on the same property securing different debts.
§ 67. Indemnity mortgage.
§ 68. Parol agreement as to time of payment.
§ 69. Agreement not to enforce mortgage.
§ 70. Extension of time of payment.
§ 71. Extension of time by parol.

§ 37. Right to foreclose.—With every mortgage there exists an inherent right of foreclosure, whether the foreclosure results in vesting an absolute title to the property in the mortgagee, as was formerly the case in England, or in a judicial sale of the premises, as is now the case in most of our states.[58] Such right of foreclosure is not an unrestrained one, for as long as the mortgagor keeps his covenants, the mortgagee can have no grievance to redress, and the mortgagor will be entitled to the undisturbed possession of the mortgaged premises; the right to foreclose arises only where the condition of the mortgage has been forfeited by failure to pay the principal or interest when due, or by some similar breach of contract.[59] The lapse of time, however, which usually determines the right to institute an action for foreclosure, is not always the criterion by which the complainant is to be governed, for that right may be made to depend upon other events or contingencies.[60]

The nature of the security may be such that an event not contemplated by the parties, nor provided for in their agreement, may render it impossible for the mortgagor to comply with the conditions of his mortgage. In such an event a right of action will accrue at once.[61]

[58] *Koch* v. *Briggs,* 14 Cal. 256, 262, 73 Am. Dec. 651.

[59] *Wilkinson* v. *Flowers,* 37 Miss. 579, 584, 75 Am. Dec. 78; *James* v. *Fisk,* 17 Miss. (9 Smed. & M.) 144, 150, 47 Am. Dec. 111; *Gladwyn* v. *Hitchman,* 2 Vern. 135; *Bartholf* v. *Bensley,* 234 Ill. 336, 84 N. E. 928.

[60] *Citizens' Bank & Trust Co.* v. *Dill,* 118 Pac. 374 (Okl.)

[61] Where a mortgage was given by a manufacturing company to secure an executory contract running through a term of years, and the company subsequently failed and became wholly insolvent, a right of action accrued upon the mortgage forthwith, because it was evident that it would be impossible for the company to keep its engagements. *Harding* v. *Mill River Woolen Manuf. Co.* 34 Conn. 458, 461.

Where a railroad company files a bill alleging its insolvency, and praying that it may be sold and its proceeds distributed among its creditors according to their respective priorities, and a receiver is accordingly appointed, a mortgagee who files a cross-bill asking a foreclosure of a mortgage on which default in the interest has been made, but the debt secured by which is not

The right to foreclose, may be exercised either by the mortgagee, his assignee, or personal representative; and in those cases where the mortgage is executed to a person in his official capacity, it may be foreclosed by such person or his successor or successors in office.[62] An equitable assignment by a prior mortgagee of a portion of the indebtedness will not affect his right to foreclose, if he has retained the legal title as well as a large equitable interest.[63]

This inherent right of foreclosure is not affected by the commencement of an action by a prior mortgagee to foreclose his mortgage, where the second mortgagee has first commenced an action of foreclosure. In such a case such second mortgagee may proceed therein and have the first mortgage paid out of the proceeds of the sale made under his foreclosure.[64]

In general terms the right to foreclose means the power to cut off a right to redeem given by equity, when, under a condition of the mortgage, the mortgagee's estate has become absolute at law;[65] but it is thought that an agreement between the mortgagor and the mortgagee to the effect, that after a formal foreclosure the mortgagor shall remain in a possession, paying interest on the debt as rent, and have a reconveyance by paying the whole debt, may defeat the foreclosure.[66]

§ 38. When right to foreclose accrues.—An action to foreclose a mortgage will not lie until the debt secured has matured,[67] or its conditions have in some way been broken,

due, is entitled to a foreclosure although by the terms of the mortgage it is not subject to foreclosure until default in payment of the principal at maturity. *McIlhenny* v. *Binz*, 80 Tex. 1, 26 Am. St. Rep. 705, 13 S. W. 655.

[62] *Norton* v. *Ohrns*, 67 Mich. 612, 35 N. W. 175.

[63] *Boone* v. *Clarke*, 129 Ill. 466, 5 L.R.A. 276, 21 N. E. 850.

[64] *Guilford* v. *Jacobie*, 69 Hun (N. Y.) 420, 23 N. Y. Supp. 462, 52 N. Y. S. R. 837.

[65] *Shepard* v. *Richardson*, 145 Mass. 32, 11 N. E. 738.

[66] *Scott* v. *Childs*, 64 N. H. 566, 15 Atl. 206.

[67] *Kelly* v. *Bogardus*, 51 Mich. 522; *Thompson* v. *Cheeseman*, 15 Utah, 43, 48 P. 477. See *Warren* v. *Harrold*, 92 Tex. 417, 49 S. W. 364.

Under Nebraska Code, § 851, no proceedings shall be had to fore-

or their performance by the mortgagor or other party liable has been rendered impossible. Where a note and mortgage absolute in its terms has been executed, together with a contemporaneous collateral written agreement changing the absolute liability expressed in the note and mortgage to a contingent liability only, the happening of the contingency stipulated in the collateral agreement must be shown before a recovery can be had in a suit on the note and mortgage.[68] Where a mortgagee whose debt is not due, is made a defendant in the foreclosure of a subsequent mortgage securing a debt which is due, and files a cross-complaint setting up such prior mortgage and asking its foreclosure, the court will decree the foreclosure of the subsequent mortgage alone, and order the property to be sold subject to the lien of the prior mortgage; it seems that the court can not foreclose the prior mortgage nor order a sale to satisfy it under such cross-complaint.[69]

A mortgage to secure two notes payable in successive years, reciting that its purpose or consideration is security of payment on the date of the maturity of the latter note, cannot be foreclosed for default in payment of the first note at the time it matures.[70] And a provision in a trust deed authorizing a trustee's sale of the property on default in the payment of any of the notes secured thereby, at the instance of the legal holder thereof, does not authorize such sale at the instance of

close a mortgage after a judgment at law has been obtained, until an execution has been issued on the judgment and returned unsatisfied. *Hargreaves* v. *Menken,* 45 Neb. 668, 63 N. W. 951.

Return of an attachment pending an action at law, in which judgment is obtained, is not sufficient to authorize a foreclosure under such statute. *Hargreaves* v. *Menken,* 45 Neb. 668, 63 N. W. 951.

On failure to pay interest, see *post,* § 56.

[68] *Citizens' Bank & Trust Co.* v. Dill, 118 Pac. 374 (Okl.)

[69] *Trayser* v. *Trustees of Indiana Asbury University,* 39 Ind. 556.

[70] *Keith* v. *McLaughlin,* 105 Ala. 339, 16 So. 886.

the holder of only one of such notes without the consent of the others.[71]

A provision of a mortgage of stock and securities by a railroad company, that after default in interest for more than six months the trustee may, and upon demand of not less than a majority in amount of the bonds shall, declare the principal due and payable, and in either of such cases may, and upon request of a majority in amount of the bonds shall proceed to sell the stock; and that at any time prior to the sale the holders of a majority in amount of all the bonds may notify the trustee of their desire to revoke the declaration that the principal is due; and that he shall take no further steps to sell the securities until another default, does not make the remedy of foreclosure, as vested in the trustee, subject to the absolute control of the holders of a majority in amount of the bonds secured, and exclusive of any remedy through a court of chancery.[72]

The general rule is that a foreclosure and sale under a mortgage given to secure notes is proper upon proof that they are due and unpaid, are lost, and have never been sold or disposed of.[73] And where a mortgage is given to indemnify [74] for indorsements and future advances to pay off outstanding judgments against the mortgagor and to save his property from sacrifice, the mortgagee has the right to foreclose such mortgage by advertisement at its maturity, and is not obliged to wait until he has actually paid off the outstanding judgments.[75] But where the estate of the mortgagor expires before the decree of foreclosure and sale, this will prevent a foreclosure on a leasehold,[76] and in those cases

[71] *Bomar* v. *West,* 87 Tex. 299, 28 S. W. 519.

[72] *Toler* v. *East Tennessee, V. & G. R. Co.* 67 Fed. 168.

[73] *Allendorph* v. *Ogden,* 28 Neb. 201, 44 N. W. 220.

[74] As to when indemnity mortgage may be foreclosed. See *post,* § 67.

[75] *Lewis* v. *Duane,* 141 N. Y. 302, 57 N. Y. S. R. 410, 36 N. E. 322.

[76] *Conn* v. *Towner,* 86 Iowa, 577, 53 N. W. 320.

where, as in Welsh mortgages,[77] the mortgagee's estate never becomes absolute, there never can be a foreclosure,[78] for the reason that as long as the mortgagor still has a right to redeem, the mortgagee cannot foreclose.[79] It has been said that although the failure expressly to fix a limit to the time for redemption does not necessarily take away the usual remedies of the mortgagee,[80] in some cases, where no time was fixed by the deed beyond which the mortgagor could not defeat the mortgagee's estate by payment, the foundation for foreclosure has been thought to be wanting.[81]

It is thought the fact that a mortgagee has entered to foreclose will not preclude the maintenance of a writ of entry to foreclose and for a conditional judgment, since the defense that the demandant has actual and peaceable possession, available in an ordinary writ of entry, does not apply in mortgage foreclosures.[82]

§ 39. Same—Before debt due.—The general rule is that where an action is brought to foreclose a mortgage before the debt is due, the action will be dismissed with costs,[83] con-

[77] See 3 Kerr on Real Property, § 2046.

[78] *Shepard* v. *Richardson,* 145 Mass. 32, 11 N. E. 738. See *Yeates v. Hambly,* 2 Ark. 459; *Adams Eq.* 125, 126.

As to what claims may be foreclosed. See *post,* § 276.

[79] *Shepard* v. *Richardson,* 145 Mass. 32, 11 N. E. 738. See *Bonham* v. *Newcomb,* 1 Vern. 232, 2 Vent. 364.

[80] See *Balfe* v. *Lord,* 2 Drury & W. 480, 489.

[81] *Shepard* v. *Richardson,* 145 Mass. 32, 11 N. E. 738. See *Teulon* v. *Curtis,* 1 Young, 610.

[82] *Trustees of Smith Charities* v. *Connolly,* 157 Mass. 272, 31 N. E. 1058.

[83] *Eastwood* v. *Worrall,* 5 Atl. 180 (N. J.)

Under the Georgia code (Ga. Code, §§ 3962–4), although when the term commenced at which the rule *nisi* to foreclose a mortgage was taken, the debt to secure which the mortgage was given was not due, yet if, when the petition and rule *nisi* were presented, the debt had matured, and the rule *nisi* was served on the defendant more than three months before the next term, at which the money due on the mortgage was required to be paid,—this is all that the mortgagor was entitled to. *Hart* v. *Altmeyer,* 74 Ga. 367.

sequently a mortgage payable on or before a specified date cannot before such date be enforced against a purchaser subject thereto at the suit of one who took a conveyance of the land for the purpose of selling it to pay the mortgage and a debt due himself, and reconveyed it to the original owner upon the understanding that the latter would make the sale and pay such debts.[84] Yet a provision in a mortgage stipulating that the mortgagee may proceed to subject the security to the satisfaction of the debt upon default in any of the provisions of the mortgage, may be enforced, althougt it is given to secure a promissory note which is not yet due.[85]

§ 40. Same—Abandonment of premises.—The abandonment of the premises is a ground of foreclosure where the revenue derived from the operation thereof is relied on for the revenue wherewith to pay the cost of maintenance and interest on the indebtedness.[86]

§ 41. Same—Failure to repair premises.—Where a mortgage was given by a lessee to a lessor conditioned on a covenant to repair the premises by the lessee, foreclosure may be had on breach of the conditions.[87]

[84] *Wenzel* v. *Schultz,* 100 Cal. 250, 34 Pac. 696.

[85] *Taylor* v. *Alliance Trust Co.* 71 Miss. 694, 15 So. 121. See *post,* § 276; *First Nat. Bank* v. *Citizens' State Bank,* 11 Wyo. 32, 100 Am. St. Rep. 925, 70 Pac. 726.

See contra, *Cumberland Island Co.* v. *Bunkley,* 108 Ga. 756, 33 S. E. 183; *American Loan & Trust Co.* v. *Union Depot Co.* 80 Fed. 36.

[86] An abandonment of and ceasing to operate a canal before its completion, for want of necessary funds, is a breach of a mortgage executed by legislative authority to secure preferred bonds made payable out of the canal's revenues, conditioned that the company may retain the management and collect the revenues so long as it complies with the contract, but that the mortgagees may take possession in case of its noncompliance for any cause except deficiency of revenue from a failure of business without the company's fault. *Brown* v. *Chesapeake & Ohio Canal Co.* 73 Md. 567.

[87] *Gettysburg Electric Ry. Co.* v. *Electric Light, H. & P. Co.* 200 Pa. 372, 49 A. 952.

§ 42. Same—Failure to insure premises.—Where the parties stipulate that the mortgagee may, upon the neglect of the mortgagor to effect insurance as provided, consider the principal and interest due, and may without delay begin proceedings to foreclose the mortgage, the mortgagee may enforce such stipulation without previous notice of election to declare the principal and interest due.[88]

§ 43. Same—Interest clause—Default.[89]—In the form of mortgage generally used in the various states, there are provisions under which the mortgage may be foreclosed for the whole debt on the breach of a single condition or covenant.[90] Such a stipulation may be contained either in the mortgage or note which it secures.[91] The parties to a mortgage can lawfully agree to such conditions;[92] and when they do so the conditions will be enforced by courts of equity.[93] The right to foreclose, upon failure to perform any of the conditions of a mortgage, need not be formally set forth in exact words, but may be gathered from the intention of the parties, as expressed in the instrument. Thus where it ap-

[88] *Moore* v. *Crandall,* 146 Iowa, 25, 140 Am. St. Rep. 276, 124 N. W. 812.

[89] See § 56.

[90] See *Holden* v. *Gilbert,* 7 Paige Ch. (N. Y.) 208; *McLean* v. *Presley's Adm'rs,* 56 Ala. 211; *Pope* v. *Durant,* 26 Iowa, 233; *Bushfield* v. *Meyer,* 10 Ohio St. 334; *Hosie* v. *Gray,* 71 Pa. St. 198; *First Nat. Bank* v. *Citizens' State Bank,* 11 Wyo. 32, 100 Am. St. Rep. 925, 70 P. 726. Contra: Where there are two conditions in a mortgage a default may not occur until there is a breach of both. *Poole* v. *French,* 83 Kan. 281, 111 P. 488. See also *Lewis* v. *Lewis,* 58 Kan. 563, 50 P. 454.

[91] *San Gabriel Valley Bank* v. *Lake View Town Co.* 89 Pac. 360 (Cal.); *Fox* v. *Gray,* 105 Iowa, 433, 75 N. W. 339; *Brewer* v. *Penn. Mut. Life Ins. Co.* 94 Fed. 347, 36 C. C. A. 289; *Farmsworth* v. *Hoover,* 66 Ark. 367, 50 S. W. 865; *Kleinsorge* v. *Kleinsorge,* 133 Cal. 412, 65 Pac. 876.

[92] *Curran* v. *Houston,* 201 Ill. 442, 66 N. E. 228.

[93] *Richards* v. *Holmes,* 59 U. S. (18 How.) 143, 15 L. ed. 304; *Hothorn* v. *Louis,* 170 N. Y. 576, 62 N. E. 1096; *Connecticut Mut. Life Ins. Co.* v. *Westerhoff,* 58 Neb. 379, 76 Am. St. Rep. 101, 78 N. W. 724, 79 N. W. 731; *Cole* v. *Hinck,* 120 App. Div. 355, 105 Supp. 407; *Smith* v. *Lamb,* 59 Misc. 568, 111 Supp. 455.

pears from the mortgage, that it was the intention of the parties that the mortgagee should have the right to foreclose for the whole debt on failure to pay an instalment thereof or the interest when due, such intention will be upheld by the courts.[94]

In all cases where the mortgage provides that upon the non-payment of interest or an instalment of the principal when due, the whole of the principal and interest shall become due and payable at the option of the mortgagee, or holder of the mortgage, upon a non-payment of the interest or an installment of the principal the mortgage may be foreclosed for the full amount.[95] Thus where a mortgage has been given to secure the payment of promissory notes, containing a covenant that, upon a failure to pay the interest upon the notes as specified, the principal should become due, a *bona fide* purchaser of the notes, upon a failure to pay interest, may foreclose the mortgage for the principal sum, without regard to

[94] *Holden* v. *Gilbert,* 7 Paige Ch. (N. Y.) 208; *Pope* v. *Durant,* 26 Iowa, 233; *Fox* v. *Gray,* 105 Iowa, 433, 75 N. W. 339; *San Gabriel Valley Bank* v. *Lake View Town Co.* 86 Pac. 727 (Cal.)

[95] *Dean* v. *Ridgeway,* 82 Iowa, 757, 48 N. W. 923. See *Clemens* v. *Luce,* 101 Cal. 432, 35 Pac. 1032; *Mulcahey* v. *Strauss,* 151 Ill. 70, 37 N. E. 702, aff'g 52 Ill. App. 252; *Frink* v. *Neal,* 37 Ill. App. 621; *Atkinson* v. *Walton,* 162 Pa. St. 219, 29 Atl. 898, 34 W. N. C. 562; *Swett* v. *Stark,* 31 Fed. 858; *Farmers' Loan & Trust Co.* v. *Nova Scotia C. R. Co.* 24 N. S. 542; *Compare Edgar* v. *Beck,* 96 Mich. 419, 56 N. W. 15.

In *Nova Scotia* the whole principal secured by a mortgage becomes immediately due upon default in the payment of interest, although there is no express provision therefor in the mortgage. *Farmers' Loan & Trust Co.* v. *Nova Scotia C. R. Co.* 24 N. S. 542; *Robertson* v. *Parrish,* 39 S. W. 646 (Tex. Civ. App.); *Phelps* v. *Mayers,* 126 Cal. 549, 58 P. 1048; *Silverman* v. *Silverman,* 189 Ill. 394, 59 N. E. 949. See *Brewer* v. *Penn. Mut. Ins. Co.* 94 Fed. 347, 36 C. C. A. 289; *Kleinsorge* v. *Kleinsorge,* 133 Cal. 412, 65 P. 876; *Caldwell* v. *Ellebrecht,* 68 Ill. App. 596.

But it has been held that where the interest is usurious on coupon interest notes, though default has been made in the payment of the interest, foreclosure cannot be had before maturity of the principal note. *Vermont Loan & Trust Co.* v. *Tetzlaff,* 6 Idaho, 105, 53 Pac. 104.

equities existing between the original parties; and this is so even though one of the notes would not become due for six years.[96] But where a mortgage payable in installments contained a power of sale conditioned that if any installment of principal or interest should remain unpaid for thirty days after it became due, the premises should be sold and the surplus, if any, arising from such sale should be paid to the mortgagor after deducting the interest and costs and the whole debt secured by the mortgage, the court held that such a condition was only intended to authorize a foreclosure in case of the non-payment of the interest or installment within the time prescribed, with the right to retain the whole debt in case such interest or installment and costs were not paid before the sale; but that mere failure to pay the interest or installment within the prescribed time did not of itself make the whole mortgage debt due and payable.[97]

The mortgagee of lands is not deprived of the right to declare the whole of the amount of the mortgage due as provided therein, upon default in the payment of the interest on the whole debt, by the fact that since the execution of the mortgage the mortgagor's property has been placed in the hands of a receiver.[98]

A mortgage containing a provision that in case of default in the payment of interest, or any part thereof, according to the conditions of the note secured thereby, the whole sum of principal and interest shall become immediately due, is not in conflict with a note providing for the payment of interest quarterly, and if it is not so paid it is to become a part of the principal and bear a like rate of interest until paid, and the mortgagee may begin foreclosure proceedings upon default in any payment of interest.[99] And a trust deed

[96] *Swett* v. *Stark,* 31 Fed. 858.

[97] *Holden* v. *Gilbert,* 7 Paige Ch. (N. Y.) 208; *American Loan & Trust Co.* v. *Union Depot Co.* 80 Fed. 36.

[98] *Mulcahey* v. *Strauss,* 151 Ill. 70, 37 N. E. 702.

[99] *Clemens* v. *Luce,* 101 Cal. 432, 35 Pac. 1032.

authorizing a foreclosure of the whole debt for default in the payment of interest may be foreclosed before the maturity of the note secured thereby, where the maker refuses to correct the mistake thereon making interest payable after, instead of annually before, maturity.[1] A foreclosure may be had for nonpayment of an installment of interest, without waiting for a default in the payment of the whole note, principal and interest, under a note payable five years after date, providing that interest shall be payable annually and, if not so paid, shall be compounded annually and bear the same rate as the principal and the mortgage securing it, providing that in default of payment of the note by its terms the mortgagee may foreclose;[2] and in such a case both the principal and the interest of a note may be retained out of the proceeds of a sale under foreclosure in default of payment of interest, under a mortgage providing that if default is made in the payment of the principal or interest of the note secured thereby, the mortgagee is empowered to sell the premises and out of the moneys arising from such sale retain the principal and interest.[3] Thus it has been said where a mortgage provides that, when the interest on the bonds secured thereby shall remain unpaid for sixty days after a demand, the trustee in the mortgage shall, upon request of the holders of seventy-five per cent. of the outstanding bonds, take possession of and operate the property, and shall, upon like request, foreclose the mortgage, this does not limit the power of the trustee to foreclose the mortgage in equity without such request; especially where the mortgage contains the clause that nothing contained in it shall prevent a foreclosure by any court of competent jurisdiction.[4] But powers given by the mortgage to

[1] *Frink* v. *Neal,* 37 Ill. App. 621.

[2] *Yoakam* v. *White,* 97 Cal. 286, 32 Pac. 238. See *post,* §§ 47, 56, 292, 300.

[3] *Davis* v. *Dodson,* 4 Ariz. 168, 35 Pac. 1058.

[4] *Morgan's L. & T. R. & Steamship Co.* v. *Texas C. R. Co.* 137 U. S. 171, 34 L. ed. 625, 9 Ry. & Corp. L. J. 47, 45 Am. & Eng. R. Cas. 631, 11 Sup. Ct. Rep. 61.

In the case of the *Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co.,* 139 U. S. 137,

the trustee to take possession of the property and sell it, and apply the proceeds to the payment of principal and interest, do not operate to make the principal due upon default in payment of interest, so as to authorize a foreclosure for both.[5]

PART PAYMENT OF INTEREST.—Under a mortgage providing that if at any time default shall be made in the payment of interest for the space of thirty days after it becomes due, the principal sum shall, at the option of the mortgagee, or the legal holder of the mortgage, become due, it is held that payment of the same, with interest, may be enforced and recovered at once, and a payment of a portion only of the interest due will not prevent the mortgagee, or holder of the mortgage, from declaring the whole mortgage debt due and recovering the whole of the principal.[6] Hence, it follows that a mortgagee to whom a check is sent, declaring on its face that it is in full of interest to a date later than its amount will in fact pay, may return the check and avail himself of a clause of the mortgage providing that the whole principal may, at his election, be declared due for default in payment of interest, both because of the insufficiency of amount and because a check is not legal tender.[7] And a mortgagee who has exercised his election under the mortgage to declare the whole amount due for non-payment of interest, after having returned a check for too small a sum, is not thereafter obliged to

35 L. ed. 116, 11 Sup. Ct. Rep. 512, 45 Am. & Eng. R. Cas 689, it is said that a condition in a trust deed that on default in the payment of interest or principal for the time stated, the trustees shall, on the written request of sixty per cent. of the bondholders, take possession of the property and sell the same in a place named, does not apply to foreclosure proceedings begun in a court of competent jurisdiction to obtain a judicial sale of property.

[5] *McFadden* v. *Mays Landing & E. H. C. R. Co.* 49 N. J. Eq. 176, 22 Atl. 932; *American Loan & Trust Co.* v. *Union Depot Co.* 80 Fed. 36; *Cumberland Island Co.* v. *Bunkley,* 108 Ga. 756, 33 S. E. 183.

[6] *Smith* v. *Hooton,* 3 Pa. Dist. Rep. 250; *Curran* v. *Houston,* 201 Ill. 442, 66 N. E. 228; *American Loan & Trust Co.* v. *Union Depot Co.* 80 Fed. 36.

[7] *Martin* v. *Clover,* 45 N. Y. S. R. 44, 17 N. Y. Supp. 638.

accept a second check for the interest due, but may return it as tendered too late.[8]

PAYMENT AFTER SUIT.—In those cases where the mortgagee, in pursuance of a provision of the mortgage, has declared the whole debt secured thereby due upon the mortgagor's failure to pay an installment of interest or principal, the mortgagor cannot be relieved in equity from foreclosure for the principal upon payment of the interest and costs of the suit.[9] And where the mortgage provides that the entire principal sum shall become due, at the option of the mortgagee, after default in the payment of interest for thirty days, a mortgagor who makes no offer to pay an installment of interest until eight months after it has become due under such provision and an action begun for the foreclosure of the entire mortgage, cannot, by tendering the sum due for interest and costs, be relieved from the express terms of his contract that the entire mortgage shall become due.[10] A mortgagor who is in default in the payment of interest due will not be permitted to pay both principal and interest where the principal is not payable until the death of a third person who is still living, and the interest is payable semi-annually, with a provision that if not paid within thirty days after it becomes due the principal shall also become due, without adding, "at the option of the owner or holder," or any equivalent words.[11]

WAIVER OF RIGHT OF FORFEITURE.[12]—A mortgagee, or the holder of a mortgage providing that on the failure to pay an installment of principal or interest, the whole debt shall become due and payable, at the option of such mortgagee or

[8] *Martin* v. *Clover,* 45 N. Y. S. R. 44, 17 N. Y. Supp. 638.

[9] *Warwick Iron Co.* v. *Morton,* 1 Pa. Adv. Rep. 514, 23 Atl. 1065. See *Martin* v. *Cleve,* 45 N. Y. S. R. 44, 17 N. Y. Supp. 638; *Osborne* v. *Ketcham,* 76 Hun (N. Y.) 325, 27 N. Y. Supp. 694; 59 N. Y. S. R. 83. *Rosche* v. *Kosmowski,* 61 App. Div. 23, 70 Supp. 216; *American Loan & Trust Co.* v. *Union Depot Co.* 80 Fed. 36.

[10] *Osborne* v. *Ketcham,* 76 Hun (N. Y.) 325, 27 N. Y. Supp. 694, 59 N. Y. S. R. 83.

[11] *Cox* v. *Kille,* 50 N. J. Eq. (5 Dick) 176, 24 Atl. 1032.

[12] See *post,* § 61.

holder, may waive his right to foreclose; but an intention to waive such right must clearly appear.[13] Thus, it has been held that a mere transfer of rents as a satisfaction of the interest due on a trust deed on a given date is not an agreement to forbear claiming a forfeiture of the principal and interest on the trust deed under a provision therein, upon a failure to pay the next installment of interest.[14] And a delay of three months, at the mortgagor's request for additional time after default in payment of the interest on a mortgage, is not a waiver of an option given thereby to the mortgagee to declare the whole amount secured thereby due.[15] And after default in the payment of interest the mortgagor cannot compel the mortgagee to accept payment, notwithstanding that on former occasions strict compliance had been waived.[16]

A mortgagee does not lose his right to declare a mortgage due for non-payment of interest by his previous refusal to accept payment before the maturity of the mortgage.[17] A payment or acceptance of interest after default will, however, constitute a waiver of forfeiture.[18] But the acceptance of a

[13] *Curran* v. *Houston,* 201 Ill. 442, 66 N. E. 228; *Bizzell* v. *Roberts,* 156 N. C. 272, 72 S. E. 378.

[14] *Martin* v. *Land Mortg. Bank of Texas,* 5 Tex. Civ. App. 167, 23 S. W. 1032.

[15] *Hewitt* v. *Dean,* 25 Pac. 753, 91 Cal. 5, 27 Pac. 423, 91 Cal. 617, 25 Am. St. Rep. 227, 28 Pac. 93.

[16] *O'Connor* v. *Meskill,* 39 Atl. 1061 (N. J. Eq.)

[17] *Moore* v. *Kime,* 43 Neb. 517, 61 N. W. 736.

[18] *Mason* v. *Luce,* 116 Cal. 232, 48 Pac. 72; *Belloc* v. *Davis,* 38 Cal. 242. The acceptance of a check on April the fourth, in payment of interest on a mortgage in default since March thirty-first, will be inferred to be a waiver of any claims of forfeiture which might have arisen by reason of such default. *Smalley* v. *Renken,* 85 Iowa, 612, 52 N. W. 507. And it is held that the failure to include in such a check so given, and expressed to be in "full of interest" due April first on a mortgage, the amount of interest on the defaulted interest for the time in default, does not work a forfeiture as to time, the acceptance of the check indicating a purpose to accept the amount in discharge of the interest claim. *Smalley* v. *Renken,* 85 Iowa, 612, 52 N. W. 507.

For other instances of waiver see *Jacobs* v. *Swift,* 8 Kan. App. 857, 56 P. 1127; *Succession of Loeper,* 105 La. 772, 30 So. 131.

payment of interest after default in payment of an installment of principal will not constitute a waiver of the right to enforce the forfeiture for the default in payment on the principal.[19] Neither will a tender of the interest after the indebtedness has fully matured defeat the foreclosure.[20]

§ 44. Same—Death of mortgagor.—In those cases where the mortgagee fails to exhibit his mortgage debt as a demand against the estate of a deceased mortgagor, within the statutory time for presenting claims, this fact will not prevent him from foreclosing the mortgage and subjecting the mortgaged property to the payment of the mortgage debt;[21] yet where the claim is not duly presented, the recovery will be limited to the proceeds arising from the sale of the mortgaged property.

[19] *Northwestern Mutual Life Ins. Co.* v. *Butler,* 57 Neb. 198, 77 N. W. 667.

[20] *Swearingen* v. *Lahner,* 93 Iowa, 147, 61 N. W. 431, 26 L.R.A. 765, 57 Am. St. Rep. 261.

[21] In the case of *Andrews* v. *Morse,* 51 Kan. 30, 32 Pac. 640. The court say: "It is conceded that no part of the principal debt has been paid, and no ground of invalidity is asserted against the mortgage; nor is any objection made to the enforcement of the lien, except that the debt was not presented to the administrator as a demand against the estate of the deceased mortgagor. This objection is not good. The death of the mortgagor did not impair or affect the lien of the mortgage. It did not place the mortgagee who had a lien in the same position as an unsecured creditor, and remit him to the general assets of the estate to satisfy his lien. If he looks to the personal assets in the hands of the administrator for payment of his debt or any part of it, he must then present his demand under the statute. If he fails to present it within the three-year period, he can obtain nothing from the general assets, and is limited to the proceeds arising from the sale of the mortgaged property. An equitable claim like the plaintiff's is enforceable in the district court, and is not such a demand as the statute referred to contemplates. Neither the presentation of the claim in the probate court nor the failure to present it precludes the foreclosure of the mortgage lien until the mortgage debt has been paid or extinguished. *Crooker* v. *Parsons,* 41 Kan. 410, 21 Pac. 270; *Graham* v. *Graham,* 38 Kan. 440, 17 Pac. 152; *Johnson* v. *Cain,* 15 Kan. 537. A like limitation was before the supreme court of Iowa, and it held that the limitation of the stat-

§ 45. Same—Corporation bonds—Request of holder.— It is the general rule that the holders of corporate bonds cannot maintain a suit to foreclose a mortgage given to secure them, where the trustee elects not to foreclose, and they have not complied with the provision of the mortgage by making the necessary request, where the mortgage provides that the trustee may be compelled to foreclose upon request of a specified proportion of the bondholders, by making such a request.[22] And it is said that a provision in a mortgage, that no proceeding, in law or equity, shall be taken by any bondholder to foreclose independently of the trustee, until after the latter's refusal to comply with a requisition by a certain percentage of the bondholders, is reasonable and valid.[23]

ute applied only to claims the satisfaction of which is primarily sought out of the personal assets of the decedent, and not upon claims secured by a mortgage upon which the creditor relies for satisfaction. It was declared that the fact that the creditor did not file his claim against the estate within the time prescribed by the statute was not a sufficient defense to an action to foreclose a mortgage executed to secure such claim. *Allen* v. *Maer,* 16 Iowa, 307. There is some diversity of opinion in the different states as to what claims are barred by the failure to present them as demands against the estate, but it is generally held that claims purely equitable in their nature require no presentation or approval. It has been said that 'it would appear to be the better opinion that a creditor may rely upon a mortgage or other specific lien although the claim secured by it has not been presented; but in such cases he has no claim upon the general assets in the hands of the administrator.'" 5 Am. & Eng. Encyc. of L. 213; Woener's Adm'r. § 409. See *McClure* v. *Owens,* 32 Ark. 443; *Simms* v. *Richardson,* 32 Ark. 397; *McCallam* v. *Pleasants,* 67 Ind. 542; *Moores* v. *Ellsworth,* 22 Iowa, 299; *Teel* v. *Winston,* 22 Oreg. 489, 29 Pac. 142; *Grafton Bank* v. *Doe,* 19 Vt. 463, 47 Am. Dec. 697; *Scammon* v. *Ward,* 1 Wash. 179, 23 Pac. 439.

[22] *Humes* v. *Company,* 2 Pa. Dist. R. 107. See *post,* § 112.

[23] *Seibert* v. *Minneapolis & St. L. R. Co.* 52 Minn. 148, 53 N. W. 1134, 20 L.R.A. 535, 38 Am. St. Rep. 530, 52 Minn. 246, 53 N. W. 1151. See *Guaranty Trust & S. D. Co.* v. *Green Cove Springs & M. R. Co.* 139 U. S. 137, 35 L. ed. 116, 11 Sup. Ct. Rep. 512, 45 Am. & Eng. R. Cas. 689; *Morgan's L. & T. R. Steamship Co.* v. *Texas Cent. R. Co.* 137 U. S. 171, 34 L. ed. 625, 9 Ry. & Corp. L. J. 47, 11 Sup. Ct. Rep. 61, 45 Am. & Eng. R. Cas. 631.

§ 46. Same—Notice to quit.—Under the common law theory of mortgages notice to a tenant to quit is not an essential prerequisite to a writ of entry to foreclose a mortgage.[24]

§ 47. Same—Stipulation for delay and waiver.—In those cases where the mortgage in express terms provides that no entry under the mortgage shall be made, until six months after default and demand of payment, and the instrument in another clause provides for a sale equally limited, followed by a paragraph saying: "This provision is cumulative to the ordinary remedies by foreclosure in the courts. * * * Upon default being made as aforesaid," six months delay after default is not necessary before instituting suit in foreclosure.[25] The right of foreclosure inherent in every mortgage is a privilege which the mortgagee or holder of the mortgage may exercise, or waive, in his discretion; and where the mortgagee, after foreclosure proceedings commenced or concluded, accepts money to be applied on the mortgage debt, he thereby waives the foreclosure and restores the mortgage.[26]

§ 48. Same—Mortgage given for support.—A mortgage given by the mortgagor to secure the faithful execution

[24] *Trustee of Smith's Charities* v. *Connolly,* 157 Mass. 272, 31 N. E. 1058.

In the case of *Smith* v. *Johns,* 69 Mass. (3 Gray) 517, 519, Judge Bigelow says: "It is common learning that, in the absence of any agreement to the contrary, a mortgagee may enter upon the estate under his deed, even before condition broken, and if the mortgagor refuses to quit the possession, the mortgagee may consider him a trespasser, and maintain an action of trespass against him; or he may, in a writ of entry, recover against him as a disseizor. This results from the legal effect and operation of a conveyance in mortgage, by which the legal estate, as against the mortgagor and all persons claiming under him, is vested in the mortgagee, leaving only a right to redeem the estate in the mortgagor. *Bradley* v. *Fuller,* 40 Mass. (23 Pick) 1, 9; *Green* v. *Kemp,*13 Mass. 515, 518, 7 Am. Dec. 169; *Goodwin* v. *Richardson,* 11 Mass. 469, 473; *Newall* v. *Wright,* 3 Mass. 138, 155, 3 Am. Dec. 98; *Erskine* v. *Townsend,* 2 Mass. 493, 3 Am. Dec. 71.

[25] *Mercantile Trust Co.* v. *Missouri, K. & T. R. Co.* 36 Fed. 221, 1 L.R.A. 397.

[26] *Scott* v. *Childs,* 64 N. H. 566, 15 Atl. 206.

of a contract to furnish support for another, on breach, may be foreclosed, the same as the ordinary mortgage; but it has been held that there is no breach of a mortgage given for a life support, until an application for such support and a failure to furnish it.[27] And a foreclosure will be refused of a mortgage given by one to whom property has been transferred in consideration of future support, to secure such support and the prompt payment of the amounts becoming due upon a prior mortgage on the mortgaged property, and providing that the whole consideration shall become due immediately in case of any default, although the payments on the prior mortgage were not paid at the exact time they became due, where they were paid before the commencement of the foreclosure action and no injury has been done the mortgagee.[28]

§ 49. **Previous demand—Necessity for.**—In the absence of a stipulation so providing, after a default, it is not essential that a demand for payment be made before the commencement of an action for foreclosure,[29] especially where the whole sum of principal and interest shall become immediately due on default made in payment of the interest.[30] And a failure to demand payment of mortgage notes upon their maturity is not such laches as will prevent a recovery thereon, it being the business of the maker to seek the holder and pay the debt when due,[31] the only effect of a failure to make a demand at

[27] *Coleman* v. *Whitney,* 62 Vt. 123, 20 Atl. 322, 9 L.R.A. 517; *Calhoun* v. *Calhoun,* 49 App. Div. 520, 63 Supp. 601.

[28] *Gilbert* v. *Shaw,* 63 Hun (N. Y.) 148, 44 N. Y. S. R. 157, 17 N. Y. Supp. 621.

[29] *Ferris* v. *Spooner,* 102 N. Y. 10, 5 N. E. 773; *Lipscomb, as adm'r, etc.* v. *Hammett,* 56 S. C. 549, 35 S. E. 194. Contra, see *Nicholson* v. *Cinque,* 51 App. Div. 604, 64 Supp. 191.

[30] *Clemens* v. *Luce,* 101 Cal. 432, 35 Pac. 1032; *Hewett* v. *Dean,* 25 Pac. 753 (Cal.); *Swearingen* v. *Lahner,* 93 Iowa, 147, 61 N. W. 431, 26 L.R.A. 765, 57 Am. St. Rep. 261. See *Moore* v. *Crandall,* 146 Iowa, 25, 140 Am. St. Rep. 276, 124 N. W. 812.

[31] *Hoffacker* v. *Manufacturers' Nat. Bank,* 23 Atl. 579 (Md.)

the place where the mortgage was payable is that the plaintiff cannot recover costs if the defendant had the money there to pay the mortgage debt.[32] But the abandonment by the mortgagor of his office where the interest is payable makes a demand by the mortgagee unnecessary.[33]

In the foreclosure of a mortgage given to secure a note payable on demand and not at a particular time or place, a demand of payment is not necessary before the commencement of the action.[34] Nor is it necessary to make a demand before bringing a suit to foreclose, where the note is payable on demand at a particular place; but if, in such a case, the defendant shows that he was ready at the appointed place to make payment, and brings the money into court, he will be relieved from interest and costs.[35] Where a mortgage was given as collateral security for a bond to the treasurer of a state, payable on demand with annual interest at a specified date, it was held that a failure to pay the interest as stipulated was a breach of the bond, and that the mortgagee, or his

[32] *Norton* v. *Ohrns,* 67 Mich. 612.

[33] *Long Island Loan & Trust Co. as trustee, etc.* v. *Long Island City & Newtown R. Co.* 178 N. Y. 588, 70 N. E. 1102.

[34] *Locklin* v. *Moore,* 57 N. Y. 362; *Hills* v. *Place,* 48 N. Y. 520, 8 Am. Rep. 568; 36 How. (N. Y.) Pr. 26; *Pusey* v. *New Jersey & W. L. R. R. Co.* 14 Abb. (N. Y.) Pr. N. S. 434, 439; *Hirst* v. *Brooks,* 50 Barb. (N. Y.) 334; *Gillett* v. *Balcom,* 6 Barb. (N. Y.) 370; *Caldwell* v. *Cassidy,* 8 Cow. (N. Y.) 271; *Nelson* v. *Bostwick,* 5 Hill (N. Y.) 37, 40 Am. Dec. 310; *Wolcott* v. *VanSantvoord,* 17 Johns. (N. Y.) 248, 8 Am. Dec. 396; *Haxtun* v. *Bishop,* 3 Wend. (N. Y.) 13; *Burnham* v. *Allen,* 67 Mass. (1 Gray) 496; *Watkins* v. *Crouch,* 5 Leigh (Va.) 522; *Rumball* v. *Ball,* 10 Mod. 38.

[35] *Green* v. *Goings,* 7 Barb. (N. Y.) 652, 655; *Caldwell* v. *Cassidy,* 8 Cow. (N. Y.) 271; *Place* v. *Union Express Co.* 2 Hilt. (N. Y.) 19, 31; *Gay* v. *Paine* 5 How. (N. Y.) Pr. 108; *Wolcott* v. *VanSantvoord,* 17 Johns. (N. Y.) 248, 8 Am. Dec. 396; *Foden* v. *Sharp,* 4 Johns. (N. Y.) 183; *Locklin* v. *Moore,* 5 Lans. (N. Y.) 308; *Nazro* v. *Fuller,* 24 Wend. (N. Y.) 376; *Haxtun* v. *Bishop,* 3 Wend. (N. Y.) 13; *Carley* v. *Vance,* 17 Mass. 389; *Fullerton* v. *Bank of United States,* 26 U. S. (1 Pet.) 604, 7 L. ed. 28; *Bank of United States* v. *Smith,* 24 U. S. (11 Wheat.) 171, 6 L. ed. 443; *Fenton* v. *Goundry,* 13 East. 459.

assignee, could maintain a suit for the foreclosure thereof without pleading or proving a demand.[36]

When there is a provision in a mortgage to a trustee to secure bond-holders, that in case default be made in the payment of interest six months after demand therefor the whole principal sum shall become due and payable, and the lien created may at once be enforced, relates solely to the power of sale by the trustee, and will not prevent foreclosure by action for the whole principal upon default in interest without demand and waiting for six months to elapse therefrom.[37]

In those cases where a demand is required by the terms of the instrument, an explicit warning in writing after the maturity of interest coupons attached to bonds, that the holder will look to the corporation for payment, is a demand made in writing within a provision of the mortgage securing the bonds, that if payment of principal or interest be neglected or refused after such a demand the trustee may take possession of and operate or sell the property.[38] When a demand is made, a mortgage sale is not invalidated by the fact that the notice of demand was signed by the sheriff, instead of the clerk, where the objection was not raised by the defendant until after the sale.[39]

§ 50. Effect of provision for foreclosure on breach of condition.—A stipulation in a mortgage permitting foreclosure for the whole debt on the breach of a single condition or covenant is not regarded as a penalty,[40] but as a provision

[36] *Austin* v. *Burbank,* 2 Day (Conn.) 474, 2 Am. Dec. 119.

[37] *Farmers' Loan & Trust Co.* v. *Nova Scotia Cent. R. Co.* 24 N. S. 542. See *Long Island Loan & Trust Co. as strustee, etc.* v. *Long Island City & Newtown R. Co.* 178 N. Y. 588, 70 N. E. 1102; *Arnot, as trustee, etc.* v. *Union Salt Co.* 186 N. Y. 501, 79 N. E. 719.

[38] *Pennsylvania Co. for Ins. on Lives and Granting Annuities* v. *The Philadelphia & R. Co.* 69 Fed. 482, 36 W. N. C. 534.

[39] *Chase* v. *New Orleans Gaslight Co.* 45 La. An. 300, 12 So. 308.

[40] *Curran* v. *Houston,* 201 Ill. 442, 66 N. E. 228; *Kerbaugh* v. *Nugent,* 95 N. E. 336 (Ind.); *Connecticut Mut. Life Ins. Co.* v. *Westerhoff,* 58

for the earlier maturing of the debt upon the happening of certain contingencies.[41] If the mortgage does not contain such a stipulation in the form of an interest clause, the decree of foreclosure can direct the payment of such part of the debt only as is due at the time of the commencement of the action, or as may become due before the final hearing, and to effect that purpose, direct the sale of such part only of the mortgaged premises as may be necessary to pay that portion of the debt which has matured.[42] The reason for this is that

Neb. 379, 76 Am. St. Rep. 101, 78 N. W. 724, 79 N. W. 731.

[41] *Stillwell* v. *Adams,* 29 Ark. 346; *Grattan* v. *Wiggins,* 23 Cal. 16; *Jones* v. *Lowrence,* 18 Ga. 277; *Morgenstern* v. *Klees,* 30 Ill. 422; *Taber* v. *Cincinnati L. & C. R. Co.* 15 Ind. 459; *Hunt* v. *Harding,* 11 Ind. 245; *Smart* v. *McKay,* 16 Ind. 45. See *Cecil* v. *Dynes,* 2 Ind. 266; *Hough* v. *Doyle,* 8 Blackf. (Ind.) 300; *Greenman* v. *Pattison,* 8 Blackf. (Ind.) 465; *Andrews* v. *Jones,* 3 Blackf. (Ind.) 440; *Mobray* v. *Leckie,* 42 Md. 474; *Schooley* v. *Romain,* 31 Md. 575, 100 Am. Dec. 87; *Salmon* v. *Clagett,* 3 Bland. Ch. (Md.) 125; *Magruder* v. *Eggleston,* 41 Miss. 284; *Goodman* v. *Cincinnati & C. R. R. Co.* 2 Disney (Ohio) 176; *Baker* v. *Lehman,* Wright (Ohio) 522; *Richards* v. *Holmes,* 59 U. S. (18 How.) 143, 15 L. ed. 304; *Cole* v. *Hinck,* 120 App. Div. 355, 105 Supp. 407; *Kerbaugh* v. *Nugent,* 95 N. E. 336 (Ind.) But it is said by the supreme court of New York, in the case of *Price* v. *Wood,* 76 Hun (N. Y.) 318, 27 N. Y. Supp. 691; 59 N. Y. S. R. 137, that a clause in a mortgage for future advancements executed to an attorney by his client, providing that in case semi-annual interest remains unpaid for thirty days, the whole principal sum shall become due and payable, which is given simultaneously with an agreement that the mortgagee shall pay certain indebtedness of the mortgagor, and keep an account of all his services and expenses, and render an account thereof to the mortgagor on demand, and that all payments, services, and expenses shall draw interest from the date rendered, and constitute a part of the sum provided for in the mortgage, is not operative where the mortgagee neglects to furnish an itemized account of his services and disbursements and interest, and when he said to the mortgagor, at the execution of the mortgage, that such clause was merely formal and that the terms of the agreement would control.

Such a provision is for the benefit of the mortgagee and cannot be taken advantage of by the mortgagor to set the statute of limitations running. *Quackenbush* v. *Mapes,* 54 Misc. 124, 105 Supp. 654.

[42] *Suffern* v. *Johnson,* 1 Paige Ch. (N. Y.) 450, 19 Am. Dec. 440; *Mussina* v. *Bartlett,* 8 Port. (Ala.) 277, 284; *Greenman* v. *Pattison,* 8

a mortgage is merely a collateral security, and being, moreover, entitled to no other effect in equity, should not, as a matter of election by the mortgagee, be enforced by a court of equity for any other purpose than that of paying the debt, or so much thereof only as may be due and unpaid at the time of granting the decree, nor to any greater extent than the default of the mortgagor may require. The process of foreclosure being merely incidental to every mortgage, a court of equity will not enforce a technical default or forfeiture.[43] It has been said that a court of equity, looking to the object and purpose rather than to the letter of the contract, treats a mortgage as collateral security merely, and will aid the mortgagee no farther than may be necessary for enforcing his debt upon equitable principles as it becomes due.

Therefore, whatever the merely legal rights of a mortgagee may be, if instead of enforcing them, he elects to resort to a court of equity for foreclosure, that court ought not to permit the action, either before there is a right of redemption of which the mortgagor could avail himself by plea, or to any greater extent, finally, than that to which the mortgagor has a right to redeem. A mortgagor has no right of redemption before default; and in a default that results only from the non-payment of the first of several installments his right of redemption would be limited to that installment; he could not anticipate nor be required to pay the other installments before they became due.[44] Courts of equity, without the aid of statutory provisions, but from the liberality of the princi-

Blackf. (Ind.) 465; *Adams* v. Essex, 1 Bibb. (Ky.) 149, 4 Am. Dec. 623; *Caufman* v. *Sayre*, 2 B. Mon. (Ky.) 202; *Magruder* v. *Eggleston*, 41 Miss. 284; *James* v. *Fisk*, 17 Miss. (9 Smed. & M.) 144, 153, 47 Am. Dec. 111. See also *Kirk* v. *Van Petten*, 38 Fla. 335, 21 So. 286. But see *Copper Belle Mining Co.* v. *Costello*, 12 Ariz. 318, 100 Pac. 807.

[43] *Germania Life Ins. Co.* v. *Potter*, 124 App. Div. 814, 109 Supp. 435; *Schieck* v. *Donohue*, 92 App. Div. 330, 87 Supp. 206; *Ver Planck* v. *Godfrey*, 42 App. Div. 16, 58 Supp. 784.

[44] *Caufman* v. *Sayre*, 2 B. Mon. (Ky.) 202, 205-6.

ples and rules which govern them, have it in their power so to shape the terms of the decree of foreclosure, either as to a part or the whole of the demand, as to do complete justice to all parties interested, and have power to retain jurisdiction of the action for the purpose of making, from time to time, such further orders as justice may require.[45] This latitude of decision is indispensably necessary in the foreclosure of mortgages to secure the payment of annuities, jointures, money required to be raised annually for the maintenance and education of children, and in many other cases of a similar nature, in which, if it were required by law, that no proceeding should be had upon the mortgage to foreclose and enforce payment, until the last installment became due, the very object of the contract would be defeated.[46]

In those cases, however, where the good of all the parties concerned requires it, the decree may direct a sale of the whole mortgaged estate, though a sale of the entire estate may not be required for the payment of the installments already due. This may be done particularly where the mortgagor consents to the sale,[47] or the property is indivisible,[48] or where the court is satisfied from the character of the property, that it would sell to better advantage if sold in one parcel at one time, than if sold in separate parcels at different times.[49] Particularly is this the case where the property is of such a nature, or the circumstances of the mortgagor are such that a single sale of the entire estate would either pay the whole debt or approximate more nearly to it than several sales of the premises in parcels at different times.[50]

But where the entire premises are sold on failure to pay an

[45] *Adams* v. *Essex,* 1 Bibb. (Ky.) 149, 4 Am. Dec. 623.

[46] *Adams* v. *Essex,* 1 Bibb. (Ky.) 149, 4 Am. Dec. 623.

[47] *Gregory* v. *Campbell,* 16 How. (N. Y.) Pr. 417, 422; *Caufman* v. *Sayre,* 2 B. Mon. (Ky.) 202, 209.

[48] *Bank of Ogdensburg* v. *Arnold,* 5 Paige Ch. (N. Y.) 38; *Greenman* v. *Pattison,* 8 Blackf. (Ind.) 465; *Caufman* v. *Sayre,* 2 B. Mon. (Ky.) 202, 209.

[49] *Caufman* v. *Sayre,* 2 B. Mon. (Ky.) 202, 209.

[50] *Caufman* v. *Sayre,* 2 B. Mon. (Ky.) 202, 209.

installment of principal or interest, such sale exhausts the mortgagee's remedy by foreclosure, and a second sale cannot be had upon the maturity of the whole principal,[51] because such first sale of the mortgaged premises in pursuance of a decree of foreclosure, passes to the purchaser the entire title and interest of both the mortgagor and the mortgagee in the premises.[52]

§ 51. **Stipulation against forfeiture.**—It is competent for the parties at the time of executing a mortgage to stipulate against its forfeiture;[53] and where a mortgage contains an absolute covenant, that the principal shall not be called in during a specified period, or until the happening of a certain event, a default in the payment of the interest in the meantime will not enable the mortgagee to foreclose. Thus where a mortgage provided that the principal should not be called in during the life-time of the mortgagor, it was held that the failure to pay a yearly interest, reserved during the life-time of the mortgagor, did not give a right to foreclose;[54] but such a

[51] *Poweshiek Co.* v. *Dennison,* 36 Iowa, 244, 14 Am. Rep. 521; *Buford* v. *Smith,* 7 Mo. 489.

[52] *Holden* v. *Sackett,* 12 Abb. (N. Y.) Pr. 473; *Lansing* v. *Goelet,* 9 Cow. (N. Y.) 346; *Bradford* v. *Harper,* 25 Ala. 337; Kelly v. *Payne,* 18 Ala. 371; *Hobby* v. *Pemberton,* Dudley (Ga.) 212; *Poweshiek Co.* v. *Dennison,* 36 Iowa, 244, 248, 14 Am. Rep. 521; *Marston* v. *Marston,* 45 Me. 412; *Haynes* v. *Wellington,* 25 Me. 458; *Brown* v. *Tyler,* 74 Mass. (8 Gray) 135, 69 Am. Dec. 239; *Ritger* v. *Parker,* 62 Mass. (8 Cush.) 145, 54 Am. Dec. 744; *Clower* v. *Rawlings,* 17 Miss. (9 Smed. & M.) 122, 47 Am. Dec. 108; *Stark* v. *Mercer,* 4 Miss. (3 How.) 377; *Carter* v. *Walker,* 2 Ohio St. 339; *West Branch Bank* v. *Chester,* 11 Pa. St. 282, 51 Am. Dec. 547; *McCall* v. *Lenox,* 9 Serg. & R. (Pa.) 302, 312; *Pierce* v. *Potter,* 7 Watts (Pa.) 477; *Berger* v. *Heister,* 6 Whart. (Pa.) 214; *Hodson* v. *Treat,* 7 Wis. 263; *Tallman* v. *Ely,* 6 Wis. 244; *Hope* v. *Booth,* 1 Barn. & Ad. 498.

[53] *Brownlee* v. *Arnold,* 60 Mo. 79.

[54] *Burrowes* v. *Molloy,* 2 Jones & LaT. 521, 8 Irish Eq. 482. But see *Burt* v. *Saxton,* 1 Hun (N. Y.) 551.

Where by the terms of a note the principal is not on interest and is payable on demand, but a contemporaneous agreement requires the payment of $5.00 a month (being 2⅔ per cent of the principal), and postpones payment of the

provision does not prevent an action to declare the debt a lien on the land.[55] And where a mortgage, given to secure several notes maturing at different times, provides that none of them shall become payable and that the mortgage shall not be foreclosed, until the maturity of the note last due, a holder who purchases one or more of the notes with knowledge of such stipulation in the mortgage cannot recover judgment thereon until the last note matures.[56] In such a case the notes and the mortgage, having been contemporaneously executed and relating to the same subject matter, are to be read together and considered as one instrument.[57]

And where, at the time a mortgage was executed and as a part of the consideration and agreement for the loan, the mortgagee indorsed upon the mortgage a stipulation on his part that "the loan will not be called in so long as the mortgagor continues punctually to pay the interest semi-annually, and the value of the estate pledged shall be double the amount of the debt, until the expiration of two years after the service of a written notice, stating the time when payment will be required," it was held that such stipulation became a part of the mortgage contract and that the mortgagee or his assignee could not maintain an action for foreclosure until two years after the service of the required notice.[58]

principal until the decease of the mortgagor or default in the payment of the monthly installments, the note, mortgage and contemporaneous agreement should be construed together making the interest payable monthly at the rate of $2\frac{2}{3}$ per cent per annum, and the note payable on demand after the decease of the mortgagor or default in payment of interest. *Sanborn* v. *Ladd,* 69 N. H. 221, 39 A. 1072.

[55] *Arnold* v. *McBride,* 78 Ark. 275, 93 S. W. 989.

[56] *Noell* v. *Gaines,* 68 Mo. 649, 8 Cent. L. J. 353; *Brownlee* v. *Arnold,* 60 Mo. 79.

[57] See *Church* v. *Brown,* 21 N. Y. 315, 330; *Hanford* v. *Rogers,* 11 Barb. (N. Y.) 18; *Gammon* v. *Freeman,* 31 Me. 243; *Hunt* v. *Frost,* 58 Mass. (4 Cush.) 54; *Brownlee* v. *Arnold,* 60 Mo. 79, 2 Parsons on Contr. 553. See *Clark* v. *Munroe,* 14 Mass. 351; *Harrison* v. *Trustees of Phillips' Academy,* 12 Mass. 456; *Gilliam* v. *Moore,* 4 Leigh (Va.) 30, 24 Am. Dec. 704.

[58] *Belmont County Branch Bank* v. *Price,* 8 Ohio St. 299.

§ 52. Note payable on demand.—Where a note, to secure the payment of which a mortgage is given, is payable on demand, it is due immediately,[59] and the mortgagee has a right to foreclose at any time without making a previous demand.[60] It is well settled that when a right of action accrues upon the note, the mortgage securing it may be foreclosed. And even if a note on demand is payable at a particular place, no previous demand need be averred or shown; but if the defendant pleads that when the suit was commenced he was ready at the place mentioned in the note to make payment, and brings the money into court, he will thereby discharge himself from interest and costs.[61]

But where the conditions in a mortgage, given to secure a promissory note payable on demand, provide that if the note should be paid "within sixty days after such demand" the mortgage should be void, a demand of payment at least sixty days prior to the commencement of the foreclosure must be actually shown.[62] And where by the agreement of the parties at the time of the execution of a note payable on demand, it was orally stipulated that it should not be paid until a future specified time, the statute of limitations against such note will begin to run from the time when it was payable, according to the agreement, and not from the date of its execution.[63]

§ 53. Where the time of payment is not specified.—Where a note or bond secured by mortgage, is given for the

[59] *Gillett* v. *Balcom,* 6 Barb. (N. Y.) 370; *Pullen* v. *Chase,* 4 Ark. 210; *Hill* v. *Henry,* 17 Ohio, 9.

[60] *Gillett* v. *Balcom,* 6 Barb. (N. Y.) 370; *Haxtun* v. *Bishop,* 3 Wend. (N. Y.) 13, 21; *Pullen* v. *Chase,* 4 Ark. 210; *Union Central Life Ins. Co.* v. *Curtis,* 35 Ohio St. 343, 357; *Hill* v. *Henry,* 17 Ohio, 9; *Darling* v. *Wooster,* 9 Ohio St. 517; *Rumball* v. *Ball,* 10 Mod. 38; Bayley on Bills (5th ed.) 403; Chitt. on Bills (8th ed.) 590, 608, 609. *Kebabian* v. *Shinkle,* 26 R. I. 505, 59 A. 743.

[61] *Haxtun v. Bishop,* 3 Wend. (N. Y.) 13, 21. See *ante,* § 49.

[62] *Union Central Life Ins. Co.* v. *Curtis,* 35 Ohio St. 343, 357.

[63] *Hale* v. *Pack,* 10 W. Va. 145.

payment of a specified sum of money, but no time is fixed for such payment, the law supplies the omitted element and makes the debt due immediately.[64] In a recent case,[65] where the mortgage did not distinctly identify the date or provide a time of payment, it was held to be due as soon as given; and in another case,[66] where the condition of a mortgage, given to secure the payment of a promissory note payable on demand, was that if the mortgagor should pay such note or cause it to be paid, the mortgage deed should be void, the court held in an action to foreclose such mortgage, that a demand of payment of the note, before suit, was not a necessary condition precedent to a right of action on the mortgage.[67]

[64] *Gillett* v. *Balcom,* 6 Barb. (N. Y.) 370. See also *Purdy* v. *Philips,* 11 N. Y. 406, aff'g 1 Duer. (N. Y.) 369; *People* v. *County of New York,* 5 Cow. (N. Y.) 331; *Rensselaer Glass Factory* v. *Reid,* 5 Cow. (N. Y.) 587; *Reid* v. *Rensselaer Glass Factory,* 3 Cow. (N. Y.) 393; *Clark* v. *Barlow,* 4 Johns. (N. Y.) 183; *Selleck* v. *French,* 1 Conn. 32, 6 Am. Dec. 185; *Brown* v. *Brown,* 103 Ind. 23; *Green* v. *Drebilbis,* 1 G. Greene (Iowa) 552; *Francis* v. *Castleman,* 4 Bibb. (Ky.) 282; *Taylor* v. *Knox,* 1 Dana (Ky.) 391, 5 Dana (Ky.) 466; *Goodloe* v. *Clay,* 6 B. Mon. (Ky.) 236; *Swett* v. *Hooper,* 62 Me. 54; *Jillson* v. *Hill,* 70 Mass. (4 Gray) 316; *Dodge* v. *Perkins,* 26 Mass. (9 Pick.) 369; *Weeks* v. *Hasty,* 13 Mass. 218; *Eaton* v. *Truesdail,* 40 Mich. 1, 6; *Rhoads* v. *Reed,* 89 Pa. St. 436; *Heath* v. *Page,* 63 Pa. St. 108, 3 Am. Rep. 533; *Northern Pennsylvania R. R. Co.* v. *Adams,* 54 Pa. St. 94, 93 Am. Dec. 677; *Hummel* v. *Brown,* 24 Pa. St. 313; *Lessee of Dilworth* v. *Sinderling,* 1 Binn. (Pa.) 488, 2 Am. Dec. 469; *Cheesborough* v. *Hunter,* 1 Hill (S. C.) 400; *Smetz* v. *Kennedy,* Riley (S. C.) 218; *Aikin* v. *Peay,* 5 Strobh. (S. C.) 15 53 Am. Dec. 684; *Roberts* v. *Cocke,* 28 Gratt. (Va.) 207; *Young* v. *Godbe,* 82 U. S. (15 Wall.) 562, 21 L. ed. 250; *Brewster* v. *Wakefield,* 63 U. S. (22 How.) 118, 127, 16 L. ed. 301; *Sheehy* v. *Mandeville,* 11 U. S. (7 Cr.) 208, 217, 3 L. ed. 317; *United States* v. *Gurney,* 8 U. S. (4 Cr.) 333, 2 L. ed. 638; *Rapelie* v. *Emory,* 1 U. S. (1 Dall.) 349, 1 L. ed. 170; *Farquhar* v. *Morris,* 7 T. R. 124 (1797); Bayley on Bills (5th ed.) § 14 p. 59; Thompson on Bills, § 1, p. 32.

[65] *Eaton* v. *Truesdail,* 40 Mich. 1.

[66] *Union Central Life Insurance Company* v. *Curtis,* 35 Ohio St. 357.

[67] See also *Darling* v. *Wooster,* 9 Ohio St. 517; *Hill* v. *Henry,* 17 Ohio 9; *Norton* v. *Ellam,* 2 M. & W. 460.

§ 54. Mortgage payable in installments.—It is a general rule that a forfeiture takes place and a right of action accrues when the principal of the debt or any part thereof or the interest thereon is not paid at the time agreed upon for the payment of the same,[68] unless there has been a new agreement upon a sufficient consideration for an extension of the time of payment,[69] in which case the right to foreclose will be suspended until the expiration of the extended time.[70] It is lawful for the parties at the time of executing a mortgage to stipulate, that upon a failure to pay an installment of the principal when the same becomes due, the whole principle shall immediately become due and payable;[71] and under such a stipulation a neglect to pay an installment of the

[68] See *Grattan* v. *Wiggins,* 23 Cal. 16, 28; *Jones* v. *Lawrence,* 18 Ga. 277; *Adams* v. *Essex,* 1 Bibb. (Ky.) 149, 4 Am. Dec. 623; *Caufman* v. *Sayre,* 2 B. Mon. (Ky.) 202; *West Branch Bank* v. *Chester,* 11 Pa. St. 282, 51 Am. Dec. 547; *Richards* v. *Holmes,* 59 U. S. (18 How.) 143, 15 L. ed. 304; *Standhope* v. *Manners,* 2 Eden. 197; *Gladwyn* v. *Hitchman,* 2 Vern. 135; *Pfenninghausen* v. *Shearer,* 65 Mo. App. 348.

[69] See *post,* §§ 70, 71.

[70] *Reed* v. *Home Savings Bank,* 127 Mass. 295. See *Burt* v. *Saxton,* 1 Hun (N. Y.) 551. But see *Sharpe* v. *Arnott,* 51 Cal. 188; *Pendleton* v. *Rowe,* 34 Cal. 149; *Maher* v. *Lamfrom,* 86 Ill. 513; *Flynn v. Mudd,* 27 Ill. 323; *Redman* v. *Deputy,* 26 Ind. 338; *Lee* v. *West Jersey Land Co.* 29 N. J. Eq. (2 Stew.) 377; *Tompkins* v. *Tompkins,* 21 N. J. Eq. (6 C. E. Gr.) 338; *Massaker* v. *Mackerley,* 9 N. J. Eq. (1 Stockt.) 440; *Union Central Life Ins. Co.* v. *Bonnell,* 35 Ohio St. 365; *Albert* v. *Grosvenor Investment Co.,* L. R. 3 Q. B. 123.

[71] *Cincinnati Hotel Co.* v. *Central Trust & S. D. Co.* (Supr. Ct. Cin.) 25 Ohio L. J. 375. See *Phillips* v. *Taylor,* 96 Ala. 426, 11 So. 323; *Fox* v. *Wharton,* 5 Del. Ch. 200; *Horn* v. *Bennett,* 135 Ind. 165, 34 N. E. Rep. 956, 24 L.R.A. 804; *Bressler* v. *Martin,* 34 Ill. App. 122, 133 Ill. 278, 24 N. E. 518; *Penouilh* v. *Abraham,* 44 La. An. 188, 10 So. 676; *Meier* v. *Meier,* 105 Mo. 411, 16 S. W. 223; *Maitland* v. *Godwin,* 19 N. Y. Supp. 275, 46 N. Y. St. Rep. 959; *Gillmour* v. *Ford* (Tex.) 19 S. W. 442.

And this is true even though required to be by an instrument in writing under seal, and a copy served on the mortgagor. *Cincinnati Hotel Co. v. Central Trust & S. D. Co.* (Super. Ct. Cin.) 25 Ohio L. J. 375; *Curran* v. *Houston,* 201 Ill. 442, 66 N. E. 228; *Smith* v. *Lamb,* 59 Misc. 568, 111 Supp. 455; *Bizzell* v. *Roberts,* 72 S. E. 378. See *Robson* v. *Beasley,* 118 La. 738, 43 So. 391.

principal when it becomes due, will work a forfeiture of the mortgage,[72] and an action for the foreclosure and sale of the premises may be commenced forthwith.[73]

Such a provision in a mortgage applies to contemplated future advances where the existing indebtedness is not payable in installments.[74] Hence, a clause in a bond accompanying a mortgage, although not in the latter instrument, making the whole amount due upon default as to an installment, and a provision in the mortgage that upon default in the payment of any part the mortgagee may sell and retain the amount due on the bond, entitle the mortgagee to foreclose the whole mortgage upon default in the payment of an installment.[75] And where the mortgage makes the whole amount due upon default as to one installment, at the option of the

[72] *Whitcher* v. *Webb,* 44 Cal. 127; *Ottawa Northern Plank R. Co.* v. *Murray,* 15 Ill. 336; *Noell* v. *Gaines,* 68 Mo. 649; *Beisel* v. *Artman,* 10 Neb. 181; *Ackerson* v. *Lodi Branch R. R. Co.* 31 N. J. Eq. (4 Stew.) 42; *Voorhis* v. *Murphy,* 26 N. J. Eq. (11 C. E. Gr.) 434; see, however, *McLean* v. *Presley,* 56 Ala. 211; *Andrews* v. *Jones,* 3 Blackf. (Ind.) 440; *Indiana & I. C. R. Co.* v. *Sprague,* 103 U. S. (13 Otto) 756, 26 L. ed. 554; *Sweeney* v. *Kaufmann,* 168 Ill. 233, 48 N. E. 144.

[73] *Bird* v. *Olmstead,* 53 S. W. 978 (Tenn.); *Rubens* v. *Prindle,* 44 Barb. (N. Y.) 336; *Dwight* v. *Webster,* 32 Barb. (N. Y.) 47, 19 How. (N. Y.) Pr. 349, 10 Abb. (N. Y.) Pr. 128; *Ferris* v. *Ferris,* 28 Barb. (N. Y.) 29, 16 How. (N. Y.) Pr. 102; *Grattan* v. *Wiggins,* 23 Cal. 16; *Morgenstern* v. *Klees,* 30 Ill. 422; *Ottawa Northern Plank Road Co.* v. *Murray,* 15 Ill. 336; *Mobray* v. *Leckie,* 42 Md. 474.

After a breach of the conditions of a mortgage or deed of trust, the *cestui que trust* may resort to a court of chancery for its enforcement, without alleging any other ground therefor than such breach. *McDonald* v. *Vinson,* 56 Miss. 497; *Fox* v. *Wharton,* 5 Del. Ch. 200. See *Penouilh* v. *Abraham,* 44 La. An. 188, 10 So. 676.

A writ of seizure and sale of mortgaged property is not prematurely issued when one installment of the mortgage debt is due. *Penouilh* v. *Abraham,* 44 La. An. 188, 10 So. 676.

But permission to foreclose on default in payment of the principal and interest will not make the whole debt due on failure to pay any instalment. *Pomeroy* v. *Woodward,* 38 Or. 212, 63 P. 194.

[74] *Dunn* v. *Sharpe,* 9 Misc. (N. Y.) 636, 62 N. Y. S. R. 108, 30 N. Y. Supp. 353.

[75] *Maitland* v. *Godwin,* 19 N. Y. Supp. 275, 46 N. Y. S. R. 959.

mortgagee, a foreclosure suit to enforce the payment of the first installment is no bar to a suit for the second, the mortgagee not having exercised his option to declare the whole amount to be due upon the first default.[76] Hence, it follows that a further default made upon a mortgage subsequent to a decree of foreclosure for a prior partial default entitles the possessor of the decree to an order founded on such decree directing a sale to satisfy the amount due.[77]

Where a mortgage is given to secure a note payable in installments and any of the installments are not paid when they fall due, such non-payment will constitute a breach of the mortgage, and an action for foreclosure may thereupon be filed and a sale of the mortgaged premises had.[78]

In those cases where the entire amount is to become due and payable upon the failure to pay the first installment, the mortgagee, or holder of the mortgage, may elect to foreclose upon such default either for the installment or the whole amount, but he will not be entitled to the appointment of a receiver to take charge of the property and collect rent until the maturity of all, and then to foreclose.[79]

If the mortgage contains a clause authorizing the mortgagee, upon the non-payment of interest for a specified number of days after it becomes due, to elect that the whole amount unpaid shall become due, he can not be compelled to accept the interest and to waive the stipulation after the default has occurred and he has exercised his option.[80] Nor is the mortgagee estopped from asserting his right of election by the commencement of an action to foreclose, prior to the

[76] *Bressler* v. *Martin,* 133 Ill. 278, 24 N. E. 518, aff'g 34 Ill. App. 122; *Brand* v. *Smith,* 99 Mich. 395, 58 N. W. 363.

[77] *Brand* v. *Smith,* 99 Mich. 395, 58 N. W. 363.

[78] *Fields* v. *Drennen,* 115 Ala. 558, 22 So. 114. See *Estabrook* v. *Moulton,* 9 Mass. 258.

[79] *Phillips* v. *Taylor,* 96 Ala. 426, 11 So. 323.

[80] *Malcolm* v. *Allen,* 49 N. Y. 448; *Rubens* v. *Prindle,* 44 Barb. (N. Y.) 336; *Ferris* v. *Ferris,* 28 Barb. (N. Y.) 29. But see *Belloc* v. *Davis,* 38 Cal. 242; *Mason* v. *Luce,* 116 Cal. 232, 48 Pac. 72.

expiration of the time within which the money was to be paid; neither does he waive his right of election by accepting the installment of principal due before filing an amended or suplemental complaint and proceeding in the action for the collection of the unpaid balance.[81]

Where a note and mortgage are given for the payment of a sum of money in installments, with the stipulation that in case of default in the payment of any installment the whole principal sum shall be come due and payable at the option of the mortgagee, it is necessary for the mortgagee to take his option and in some states to give notice thereof before an action can be brought to recover the whole principal sum.[82]

§ 55. Same—Securing several notes.—A mortgage providing that all of a series of notes secured thereby shall become due upon default in the payment of any of them, may be foreclosed,[83] either for the notes due and unpaid,[84] or for the entire series,[85] on a proper rebate of the interest on the notes not yet due, or some other equitable adjustment.[86] Thus, it has been said that a provision in a trust deed stipulating that upon default in the payment of any one of the notes secured all shall become due, is valid and gives the

[81] *Malcolm* v. *Allen,* 49 N. Y. 448; *Lawson* v. *Barron,* 18 Hun (N. Y.) 414; *Odell* v. *Hoyt,* 73 N. Y. 343. Respecting waiver, see *Wilson* v. *Bird,* 28 N. J. Eq. (1 Stew.) 353.

[82] *Basse* v. *Callegger,* 7 Wis. 442, 76 Am. Dec. 225. See *post,* §§ 60, 62.

[83] The holder of a mortgage containing a stipulation that all notes shall become due on default in payment of any note or the removal of any of the property, cannot declare all notes due, and foreclose on the sale and removal of a crop, where the proceeds of such sale are used to pay the last note due. *Woodward* v. *Elrod,* 154 Ala. 340, 45 So. 647.

[84] *Land* v. *May,* 73 Ark. 415, 84 S. W. 489.

Foreclosure may be had of an overdue coupon interest note before the other notes secured by the trust deed mature. *Schlatt* v. *Johnson,* 85 Ill. App. 445; *Silverman* v. *Silverman,* 189 Ill. 394, 59 N. E. 949.

[85] *Phillips* v. *Taylor,* 96 Ala. 426, 11 So. 323; *Gillmour* v. *Ford,* 19 S. W. 442 (Tex.). See *Meier* v. *Meier,* 105 Mo. 411, 16 S. W. 223.

[86] *Gillmour* v. *Ford,* 19 S. W. 442 (Tex.)

trustee full authority to sell the mortgaged premises for payment of all the notes.[87]

Under a mortgage to secure several notes and providing that upon failure to pay any one of them, all of them shall become due and payable, the notes first due by their terms and transferred by the original mortgagee have preference over those of later dates of maturity until fully satisfied, whether the later notes are held by the original mortgagee or a subseqnent assignee.[88] But it is said that an extension of the time of payment of the first notes secured by a trust deed is not a waiver of an option given therein to declare the whole amount due upon a failure to pay subsequent notes.[89]

In all cases where the mortgage provides that upon default in the payment of the first of several mortgage notes, the whole become due, the payment of the first note does not restore the others to their original standing;[90] but matters tending to show an excuse for not paying the first note at maturity, by reason of an agreement to extend the time, will constitute a plea in abatement.[91]

§ 56. Failure to pay interest.[92]—It has been said that as a rule the non-payment of the principal debt or interest at the time agreed upon, works a forfeiture of the mortgage and entitles the mortgagee to bring an action for foreclosure.[93]

[87] *Meier* v. *Meier,* 105 Mo. 411, 16 S. W. 223.

The object of a stipulation in a trust deed maturing the entire debt on default in payment of any note secured thereby or interest thereon, is to enable the trustee to make immediate application of the entire proceeds to the discharge of the whole debt. *Hurck* v. *Erskine,* 45 Mo. 484; *Rowe* v. *Scherz,* 69 Mo. App. 88.

[88] *Horn* v. *Bennett,* 135 Ind. 165, 34 N. E. 321, 24 L.R.A. 800.

[89] *Brown* v. *McKay,* 151 Ill. 315, 37 N. E. 1037, aff'g 51 Ill. App. 295; *Bower* v. *Stein,* 177 Fed. 673, 101 C. C. A. 299.

[90] *Moore* v. *Sargent,* 112 Ind. 484, 14 N. E. 466; *Rogers* v. *Watson,* 81 Tex. 400, 17 S. W. 29.

[91] *Moore* v. *Sargent,* 112 Ind. 484, 14 N. E. 466.

[92] See *ante,* § 43.

[93] *West Branch Bank* v. *Chester,* 11 Pa. St. 282, 51 Am. Dec. 547; *Richards* v. *Holmes,* 57 U. S. (18 How.) 143, 15 L. ed. 304; *Stanhope*

The reason alleged by some of the cases for the rules as to interest, is that the interest is a part of the substance of the mortgage debt and belongs to it by tacking, and that it is not simply an incident to the debt, but *pro tanto* is the debt itself.[94] But it would seem that in the absence of a stipulation giving the power, there can be no foreclosure of a mortgage given as security for the payment of a promissory note and the interest thereon until the principal sum becomes due,[95] for the reason that the court can not shorten the time stated in an express agreement between the parties, as that would be altering the nature of the contract to the injury of the maker of the note.[96] A foreclosure can be had however for the amount of interest due, when the principal is not yet due, and the mortgage does not contain the condition that the principal shall be due upon default in payment of interest,[97] although the prin-

v. *Manners,* 2 Eden. 197; *Gladwyn* v. *Hitchman,* 2 Vern. 135; *Perry* v. *Fisher,* 30 Ind. App. 261, 65 N. E. 935. See *Security Trust & Safe Dep. Co.* v. *New Jersey Paper Board & W. P. Mfg. Co.* 57 N. J. Eq. 603, 42 Atl. 746.

[94] *West Branch Bank* v. *Chester,* 11 Pa. St. 282, 51 Am. Dec. 547.

[95] *Brodribb* v. *Tibbets,* 58 Cal. 6; *Harshaw* v. *McKesson,* 66 N. C. 266. But see *Estabrook* v. *Moulton,* 9 Mass. 258; *Rowe* v. *Griffiths,* 57 Neb. 488, 78 N. W. 20.

Where a mortgage provides that it shall be in full force and virtue if, at maturity, the note secured thereby, with the interest that may be due thereon, is not paid, a failure to pay an installment of interest which is payable monthly, will not permit of foreclosure. *Bank* v. *Doherty,* 29 Wash. 233, 69 P. 732, 92 Am. St. Rep. 903.

[96] *Harshaw* v. *McKesson,* 66 N. C. 266.

[97] *Winchell* v. *Coney,* 54 Conn. 24, 5 Atl. 354; *Cleveland* v. *Booth,* 43 Minn. 16, 44 N. W. 670; *Omaha Loan & Trust Co.* v. *Kitton,* 58 Neb. 113, 78 N. W. 374; *Warren* v. *Harrold,* 92 Tex. 417, 49 S. W. 364. The supreme court of Michigan say, in the case of *Edgaro* v. *Beck,* 69 Mich. 419, 56 N. W. 15, that an installment of interest becoming due by the terms of the mortgage, is included in the Michigan statute (How. Mich. Stat. 8498, subd. 4), providing, among other things, that in cases of "mortgages given to secure the payment of money by installments," each installment, after the first, shall be deemed a separate and independent mortgage, and the mortgage for each installment may be foreclosed as if separate mortgages were given for each subsequent installment; and a redemption from such sale by the mortgagor shall have the same effect as if the sale had been

cipal debt is not yet mature, and is held by another person who is made a party to the suit.[98] But the parties may stipulate that upon failure to pay the interest promptly at the time specified, the principal shall become due, in which case, on non-payment of interest, a foreclosure may be filed and the whole debt collected.[99] In California, however, where a promissory note due to a corporation two years after date was secured by a mortgage which provided that "in case of default by the mortgagor in the payment of said note or interest or in the performance of any of the conditions hereof, then the mortgagee may at his option either commence proceedings to foreclose this mortgage in the usual manner or cause the said premises or any part thereof to be sold," it was held that the failure to pay the interest as it became due, authorized a foreclosure for such interest only, and not for the principal.[1]

made upon an independent prior mortgage.

[98] *Cleveland* v. *Booth,* 43 Minn. 16, 44 N. W. 670.

A suit cannot be maintained upon notes secured by mortgage prior to their maturity, for a personal judgment against one who has agreed to pay them, under a clause of the mortgage that the whole principal shall become due if the interest remains in arrears for ninety days, where the notes do not contain such stipulation. *Tobin* v. *Smith,* Ohio Dec. 675, 1 Ohio N. P. 75.

[99] *Caldwell* v. *Ellebrecht,* 68 Ill. App. 596; *Copper Belle Mining Co.* v. *Costello,* 100 Pac. 807 (Ariz.)

See *Malcolm* v. *Allen,* 49 N. Y. 448; *Rubens* v. *Prindle,* 44 Barb. (N. Y.) 336, 344; *Valentine* v. *Van Wagner,* 37 Barb. (N. Y.) 60; *Ferris* v. *Ferris,* 28 Barb. (N. Y.) 29; *Crane* v. *Ward,* Clarke Ch. (N. Y.) 393; *Jester* v. *Sterling,* 25 Hun (N. Y.), 344; *Noyes* v. *Clark,* 7 Paige Ch. (N. Y.) 179, 32 Am. Dec. 620; *Mobray* v. *Leckie,* 42 Md. 474; *Schooley* v. *Romain,* 31 Md. 574, 583; *Chicago D. & V. R. R. Co.* v. *Fosdick,* 106 U. S. (16 Otto) 47, 27 L. ed. 47; *James* v. *Thomas,* 5 Barn. & Ad. 40; *Gowlett* v. *Hanforth,* 2 W. Bl. 958; *Steel* v. *Bradfield,* 4 Taunt. 227; *Burrowes* v. *Molloy,* 2 Jones & LaT. 521, 8 Ir. Eq. 482.

[1] *Bank of San Louis Obispo* v. *Johnson,* 53 Cal. 99. But see *Whitcher* v. *Webb,* 44 Cal. 127, in which case a promissory note payable at a future time provided for the payment of interest quarterly and contained a clause that in case default was made in the payment of interest quarterly, the note should immediately become due at the option of the holder, and that the failure to pay interest made the whole amount due absolutely at the option

The better doctrine seems to be that the interest falling due yearly, or at other stated periods, on a note secured by mortgage, is an installment of the debt, and that the mortgage may be foreclosed to enforce its payment, because the mortgage must have been given to secure the interest as well as the principal, and the law will not withhold a remedy until the period elapses for the maturity of the whole debt.[2] And where a condition is inserted in the mortgage which authorizes a sale to be made upon the happening of any default, the failure to pay interest when it is due is a default within the meaning of such a clause and will entitle the mortgagee to foreclose,[3] notwithstanding the fact that such failure to pay the interest was an oversight on the part of the mortgagor.[4]

A power given the trustees in a deed of trust to secure a principal note and a series of interest notes, to sell "upon default or failure being made in the payment of the said notes, or of any installment of interest thereon, when and as the same shall become due and payable" is not limited to the interest payable on the interest notes after maturity, and not due until the maturity of the principal note, but includes default in payment of any of the interest notes.[5] But upon a foreclosure for interest on a mortgage upon which the prin-

of the holder, if he so elected, without any notice from the holder to the maker.

[2] *Brinckerhoff* v. *Thallhimer,* 2 Johns. Ch. (N. Y.) 486; *Morgenstern* v. *Klees,* 30 Ill. 422.

[3] *Goodman* v. *Cincinnati & C. R. R. Co.* 2 Disney (Ohio) 176; *West Branch Bank* v. *Chester,* 11 Pa. St. 282, 51 Am. Dec. 547; *Stanhope* v. *Manners,* 2 Eden, 197. See *Burt* v. *Saxton,* 1 Hun (N. Y.), 551.

Where a mortgage contained a stipulation giving a right to sell on default in payment of principal or interest and to pay said principal and interest out of the proceeds of such sale, the failure to pay the interest makes both principal and interest due. *Gore* v. *Davis,* 124 N. C. 234, 32 S. E. 554.

[4] *Voorhis* v. *Murphy,* 26 N. J. Eq. (11 C. E. Gr.) 434. See *Dillett* v. *Kemble,* 25 N. J. Eq. (10 C. E. Gr.) 66; *Haggerty* v. *McCanna,* 25 N. J. Eq. (10 C. E. Gr.) 48; *Graham* v. *Berryman,* 19 N. J. Eq. (4 C. E. Gr.) 29.

[5] *Wheeler* v. *McBlair,* 5 App. Cas. D. C. 375, 23 Wash. L. Rep. 153.

cipal is not due, only so much of the property as is necessary to raise the amount due should be sold, in those cases where the mortgaged property is capable of division.[6] And property in the hands of a receiver in a suit for the foreclosure of a mortgage so far as the interest was in default only will not be sold under an interlocutory order on the petition of junior mortgagees who have intervened, so as to discharge the lien of prior mortgages which are not yet due, where the intervenors contest the validity of such mortgages and the question is still pending and undetermined.[7]

It has been said, however, that a mortgage given as security for the payment of a designated sum on a specified date, a number of years after its execution, with annual interest according to the terms of a promissory note providing for a compounding of the interest if unpaid, can not be foreclosed before its maturity, for default in payment of interest.[8] The rule that, when the principal of a mortgage debt cannot be declared due for non-payment of interest, there can be no foreclosure for such non-payment, cannot apply where a sale of land is made, and a so-called principal note is given with other notes, in consideration, the amount of which may not be declared due because of its being made a condition of its payment that an outstanding title to a portion of the land shall first be gotten in for the benefit of the mortgagor; and the other notes not being subject to such condition, but payable absolutely; and there being an express covenant of the mortgagor that the other notes may all be declared due upon default of payment of any one of them for a certain time after becoming due.[9]

It is thought, however, that the right to declare the prin-

[6] *McFadden* v. *Mays Landing & E. H. C. R. Co.* 49 N. J. Eq. 176, 22 Atl. 932.

[7] *Pennsylvania R. Co.* v. *Allegheny R. Co.* 42 Fed. 82, 8 Ry. & Corp. L. J. 63.

[8] *Van Loo* v. *Van Aken,* 104 Cal. 269, 37 Pac. 925. Compare *ante,* §§ 43, 47, and *post,* §§ 292, 300.

[9] *Wisner* v. *Chamberlin,* 117 Ill. 568, 7 N. E. 68.

cipal of a mortgage due for default in payment of interest is not conferred by authority to the trustee to apply the residue of income upon the principle of outstanding bonds, to cause the property to be sold as an entirety, and a provision that if the trustee is proceeding to sell for default in interest or sinking fund, the mortgagor may, before sale, pay all arrears of interest and expenses and the proceeding shall be discontinued.[10]

§ 57. Same—Set-off not a payment.—It has been said, and the decision is well-founded in principle, that the existence of a debt due from a mortgagee to the mortgagor, which may be set off against the mortgage, does not *ipso facto* pay the interest so as to prevent default by which the whole mortgage debt becomes due, in the absence of an agreement to apply it on the mortgage, or of a demand that it be so applied.[11] And a second mortgagee who retains part of the consideration of the mortgage for the purpose of discharging the first mortgage, the owner of which refuses to accept payment as not due, cannot be required to apply the money so retained upon the interest on his own mortgage so as to deprive him of the right to declare his mortgage due for non-payment of interest.[12]

§ 58. Failure to pay taxes.—The parties to a mortgage may not only stipulate for forfeiture in case of failure to pay interest promptly at the times agreed upon, but they may also, and in fact usually do, provide that in case the mortgagor fails within a time designated to pay the taxes and assessments levied against the property, the mortgagee shall have the right to elect that the whole mortgage shall be forfeited, so that he may proceed to foreclose and sell the property to pay such

[10] *Grape Creek Coal Co.* v. *Farmers' Loan & T. Co.* 63 Fed. 891, 12 C. C. A. 350.

[11] *Gumpert* v. *Ell,* 4 Pa. Dist. R. 257, 7 Kulp, 513; *Peterson* v. *Johnson,* 20 Wash. 497, 55 P. 932.

[12] *Moore* v. *Keine,* 43 Neb. 517, 61 N. W. 736 (Neb.)

taxes together with the mortgage debt and interest.[13] Such an agreement is not prohibited by statute nor is it against public policy;[14] it is not a hard contract which it would be unconscionable to enforce, because an investor may very properly insist that his security shall be kept intact, or that the loan shall mature. In fact such a provision is very analogous to an agreement, that a failure to pay the interest promptly shall render the whole principal due. Such stipulations have almost invariably been upheld by the courts.[15]

Where a mortgage provides that the mortgagor shall pay

[13] *Caldwell* v. *Ellebrecht,* 68 Ill. App. 596; *Germania Life Ins. Co.* v. *Potter,* 109 N. Y. Supp. 435; *New York City Baptist Mission Soc.* v. *Tabernacle Baptist Church,* 17 Misc. 699, 41 N. Y. Supp. 513.

Breach of condition to pay taxes must occur before filing of bill to foreclose. *Bradley* v. *Glenmary Co.* 64 N. J. Eq. 77, 53 A. 49.

[14] *Hockett* v. *Burns,* 90 Neb. 1, 132 N. W. 718; *Plummer* v. *Park,* 62 Neb. 665, 87 N. W. 534

[15] *Gray* v. *Robertson,* 174 Ill. 242, 51 N. E. 248; *Lauterjung, as ex'r, etc.* v. *Chicago Title & Trustee Co. as trustee, etc.* 156 Ill. App. 621; *Spesard* v. *Spesard,* 75 Kan. 87, 88 Pac. 576; *Booth* v. *Wolff Process Leather Co.* 224 Pa. 583. 73 A. 959; *Arkenburgh* v. *Lakeside Residence Ass'c.* 56 N. J. Eq. 102, 38 A. 297.

See *Valentine* v. *VanWagner,* 37 Barb. (N. Y.) 60; *Ferris* v. *Ferris,* 28 Barb. (N. Y.) 29; *Crane* v. *Ward,* Clarke Ch. (N. Y.) 393; *Hale* v. *Gouverneur,* 4 Edw. Ch. (N. Y.) 207; *O'Connor* v. *Shipman,* 48 How. (N. Y.) Pr. 126; *Noyes* v. *Clark,* 7 Paige Ch. (N. Y.) 179, 32 Am. Dec. 620; *Ottawa Northern Plank Road Co.* v. *Murray,* 15 Ill. 337; *Stanclift* v. *Norton,* 11 Kan. 218, 222; *The Contributors* v. *Gibson,* 2 Miles (Pa.) 324; *Richards* v. *Holmes,* 59 U. S. (18 How.) 143, 15 L. ed. 304; *James* v. *Thomas.* 5 Barn. & Ad. 40; *Steel* v. *Bradfield,* 4 Taunt. 227; *Stewart* v. *McCadden,* 107 Md. 314, 68 Atl. 571 (Md.); *French* v. *Poole,* 83 Kan. 281, 111 P. 488. See also *Pearmain* v. *Massachusetts Hospital Life Ins. Co.* 206 Mass. 377, 92 N. E. 497.

In *Pope* v. *Durant,* 26 Iowa, 233, 240, a case brought for the foreclosure of a mortgage which contained such a tax clause, the court says: "The power of sale for the non-payment of taxes was intended to cover more than accrued interest. The parties made their own agreement, and while the power to sell is derived from the instrument itself, it is equally true that where it has been fairly made the courts have no right to make another agreement for them—no power to say that it would have been better if they had incorporated other terms and conditions. And nothing is clearer than that the object and design of the parties should be kept in view in determining the nature and extent of the power conferred."

all taxes and assessments levied upon the mortgaged premises, and stipulates that in default thereof the mortgagee may pay the same and collect the amount thus paid as a part of the mortgage debt, the failure of the mortgagor to pay the taxes and assessments is such a breach of the condition of the mortgage as to entitle the mortgagee to proceed to foreclose.[16] The fact that the mortgagee has the right to pay the taxes and to charge them to the mortgagor, the same to become a part of the mortgage lien, makes no difference, because the right to foreclose is not waived or lost nor the default condoned by the mortgagee on his paying the taxes or assessments, and charging the amount thereof to the mortgagor.[17] The failure of the mortgagor to pay such taxes or assessments, however, is not such a breach of the condition of the mortgage as will give the mortgagee a right to foreclose and collect the whole amount secured, unless there is a clause in the mortgage providing that the whole sum shall become due and payable on failure to pay the taxes and assessments.[18] The right to foreclose a mortgage, providing for the payment of taxes and assessments, will not accrue upon the mere failure of the mortgagor to pay them; to acquire that right it is essential that the holder of the mortgage shall have paid off and discharged the assessments or taxes; otherwise no debt will have accrued and no money will have become due which would entitle the mortgagee to proceed with an action.[19]

Where the mortgagee requires the mortgagor to pay the taxes and keep the buildings insured, and provides that a fail-

[16] *Williams* v. *Townsend,* 31 N. Y. 411; *Brickell* v. *Batchelder,* 62 Cal. 623; *Ellwood* v. *Wolcott,* 32 Kan. 526; *National Life Ins. Co.* v. *Butler,* 61 Neb. 449, 85 N. W. 437, 87 Am. St. Rep. 462; *Weinstein* v. *Sinel,* 133 App. Div. 441, 117 N. Y. Supp. 346.

[17] *Brickell* v. *Batchelder,* 62 Cal. 623; *Hockett* v. *Burns,* 132 N. W. 718 (Neb.); *National Life Ins. Co.* v. *Butler,* 61 Neb. 449, 85 N. W. 437, 87 Am. St. Rep. 462; *Hartsuff* v. *Hall,* 58 Neb. 417, 78 N. W. 716; *Rasmussen* v. *Levin,* 28 Colo. 448, 65 P. 94.

[18] *Williams* v. *Townsend,* 31 N. Y. 411.

[19] *Williams* v. *Townsend,* 31 N. Y. 411.

See *Union Trust Co.* v. *Grant,* 148 Mich. 501, 111 N. W. 1039.

ure in either respect shall authorize the mortgage to declare the entire mortgage debt to be due, noncompliance with the provisions of the mortgage empowers the mortgagee to declare such mortgage debt due by the tenor of the notes, and to procure the possession of the premises and the application of the rents to the payment of the indebtedness.[20] But a mortgagor will be relieved from a default in paying an assessment on the mortgaged premises, under an agreement made by the mortgagee for the benefit of the mortgagor to postpone foreclosure during her life if no taxes or assessments remained unpaid more than thirty days, where the default was caused by misinformation to the latter's agent at the proper public office, and she had provided sufficient money to pay such assessment, but knew nothing of it, and paid it as soon as she learned thereof.[21]

A default in the payment of taxes by a mortgagor is not ground for declaring the debt due, under a clause in the mortgage providing that the whole indebtedness shall become due if the taxes remain unpaid for a given time where they

[20] And this is true even where the mortgage contains a provision therefor notwithstanding a contract with the mortgagor and his tenant for the application of the rents to the payment of an amount due from the mortgagor to a third person. *Niccolls* v. *Peninsular Stove Co.* 48 Ill. App. 317.

But it has been said that a clause in a mortgage providing for sale upon default in payment of the debt or interest thereon "or the taxes, or if the insurance is not kept up thereon," is too indefinite and uncertain to authorize foreclosure for failure to pay taxes or keep up insurance upon the mortgaged premises, where there is no other stipulation in the mortgage that the mortgagor shall pay taxes or keep the premises insured. *Noble* v. *Greer,* 48 Kan. 41, 28 Pac. 1004.

See *Johnson* v. *Irwin,* 16 Wash. 652, 48 P. 345.

[21] *Noyes* v. *Anderson,* 124 N. Y. 175, 26 N. E. 316, 35 N. Y. S. R. 94, 21 Am. St. Rep. 657.

As to when misinformation as to payment of taxes will not effect right to foreclose for default in payment thereof, see *Bonner Springs Lodge & Sanitarium Co.* v. *McClelland,* 59 Kan. 778, 53 P. 866.

[22] *Smalley* v. *Renken,* 85 Iowa, 612, 52 N. W. 507; *Shaw* v. *Wellman,* 59 Hun (N. Y.) 447, 13 N. Y. Supp. 527, 36 N. Y. S. R. 1002; *Fleming* v. *Franing,* 22 Okla. 644, 22 L.R.A.(N.S.) 360, 98 Pac. 961.

were paid before the commencement of the suit and before the mortgagee had suffered any loss or impairment of his security.[22] But if the delinquent taxes are not paid by the mortgagor until after the action is brought, the mortgagee may foreclose..[23]

§ 59. Failure to pay insurance.—It seems that where the mortgage or the note secured thereby contains a stipulation that if default is made in payment of interest or insurance upon the property, the principal and interest shall at once become due and payable, the mortgage may be foreclosed on default in payment of insurance.[24]

§ 60. Election of mortgagee that debt become due.—Where a mortgage is conditioned that upon the failure to do certain things specified, as the payment of interest, taxes, assessments and insurance, the mortgage shall be forfeited at the option of the mortgagee, the mortgage debt does not become due and the right to foreclose does not arise until the mortgagee has exercised his option.[25] Although an election to consider the entire debt matured on any default, must be by some affirmative act.[26] It is not necessary that any particular form of words should be used.[27]

[23] *Hockett* v. *Burns,* 90 Neb. 1, 132 N. W. 718.

If, however, the default is merely a technical one, equity will relieve against forfeiture. *Germania Life Ins. Co.* v. *Potter,* 124 App. Div. 814, 109 N. Y. Supp. 435.

[24] *Mooney* v. *Tyler,* 68 Ark. 314, 57 S. W. 1105; *Uedelhofen* v. *Mason,* 201 Ill. 465, 66 N. E. 364. See *Niccolls* v. *Peninsular Stove Co.* 48 Ill. App. 317; *Noble* v. *Greer,* 48 Kan. 41, 28 Pac. 1004.

[25] *Randolph* v. *Middleton,* 26 N. J. Eq. (110 C. E. Gr.) 543; *Coman* v. *Peters,* 52 Wash. 574, 100 P. 1002; *Gunby* v. *Ingram,* 57 Wash. 97, 36 L.R.A.(N.S.) 232, 106 Pac. 495; *McCarthy* v. *Benedict,* 89 Neb. 293, 131 N. W. 598; *Trinity County Bank* v. *Haas,* 151 Cal. 553, 91 Pac. 385. But see contra: *Union Trust & Savings Co.* v. *Marshall's Adm'rs,* 130 Ky. 206, 113 S. W. 73. S. W. 73.

[26] *Trinity County Bank* v. *Haas,* 151 Cal. 553, 91 Pac. 385; *Cresco Realty Co.* v. *Clark,* 128 App. Div. 144, 112 N. Y. Supp. 550.

[27] Thus where the record recited among other things that "the mortgagee having elected to declare said

It has been said that the holder of a mortgage note, providing that interest is to be payable semi-annually, and, if not so paid, to be compounded semi-annuually, or the whole sum of principal and interest to become immediately due and payable at option of the holder, while he exercises his option promptly, may do so at maturity and upon default of any installment of the interest.[28] But the supreme court of New York say that a mortgagee who, for several years, receives interest on the mortgage after it becomes due without claiming the right to avail himself of a provision in the mortgage that if any payment shall remain unpaid for ten days after it becomes due, the whole debt shall immediately become due, at the option of the mortgagee, cannot declare a forfeiture on account of non-payment of an installment of interest for ten days, where the mortgagor has made payments which he could well suppose had entirely paid such installment, and the forfeiture is declared for the purpose of acquiring the mortgagor's property, or causing a reduction in the amount of the principal debt.[29]

§ 61. Waiver of election.—The mortgagee can of course voluntarily waive his election after it has been exercised,[30] but he can not be compelled to accept the interest

mortgage due and payable, as he was authorized to do according to the terms and conditions thereof, and having entered in and upon said premises and taken possession thereof, the said premises were duly advertised for public sale," etc., it was held to be sufficient. *Harper* v. *Ely,* 56 Ill. 179, 189.

For circumstances not amounting to an exercise of option, see *Weinberg* v. *Naher,* 51 Wash. 591, 22 L.R.A.(N.S.) 956, 99 P. 736.

[28] *Campbell* v. *West,* 86 Cal. 197, 24 Pac. 1000.

[29] *French* v. *Row,* 77 Hun (N. Y.) 380, 60 N. Y. S. R. 396, 28 N. Y. Supp. 849.

[30] *Van Vlissingen* v. *Lenz,* 171 Ill. 162, 49 N. E. 422.

An election made by a mortgagee to declare the whole sum due cannot be revoked after the mortgagor has changed his position and assumed legal obligations because of such election. *Kilpatrick* v. *Germania Life Ins. Co.* 183 N. Y. 163, 75 N. E. 1124, 111 Am. St. Rep. 722, 2 L.R.A.(N.S.) 574.

For right to rescind election to declare whole amount due for default in payment of installment of

and to waive the stipulation after a default has occurred and he has made his election in accordance with the stipulation,[31] nor will he be estopped from asserting his right of election, by the commencement of a foreclosure prior to the expiration of the thirty days, the complaint wherein simply sets up a default in the payment of an installment of principal and interest due. Nor will he waive his right to elect by accepting the installment of principal.[32] He has the right to file an amended or supplemental complaint, and to proceed in the action for the collection of the balance unpaid.[33] And where in such a case, after tender of the interest and costs, the mortgagee, without amending his complaint obtains an order of sale for the interest only and perfects judgment, from which order and judgment no appeal is taken, the court will have power upon motion and notice to the mortgagor to make a supplemental order directing a sale and payment out of the proceeds, of the balance of the mortgage debt, with judgment against the mortgagor for any deficiency.[34]

It has been said that forbearance by a mortgagee to elect

principal and interest, see *Philadelphia Savings Fund Society* v. *Lasher,* 144 Ill. App. 653.

[31] *O'Connor* v. *Meskill,* 39 Atl. 1061, (N. J. Eq.).

The payment of taxes after default does not affect the mortgagee's rights, where he has exercised his option by foreclosing. *Plummer* v. *Park,* 62 Neb. 665, 87 N. W. 534.

But where the attorney for the mortgagee in writing the mortgagor that his client elects to consider the whole amount due because of a default in payment of taxes, also writes that before taking any steps to enforce the security he will wait a reasonable time to hear from him, the default is thereby waived when the taxes are paid within a reasonable time. *Ver Planck* v. *Godfrey,* 42 App. Div. 16, 58 N. Y. Supp. 784.

[32] But see *Sykes* v. *Arne,* 47 Pac. 868, (Cal.).

A tender by the mortgagor of overdue interest before the exercise of his option by the mortgagee destroys the right to such option. *Weinberg* v. *Naher,* 51 Wash. 591, 22 L.R.A.(N.S.) 956, 99 P. 736; *Trinity County Bank* v. *Haas,* 151 Cal. 553, 91 Pac. 385; *Bieber* v. *Goldberg,* 133 App. Div. 207, 117 N. Y. Supp. 211; *Schieck* v. *Donohue,* 77 App. Div. 321, 79 N. Y. Supp. 233.

[33] *Malcolm* v. *Allen,* 49 N. Y. 448.

[34] *Malcolm* v. *Allen,* 49 N. Y. 448, 454. See also *Livingston* v. *Mildrum,* 19 N. Y. 443.

within a reasonable time after a default in interest, to treat the whole sum as due, does not defeat his right, especially where, in an action to foreclose, defendants do not allege waiver of such right, or offer to pay the interest which they concede to be due.[35] Thus a delay of fifty-nine days,[36] sixty-four days,[37] three months,[38] four months,[39] or even nine months,[40] in electing to take advantage of the option to declare the principal sum secured by mortgage due by reason of non-payment of interest is not, as a matter of law, an unreasonable one; and is not evidence of a waiver of the stipulation that the whole shall become due upon default in the payment of an installment of interest.[41] Nor does the fact that the mortgagee has failed to make an election after the first installment was due preclude him from making such election after the maturity of a second installment.[42]

§ 62. Demand and notice of election.—The general rule is that where a mortgage or the note secured thereby declares that on failure to pay the interest when due, the whole sum of principal and interest shall become immediately due and payable, at the option of the holder, no demand after default, is necessary to support an action to foreclose for the entire sum,[43] because such action is exercised by the preparation of a

[35] *Hewitt* v. *Dean,* 91 Cal. 5, 617, 27 Pac. 423.

[36] *Fletcher* v. *Dennison,* 101 Cal. 292, 35 Pac. 868.

[37] *Lovell* v. *Goss,* 45 Colo. 304, 22 L.R.A.(N.S.) 1110, 101 Pac. 72; *Goss* v. *Lovell,* 45 Colo. 315, 101 Pac. 75.

[38] *Atkinson* v. *Walton,* 162 Pa. St. 219, 29 Atl. 828, 34 W. N. C. 562.

[39] *Washburn* v. *Williams,* 10 Colo. App. 153, 50 P. 223.

[40] *Farmsworth* v. *Hoover,* 66 Ark. 367, 50 S. W. 865.

[41] For acts of mortgagee not constituting waiver, see *Mullen* v. *Gooding Implement & Hardware Co.* 20 Idaho, 348, 118 Pac. 666.

See also *ante,* § 43. Waiver of right of forfeiture.

[42] *Industrial Land Development Co.* v. *Post,* 55 N. J. Eq. 559, 37 A. 892.

[43] *Clemens* v. *Luce,* 101 Cal. 432, 35 Pac. 1032; *Hewitt* v. *Dean,* 91 Cal. 5, 617, 25 Pac. 753; *Swearingen* v. *Lahner,* 93 Iowa, 147, 61 N. W. 431, 26 L.R.A. 765, 57 Am. St. Rep. 261; *James* v. *Brainard-Jackson & Co.* 64 Wash. 175, 116 Pac. 633. See *Union Trust & Savings Co.* v. *Marshall's Adm'rs.* 130

bill for the foreclosure thereof,[44] and authorizing the same to be filed, where no notice is therein required to be given to the debtor of its exercise.[45]

Where a mortgage contains a provision that in case of failure to pay the installments of principal and interest, or the taxes and assessments levied against the property, for a certain number of days after they become due and payable, the whole mortgage debt shall become payable at the option of the holder of the mortgage, it is the almost [46] universal rule that notice of the exercise of such option need not be given prior to the commencement of an action to foreclose the mortgage.[47]

In those cases where the terms of the instrument or a stat-

Ky. 206, 113 S. W. 73. See *ante*, § 47.

[44] *McCarthy* v. *Benedict*, 89 Neb. 293, 131 N. W. 598; *Curran* v. *Houston*, 201 Ill. 442, 66 N. E. 228; *Mullen* v. *Gooding Implement & Hardware Co.* 20 Idaho, 348, 118 Pac. 666.

[45] *Brown* v. *McKay*, 151 Ill. 315, 37 N. E. 1037, aff'g 51 Ill. App. 295.

[46] In Wisconsin it is held that the mortgagee must give notice of his election whether or not the whole principal shall become due and payable on account of a default made by the mortgagor, where the mortgage provides for such default and election. *Malcon* v. *Smith*, 49 Wis. 200, 215–217, 5 N. W. 336; *Marine Bank* v. *International Bank*, 9 Wis. 57, 68; *Basse* v. *Gallegger*, 7 Wis. 442, 446, 76 Am. Dec. 225. See also *Hall* v. *Delaplaine*, 5 Wis. 206, 68 Am. Dec. 57.

But the mortgagor may waive his right to notice by making it unreasonably difficult for the mortgagee to give notice by changing his address without provision for forwarding mail. *Julien* v. *Model Building Loan & Investment Assoc.* 116 Wis. 79, 92 N. W. 561, 61 L.R.A. 668. In this case the court said: "This court stands alone, or nearly so, in holding that notice of election should be given."

[47] *New York.—Hunt* v. *Keech*, 3 Abb. Pr. 204; *New York Security & T. Co.* v. *Saratoga Gas E. L. Co.* 157 N. Y. 689, 51 N. E. 1092; *Hothorn* v. *Louis*, 170 N. Y. 576, 62 N. E. 1096. See *Kilpatrick* v. *Germania Life Ins. Co.* 183 N. Y. 163, 75 N. E. 1124, 111 Am. St. Rep. 722, 2 L.R.A.(N.S.) 574. But see, *Mutual Benefit Loan & Building Co.* v. *Jaeger*, 34 App. Div. 90, 54 Supp. 99; *Beach* v. *Shanley*, 35 App. Div. 566, 55 Supp. 130. See also *Howard* v. *Farley*, 3 Robt. 599, 602.

Illinois.—Hoodless v. *Reid*, 112 Ill. 105, 112; *Marston* v. *Brittenham*, 76 Ill. 611; *Princeton Loan & Trust Co.* v. *Munson*, 60 Ill. 371, 375; *Heath* v. *Hall*, 60 Ill. 344; *Harper* v. *Ely*, 56 Ill. 179, 189; *Owen* v. *Occidental Bldg. & L. Assoc.* 55 Ill. App. 347; *Heffron* v. *Gage*, 149 Ill. 182, 36 N. E. 569;

ute requires that there shall be given a notice of the exercise of the option to treat the whole debt as due upon a default, if the mortgagor is absent from his residence and place of busi-

Lauterjung, as ex'r etc. v. *Chicago Title & Trustee Co. as trustee, etc.* 156 Ill. App. 621; *Sweeney* v. *Kaufmann,* 168 Ill. 233; *Holdroff* v. *Remlee,* 105 Ill. App. 671; *Smith* v. *Billings,* 170 Ill. 543, 49 N. E. 212.

California.—*Sichler* v. *Look,* 93 Cal. 600, 29 Pac. 220, 223; *Hewitt* v. *Dean,* 91 Cal. 5, 817, 27 Pac. 423; *Bank of Commerce* v. *Scofield,* 126 Cal. 156, 58 P. 451; *San Gabriel Valley Bank* v. *Lake View Town Co.* 86 Pac. 727 (Cal.); *Trinity County Bank* v. *Haas,* 151 Cal. 553, 91 Pac. 385. See *Dean* v. *Applegarth,* 65 Cal. 391.

Indiana.—*Buchanan* v. *Berkshire Life Ins. Co.* 96 Ind. 510, 520.

North Carolina.—*Young* v. *McLean,* 63 N. C. 576.

Oregon.—*Bower* v. *Stein,* 165 Fed. 232 (Oreg.)

Idaho.—*Mullen* v. *Gooding Implement & Hardware Co.* 20 Idaho, 348, 118 Pac. 666.

Iowa.—*Swearingen* v. *Lahner,* 93 Iowa, 147, 61 N. W. 431, 26 L.R.A. 765, 57 Am. St. Rep. 261. See also *Moore* v. *Crandall,* 124 N. W. 812 (Iowa).

Nebraska.—*National Life Ins. Co.* v. *Butler,* 61 Neb. 449, 85 N. W. 437, 87 Am. St. Rep. 462. See *Eastern Banking Co.* v. *Seeley,* 55 Neb. 660, 75 N. W. 1102.

Mississippi.—*Dunton* v. *Sharpe,* 70 Miss. 850, 12 So. 800.

Dakota.—No notice other than the notice of sale under the power contained in a mortgage need be given the mortgagor of the election of the mortgagee to exercise his option, given by the mortgage, to declare the whole amount due for default in payment of an installment. *Hodgdon* v. *Davis,* 6 Dak. 21, 50 N. W. 478.

Texas.—No formal declaration of an option to treat the principal debt as due upon default is necessary before a trustee can sell under a trust deed authorizing him, upon request after default, to treat the principal debt as due and to advertise and sell the property included in the trust deed. *Chase* v. *Cleburne First Nat. Bank,* 1 Tex. Civ. App. 595, 20 S. W. 1027.

Pennsylvania.—In the recent case of *Atkinson* v. *Walton,* 162 Pa. St. 219, 29 Atl. 898, 34 W. N. C. 562, the court say that a *scire facias* issued to enforce collection of the whole of a mortgage upon default in payment of an installment of interest, under a provision therein that in case of any default in the payment of interest for the space of thirty days the whole shall become due at the option of the mortgagee, is not a proceeding to enforce a forfeiture, but is one to collect money according to express conditions of a contract and notice to the mortgagors is not required.

Michigan.—The question of notice of election arose in the case of *English* v. *Carney,* 25 Mich. 178, 184, but was not decided.

Georgia.—On necessity for giving obligor opportunity to perform, see *Provident Savings Life Assur. Soc.* v. *Georgia Industrial Co.* 124 *Ga.* 399, 52 S. E. 289.

ness, and the mortgagee, after diligent search and inquiry, is unable to ascertain his whereabouts, a notification by the mortgagee to the mortgagor of his election to consider the mortgage debt to have become due on account of the failure of the mortgagor to pay interest as it accrued is sufficiently given by leaving notices at such places.[48]

A notice of election to consider the whole debt due by reason of a default in the payment of one of the installments of the principal or interest or of a failure to pay the taxes and assessments within the time limited, given by an attorney or other duly authorized agent in the name of the mortgagee or holder of the mortgage, will be sufficient.[49]

§ 63. Who may exercise option to declare the debt due.—The mortgagee has, of course, a right to exercise the option of declaring the whole debt due;[50] so also can any person for whose benefit the provisions for the forfeiture of credit are made, take advantage of them.[51] The assignee of the mortgagee may exercise this option in the same manner as the mortgagee himself.[52] But where a mortgage is assigned as

[48] *Monroe* v. *Fohl,* 72 Cal. 568, 14 Pac. 514.

[49] *Rosseel* v. *Jarvis,* 15 Wis. 571, 578.

Even where the mortgagee's agent gives notice in his own name, the notice is sufficient if the mortgagee consents thereto. *Hothorn* v. *Louis,* 170 N. Y. 576, 62 N. E. 1096.

[50] See *Princeton Loan and Trust Co.* v. *Munson,* 60 Ill. 371; *Heath* v. *Hall,* 60 Ill. 344; *Harper* v. *Ely,* 56 Ill. 179.

[51] *Mallory* v. *West Shore, H. R. R. Co.* 35 N. Y. Super. Ct. (3 J. & S.) 174; *Fellows* v. *Gilman,* 4 Wend. (N. Y.) 414.

[52] *Heath* v. *Hall,* 60 Ill. 344, 349; *Bartlett Estate Co.* v. *Fairhaven Land Co.* 49 Wash. 58, 94 P. 900, 15 L.R.A.(N.S.) 590, 126 Am. St. Rep. 856; *Leopold* v. *Hallheimer,* 157 N. Y. 696, 51 N. E. 1091.

The assignor of notes secured by a trust deed is bound by the assignee's election to declare the whole amount due on default in the payment of the matured notes. *Stewart* v. *Ludlow,* 68 Ill. App. 349.

For right of second assignee of a note and mortgage to exercise such option where first assignee had the actual control over the note and mortgage, see *Patten* v. *Pepper Hotel Co.* 153 Cal. 460, 96 Pac. 296.

collateral security the election to declare the whole amount due on default in payment of interest or taxes must be made by both assignor and assignee.[53] All the parties owning or holding notes secured by a mortgage containing such a provision must unite in exercising the option.[54] It has been held in one case[55] that such a stipulation in a mortgage may be taken advantage of by the mortgagor, where he has transferred the property mortgaged to a grantee who assumed and agreed to pay the mortgage debt, according to the conditions of the mortgage, as part of the consideration of the conveyance.

The supreme court of Michigan say that the assignee of a decree of foreclosure of a mortgage, the whole amount not being due, has the same rights as the original complainant in the action as to exercising an option to declare the whole amount due upon a subsequent partial default.[56]

§ 64. **Power of court to relieve from forfeiture.**—Where the mortgage contains a stipulation, providing that the whole debt shall become due at the option of the mortgagee in case of failure to make punctual payments, the court can not relieve the mortgagor from his defaults even on the payment of the installments due[57] with costs, but is bound to give effect to the bond and mortgage according to its provisions and

[53] *Cresco Realty Co.* v. *Clark,* 128 App. Div. 144, 112 N. Y. Supp. 550. See also *Shaw* v. *Williams,* 59 Hun (N. Y.) 447, 13 N. Y. Supp. 527.

[54] *The Marine Bank of Buffalo* v. *International Bank,* 9 Wis. 57. Where a mortgage is given to secure coupon bonds, and contains a provision that they may be considered due by any bondholder on default of interest for six months and the mortgage might be then foreclosed, it was held that each bondholder took his bond subject to this right of his co-bondholders, and could not, by electing not to have his bond come due, obstruct the action of the majority. *Gates* v. *Boston & N. Y. Air Line Ry. Co.* 53 Conn. 333, 5 Atl. 695.

[55] *First National Bank* v. *Peck,* 8 Kan. 660.

[56] *Brand* v. *Smith,* 99 Mich. 395, 58 N. W. 363.

[57] In Washington under the statute (2 Hill's Code, § 633) the defendant is entitled to a stay of proceedings on payment of the installments due. *American Loan & Trust Co.* v. *Union Depot Co.* 80 Fed. 36.

the election of the mortgagee.[58] In an old New York case,[59] the court say: "The parties had an unquestionable right to make the extension of credit dependent upon the punctual payment of the interest at the times fixed for that purpose. And if, from the mere negligence of the mortgagor in performing his contract, he suffers the whole debt to become due and payable, according to the terms of the mortgage, no court will interfere to relieve him from the payment thereof, according to the conditions of his own agreement." [60]

If, however, the mortgagee or party holding the mortgage has been guilty of fraud, because of which the mortgagor was unable to ascertain who was the owner of the mortgage, or to find the mortgagee or such owner in order to make the stipulated payment, the court will relieve him from his de-

[58] *Rosche* v. *Kosmowski,* 61 App. Div. 23, 70 N. Y. Supp. 216; *Smith* v. *Lamb,* 59 Misc. 568, 11 N. Y. Supp. 455. See *Bennett v. Stevenson,* 53 N. Y. 508; *Ferris* v. *Ferris,* 28 Barb. (N. Y.) 29, 33; *Hale* v. *Gouverneur,* 4 Edw. Ch. (N. Y.) 207; *O'Connor* v. *Shipman,* 48 How. (N. Y.) Pr. 126; *Noyes* v. *Clark,* 7 Paige Ch. (N. Y.) 179, 32 Am. Dec. 620; *Savannah & M. R. R. Co.* v. *Lancaster,* 62 Ala. 555; *Mobray* v. *Leckie,* 42 Md. 474; *Schooley* v. *Romain,* 31 Md. 574, 100 Am. Dec. 87; *Magruder* v. *Eggleston,* 41 Miss. 284; *Stewart* v. *McCadden,* 68 Atl. 571; *Pizer* v. *Herzig,* 120 App. Div. 102, 105 N. Y. Supp. 38; *Patten* v. *Pepper Hotel Co.* 153 Cal. 460, 96 Pac. 296.

[59] *Noyes* v. *Clark,* 7 Paige Ch. (N. Y.) 179, 32 Am. Dec. 620.

[60] See also *Gowlett* v. *Hanforth,* 2 W. Bl. 958; *Steel* v. *Bradfield,* 4 Taunt. 227; *Cole* v. *Hinck,* 120 App. Div. 355, 105 N. Y. Supp. 407.

[61] *Isaacs* v. *Baldwin,* 105 N. Y. Supp. 38. See *Noyes* v. *Clark,* 7 Paige Ch. (N. Y.) 179, 32 Am. Dec. 620; *Kerbaugh* v. *Nugent,* 95 N. E. 336 (Ind.); *Schieck* v. *Donohue,* 92 App. Div. 330, 87 N. Y. Supp. 206. See also *Bieber* v. *Goldberg,* 133 App. Div. 207, 117 N. Y. Supp. 211. The supreme court of Pennsylvania say that a *scire facias* for the collection of the whole of a mortgage, issued by an assignee thereof for default in payment of an installment of interest, under a provision therein that the whole shall become payable upon default in payment of interest for the space of thirty days, cannot be resisted by a purchaser from the mortgagor, upon the ground that he did not know the address of the owner of the mortgage. *Atkinson* v. *Walton,* 162 Pa. St. 219, 29 Atl. 898, 34 W. N. C. 562.

fault.[61] The court will also grant relief where it is responsible for the default occurring while it was in control of the mortgagor's business and assets.[62]

And it seems that such a foreclosure will not be enforced against one, who denies in good faith and upon reasonable grounds that he is liable to pay the interest in arrear, or who claims that he has paid it, even when it appears from the evidence that he is in error in regard to such liability or payment.[63] But where the only questions are as to the proper tender of the amount due, and whether the tender was made at the prescribed time, they must be determined upon the trial of the foreclosure action.[64]

§ 65. Where mortgagee holds one mortgage securing several notes.—Where a mortgagee holds a mortgage sesuring several notes maturing at different times, conditioned that the mortgagor shall pay the notes as they become due, a failure to pay any note when it becomes due is a breach of the condition and entitles the holder to foreclose.[65] But

[62] *Smith* v. *Lamb,* 59 Misc. 568, 111 N. Y. Supp. 455.

[63] *Wilcox* v. *Allen,* 36 Mich. 160.

[64] *Bennett* v. *Stevenson,* 53 N. Y. 508, 510; *Asendorf* v. *Meyer,* 8 Daly (N. Y.) 278; *Lynch* v. *Cunningham,* 6 Abb. (N. Y.) 94; *Thurston* v. *Marsh,* 5 Abb. (N. Y.) 389, 14 How. (N. Y.) 572. See *Spring* v. *Fisk,* 21 N. J. Eq. 175.

[65] *McLean* v. *Presley,* 56 Ala. 211; *Gibbons* v. *Hoag,* 95 Ill. 45, 62; *Fisher* v. *Milmine,* 94 Ill. 328; *Hunt* v. *Harding,* 11 Ind. 245; *Lacoss* v. *Keegan,* 2 Ind. 406; *Cecil* v. *Dynes,* 2 Ind. 266; *Greenman* v. *Pattison,* 8 Blackf. (Ind.) 465.

In Indiana, prior to the statute of 1831, a bill to foreclose where the debt was payable in installments, would not lie until the day for the payment of the last installment had passed. See *Hough* v. *Doyle,* 8 Blackf. (Ind.) 300; *Handman* v. *Volk,* 30 Ky. Law. Rep. 818, 99 S. W. 660. The United States circuit court for the eastern district of Missouri say, in the case of *Black* v. *Reno,* 59 Fed. 917, that a mortgage to secure two notes, one payable in five and the other in ten years, with annual interest, and specifically requiring the maker to pay such notes and all interest that may be due thereon according to their tenor and effect, may be foreclosed, at the maturity of the first note, for the amount of the debt due, and a sale had of so much of the mortgaged premises as will satisfy such amount, the decree standing as security for the re-

where a mortgage has been given to secure several notes maturing at different times, which provides that none of them shall become payable and that the mortgage shall not be foreclosed until the last note secured becomes due, and some of the notes have been transferred with a knowledge of such provisions in the mortgage, the holders of such transferred notes can not recover a judgment thereon until the last note matures.[66] In such a suit the notes and the mortgage, having been contemporaneously executed and both relating to the same subject matter, are to be considered as one instrument.[67]

The general rule is that where a deed of trust secures several debts to the same person, with different sureties thereon, such debts stand equal as liens, and are to be paid *pro rata* out of the property conveyed, if still owned by the original creditor and the rights of the assignees are not involved.[68]

§ 66. Where mortgagee holds more than one mortgage on the same property securing different debts.—Where the same mortgagor executes to the same mortgagee two or more mortgages upon the same premises to secure different debts, the mortgagee will not be permitted to commence separate actions to foreclose each mortgage, but in his complaint

maining installments as they become due; or, if the property is not susceptible of division, it may be sold as a whole, and the surplus returned into court and applied to the liquidation of the deferred installment or installments, with a just rebate of interest, although the mortgage contains no provision for foreclosure upon the falling due of one installment.

In Louisiana, however, it is held that a mortgagee who brings a foreclosure under a stipulation in the mortgage that if any one of several notes secured thereby shall not be paid at maturity all the remaining notes shall at once become due at his option, must remit all the capitalized and unearned interest at the date of the mortgagor's default. *Williams' heirs* v. *Douglass,* 47 La. An. 1277, 17 So. 805.

[66] *Brownlee* v. *Arnold,* 60 Mo. 79.

[67] *Brownlee* v. *Arnold,* 60 Mo. 79. See also *Hanford* v. *Rogers,* 11 Barb. (N. Y.) 18; *Gammon* v. *Freeman,* 31 Me. 243; *Hunt* v. *Frost,* 58 Mass. (4 Cush.) 54, 2 Pars. Cont. 553.

[68] *Farmers' Bank of Phillipi* v. *Woodford,* 34 W. Va. 480, 12 S. E. 544

to foreclose the senior mortgage he must set forth all his junior incumbrances and ask to have them also foreclosed.[69] And it is said that if a second or subsequent mortgage becomes due before the decree is entered on the senior mortgage, the defendant cannot divide the action as to such junior mortgage by tendering the amount due on the first mortgage after the maturity of the second mortgage.[70] The supreme court of Massachusetts have held that the assignee of two mortgages on the same land, executed by the same mortgagor at different times to different mortgagees, may unite them in one action of foreclosure and recover thereon a conditional judgment, specifying the amount due on each and directing that unless both mortgages be paid within a time to be named by the court, the plaintiff shall have execution.[71] Yet it was held in an earlier case that where the same person had two different mortgages to secure two different debts against the same mortgagor, he could not unite them in one suit under the Massachusetts revised statutes, so as to recover one consolidated conditional judgment.[72]

A single mortgage given to secure two debts may be foreclosed in favor of both creditors at the same time, because such a foreclosure does not unite distinct and separate claims in the same action.[73]

In Indiana a person holding a mortgage upon a house and lot as secondary security, after the exhaustion of other property held as primary security, forfeit their lien against the house and lot by permitting the foreclosure by default against them of a mortgage upon the primary security, which was in fact subordinate to their lien thereon.[74] In Pennsylvania it is held that a creditor who holds a first and second mortgage

[69] *Roosevelt* v. *Ellithorp,* 10 Paige Ch. (N. Y.) 415; *Hawkins* v. *Hill,* 15 Cal. 499, 76 Am. Dec. 499. See *Homœpathic Mut. L. Ins. Co.* v. *Sixbury,* 17 Hun (N. Y.) 424.

[70] *Hawkins* v. *Hill,* 15 Cal. 499, 76 Am. Dec. 499.

[71] *Pierce* v. *Balkam,* 56 Mass. (2 Cush.) 374.

[72] *Peck* v. *Hapgood,* 51 Mass. (10 Metc.) 172.

[73] *Chamberlin* v. *Beck,* 68 Ga. 346.

[74] *O'Brien* v. *Moffit,* 133 Ind. 660, 33 N. E. 616, 36 Am. St. Rep. 566.

of the same land, and also collateral security for the payment of the first mortgage debt, must apply the proceeds of foreclosure under the first mortgage to the payment of the first mortgage debt, and, if that debt is thereby paid, must surrender the collateral to a subsequent pledgee thereof.[75] In South Carolina, where a mortgagee of land, to secure a note with surety, took another mortgage to secure this note and another, and the last was first foreclosed, the proceeds must be applied to both notes.[76]

§ 67. Indemnity mortgage.—Where a mortgage is given as an indemnity, and contains an express agreement by the mortgagor to pay the debt therein described, and to save the mortgagee harmless from all *liability,* it seems that there is a breach of such agreement when there is a failure to make the payment at the appointed time, and that the holder of such mortgage may at once, without having first paid the debt or any part thereof, maintain an action for the foreclosure of the mortgage and may recover judgment therein for his total probable loss.[77] But where a mortgage is held as an indemnity simply, without such a clause stipulating to save harmless from all liability the mortgagee or his assignee will not be permitted to foreclose until he has paid the obligation, or has otherwise been injured.[78]

[75] *Pennsylvania Ins. Co.'s App.* 109 Pa. St. 489, 1 Atl. 82.

[76] *Graham* v. *Jones,* 24 S. C. 241.

[77] *Gilbert* v. *Wiman,* 1 N. Y. 550, 49 Am. Dec. 359; *Wright* v. *Whiting,* 40 Barb. (N. Y.) 235; *Thomas* v. *Allen,* 1 Hill (N. Y.) 145, overruling *Douglass* v. *Clark,* 14 Johns. (N. Y.) 177; *Port* v. *Jackson,* 17 Johns. (N. Y.) 239. *In re Negus,* 7 Wend. (N. Y.) 499; *Reynolds* v. *Shirk,* 98 Ind. 480. See *Malott* v. *Goff,* 96 Ind. 496; *Loehr* v. *Colborn,* 92 Ind. 24; *Bodkin* v. *Merit,* 86 Ind. 560; *Durham* v. *Craig,* 79 Ind. 117; *Gunel* v. *Cue,* 72 Ind. 34; *South Side P. M. Ass'n.* v. *Cutler & S. Lumber Co.* 64 Ind. 560; *Devol* v. *McIntosh,* 23 Ind. 529; *Johnson* v. *Britton,* 23 Ind. 105, overruling *Tate* v. *Booe,* 9 Ind. 13; *Weddle* v. *Stone,* 12 Ind. 625; *Wilson* v. *Stilwell,* 9 Ohio St. 467, 75 Am. Dec. 477; *Holmes* v. *Rhodes,* 1 Bos. & P. 638; *Loosemore* v. *Radford,* 9 Mees. & W. 657; *Hodgson* v. *Bell,* 7 T. R. 97.

[78] *Ketchum* v. *Jauncey,* 23 Conn. 126; *Pond* v. *Clarke,* 14 Conn. 334; *Francis* v. *Porter,* 7 Ind. 213; *Lewis*

Thus where a surety receives a mortgage indemnifying him against all loss, cost, or damage, the condition of such mortgage will not be broken until after the surety has been obliged to pay the debt[79] or some part of it;[80] and an action can not be maintained to foreclose the mortgage until such breach. But where a surety has been obliged to pay the whole or a part of the debt, he may bring an action to foreclose the mortgage before the amount of his damages has been ascertained by a suit at law.[81] And where a mortgage is given to indemnify one against damages occasioned by the neglect or misconduct of the mortgagor or other person, the mortgagee can not maintain an action to foreclose such mortgage until after a judgment has been recovered for such negligence;[82] but where a mortgage was given as an indemnity to secure the performance of an executory contract running for a term of years, and the mortgagors become insolvent, so that it appeared to the court that it was impossible for them to fulfill their contract, it was held that the right to foreclose accrued at once.[83] A mortgage given to indemnify the mortgagee as indorser of notes cannot be foreclosed unless the mortgagee is compelled to pay such notes.[84] But he will not be required

v. *Richey,* 5 Ind. 152; *Butler* v. *Laduc,* 12 Mich. 178; *National State Bank* v. *Davis,* 24 Ohio St. 190, 195; *Ohio Life Ins. & Trust Co.* v. *Reeder,* 18 Ohio, 35, 46; *McConnell* v. *Scott,* 15 Ohio, 401, 45 Am. Dec. 583; *Kramer* v. *Farmers' & Mechanics' Bank of Steubenville,* 15 Ohio, 253; *Colvin* v. *Buckle,* 8 Mees. & W. 680.

[79] See *Platt* v. *Smith,* 14 Johns. (N. Y.) 368; *Powell* v. *Smith,* 8 Johns. (N. Y.) 249; *Rodman* v. *Hedden,* 10 Wend. (N. Y.) 500; *Pond* v. *Clarke,* 14 Conn. 334; *Shepard* v. *Shepard,* 6 Conn. 37; *McLean* v. *Ragsdale,* 31 Miss. 701; *Colvin* v. *Buckle,* 8 Mees. & W. 680.

[80] *Beckwith* v. *Windsor Manuf. Co.* 14 Conn. 594.

[81] *Rodgers* v. *Jones,* 1 McC. (S. C.) Eq. 221.

[82] *Grant* v. *Ludlow,* 8 Ohio St. 1. See *Tilford* v. *James,* 7 B. Mon. (Ky.) 337; *Planter's Bank* v. *Douglass,* 2 Head (Tenn.) 699.

[83] *Harding* v. *Mill River Manuf. Co.* 34 Conn. 461.

[84] *McInnich* v. *Schall,* 159 Mo. App. 518, 141 S. W. 447.

A mortgage conditioned to stand as security for the payment of all such sums of money as the mortgagee shall pay, or be liable to pay, on account of indorsing notes, etc., can be foreclosed on non-payment and protest of the notes without

to wait until after the notes indorsed by him have been protested, before paying them and commencing a foreclosure, where the makers have declined to pay them and have informed the indorser of their inability to pay.[85]

Where the indemnifying mortgage deviates in the least degree from a simple contract to indemnify against liability, even when indemnity is the sole object of the contract, and where, in consequence of the primary liability of other persons, actual loss may not be sustained, the mortgage can not be foreclosed for its face, but will be limited to actual compensation for probable loss.[86]

When a mortgage is clearly intended to secure the payment of all debts contracted in the erection of a building, it is not necessary, to constitute a default in the condition for the payment of such debts, that the demands should have been adjudged liens, and that claims for liens should have been filed, or that plaintiff should have paid them.[87] But it has been said that in a case where the payment of a mortgage is conditioned upon the successful prosecution and termination of a pending suit by the mortgagee for the mortgagor, his failure to so prosecute prevents a recovery on foreclosure.[88] And, where a mortgage is given to indemnify a surety on a bail bond, an action to foreclose cannot be maintained upon a mere default of the principal to appear as required by the bond, if the surety has not paid any portion of the amount named therein, although the bond accompanying the mortgage provides that it shall become due on the failure of the party bailed to appear.[89] The supreme court of South Carolina, in

the necessity of the mortgagee paying the same. *Miller* v. *Miller Knitting Co.* 23 Misc. 404, 52 N. Y. Supp. 184.

[85] *National Bank of Newark* v. *Davis,* 24 Ohio St. 190, 196.

[86] *Gunel* v. *Cue,* 72 Ind. 34, 38, 39. See *Gilbert* v. *Wiman,* 1 N. Y. 550, 49 Am. Dec. 359; *Wright* v. *Whiting,* 40 Barb. (N. Y.) 235; *Loehr* v. *Colborn,* 92 Ind. 24; *Weddle* v. *Stone,* 12 Ind. 625.

[87] *Houston* v. *Nord,* 39 Minn. 490, 40 N. W. 568.

[88] *Lamb* v. *Scullen,* 61 Mich. 280, 28 N. W. 99.

[89] *Maloney* v. *Nelson,* 144 N. Y. 182, 39 N. E. 82, 63 N. Y. S. R. 86.

the case of Beasley v. Newell,[90] say that a mortgage by a trustee to his sureties in the form of an ordinary indemnity mortgage, in express terms declared to be given for the purpose of insuring such sureties from any loss which they may sustain on account of being security on the bond of such trustee, is not converted into a mere special agreement to repay the sureties any money which they may have been required to pay for the mortgagor, so as to prevent its foreclosure before actual payment by the sureties, by a clause providing that in the event that the sureties should be injured by being security. If the premises can be sold for more than the amount which they may have paid for the principal they shall sell and dispose of the premises, returning the overplus to the mortgagor; but such clause is merely to provide for the payment of any surplus to the mortgagor.

§ 68. Parol agreement as to time of payment.—While as a rule the plain meaning of a bond, mortgage or other written instrument can not be altered or varied by parol proof,[91] yet it would seem that where it is made to appear that it was the oral agreement of the parties at the time of executing a note or bond payable on demand, which was secured by mortgage, that the claim should not be sued nor the mortgage foreclosed until a future specified time, the statute of limitations will be considered as commencing to run only from the time agreed upon for payment.[92]

§ 69. Agreement not to enforce mortgage.—An agreement between the mortgagee and the mortgagor upon a valid consideration, that the mortgage shall not be enforced, will estop the mortgagee from foreclosing.[93] And the mortgagee

[90] 40 S. C. 16, 18 S. E. 224.

[91] *Watson* v. *Hurt,* 6 Gratt. (Va.) 633; *Mead* v. *Mead,* 27 Misc. 459, 59 N. Y. Supp. 444. See *post,* § 71.

[92] *Hale* v. *Anderson,* 10 W. Va. 145.

[93] *Faxton* v. *Faxton,* 28 Mich. 159; *Fausel* v. *Schabel,* 22 N. J. Eq. (7 C. E. Gr.) 126. See also *Central Trust Co. of New York* v. *Worcester Cycle Mfg. Co.* 93 Fed. 712, 35 C. C. A. 547.

may be estopped from foreclosing even without a positive agreement, if he intentionally leads the mortgagor or other person similarly interested to do or to abstain from doing anything involving labor or the expenditure of a considerable sum of money, by giving him to understand that he would be relieved from the burden of the mortgage.[94]

Thus in Burt v. Saxton,[95] the defendants being desirous of purchasing certain lands upon which the plaintiff held a mortgage, but not being able to make the payments at the time specified in such mortgage, applied to the mortgagee who agreed by parol that if the defendant would purchase the premises, pay a given amount the ensuing spring and the interest on the sums remaining unpaid annually thereafter, and would put upon the lands certain specified improvements, he would extend the time of payment of the mortgage for twenty years. Under this agreement the defendant purchased the premises, assuming by his deed the payment of the mortgage debt, paid the sum named and made the specified improvements, but failed for two years to pay the interest. In an action brought to foreclose the mortgage, the court held that the time of payment was extended by the verbal contract, and that there was no default in the payment of the principal; that the payment of the interest annually was a condition which the defendant must perform, but that its non-payment was not such a breach of that condition as rendered the whole principal due.

[94] See *Faxton* v. *Faxton*, 28 Mich. 159; *Harkness* v. *Toulmin*, 25 Mich. 80; *Truesdail* v. *Ward*, 24 Mich. 117, 134. See also *Thompson* v. *Blanchard*, 4 N. Y. 303; *Skinner* v. *Dayton*, 19 Johns (N. Y.) 513, 561, 10 Am. Dec. 286; *Shafer* v. *Niver*, 9 Mich. 253; *Calkins* v. *State*, 13 Wis. 389; *Swain* v. *Seamens*, 76 U. S. (9 Wall.) 254, 19 L. ed. 554; *Gregg* v. *Von Phul*, 68 U. S. (1 Wall.) 274, 17 L. ed. 536; *Cairncross* v. *Lorimer*, 7 Jur. N. S. 149; *Parrott* v. *Palmer*, 3 Myl. & K. 632; *Nicholson* v. *Hooper*, 4 Myl. & C. 179; *Duke of Leeds* v. *Earl of Amherst*, 2 Phill. 117, *Raw* v. *Pote*, 2 Vern. 239.

[95] 1 Hun (N. Y.) 551.

§ 70. Extension of time of payment.—An agreement for the extension of the time for the payment of a mortgage, where it is based upon a valid consideration, suspends the right to foreclose the mortgage until the expiration of the time to which payment is extended.[96] If the agreement

[96] *Beach* v. *Shanley,* 35 App. Div. 566, 55 N. Y. Supp. 130. See *Newsam* v. *Finch,* 25 Barb. (N. Y.) 175; *Fellows* v. *Prentiss,* 3 Den. (N. Y.) 512; *Burt* v. *Saxton,* 1 Hun (N. Y.) 551; *Maher* v. *Lanfrom,* 86 Ill. 513; *Flynn* v. *Mudd,* 27 Ill. 323; *Warner* v. *Campbell,* 26 Ill. 282; *Trayser* v. *Trustees of Indiana Asbury University,* 39 Ind. 556, 567; *Carlton* v. *Tardy,* 28 Ind. 452; *Calvin* v. *Wiggam,* 27 Ind. 489; *Redman* v. *Deputy,* 26 Ind. 338; *Loomis* v. *Donovan,* 17 Ind. 198; *Dickerson* v. *The Board, etc.* 6 Ind. 128, 63 Am. Dec. 373; *Harbert* v. *Dumont,* 3 Ind. 346; *Reed* v. *Home Sav. Bank,* 127 Mass. 295; *Fowler* v. *Brooks,* 13 N. H. 240; *Bailey* v. *Adams,* 10 N. H. 162; *Tompkins* v. *Tompkins,* 21 N. J. Eq. (6 C. E. Gr.) 338; *Massaker* v. *Mackerley,* 9 N. J. Eq. (1 Stockt.) 440; *Union Central Life Ins. Co.* v. *Bonnell,* 35 Ohio St. 365; *McComb* v. *Kittridge,* 14 Ohio, 348; *Austin* v. *Dorwin,* 21 Vt. 38; *Creath's Adm'r* v. *Sims,* 46 U. S. (5 How.) 192, 12 L. ed. 111. *In re Betts,* 4 Dill. C. C. 93; *Albert* v. *Grosvenor Investment Co.* L. R. 3 Q. B. 123.

In *Trayser* v. *Trustees of Indiana Asbury University,* 39 Ind. 556, 567, the court says: "We think that the facts stated in the answer showed that there was a valid agreement to extend the time of payment of the note, and that this action was brought in violation of such agreement. This is a chancery suit, and it is well settled that courts of chancery will not enforce a contract in opposition to an agreement, for a valuable consideration, to give an extension of time; to do so would be against conscience and good faith, and in fraud of the rights of the appellants.

But a mortgagee whose mortgage provides that if any tax or assessment shall remain unpaid for six months the entire debt shall become due, does not loose his rights to declare the mortgage due for such default by extending the time for the payment of the mortgage debt after the default occurs, upon the express condition that nothing in the agreement for extension shall impair the security. *Weber* v. *Huerstel,* 11 Misc. (N. Y.) 214, 32 N. Y. Supp. 1109; *Clark* v. *Elmendorf,* 78 S. W. 538 (Tex. Civ. App.).

The supreme court of Indiana, in the case of *Ayers* v. *Hamilton,* 131 Ind. 98, 30 N. E. 895, say that an agreement to extend the time of payment of a note secured by mortgage is no bar to a foreclosure of the mortgage within that time, the only remedy for a violation of the contract being an action for damages.

Under a covenant in a mortgage making the whole sum due on default, in the payment of any assessment, taxes or water rates for three months, the assignee may elect that

for an extension of time is without consideration it will be void.[97]

To constitute a valid extension of time, the agreement must be based on a valid consideration, a mere naked promise not being sufficient.[98] The payment of legal interest upon a note in advance is a sufficient consideration to support an agreement for the extension of the time of payment,[99] but the prompt payment of the interest on demand, when it falls due, will not prolonge the term for the payment of the principal beyond the time specified in the note.[1] The giving of additional security, by a person not a party to a promissory note, is a valuable consideration for an agreement by the payee to extend the time of payment of such note, and is available as a defence to the maker;[2] and a payment on a note before it becomes due is a sufficient consideration to support an agreement between the holder and the maker that the time for the payment of the balance of the note shall be extended for a specified period.[3]

Where the holder of a mortgage agreed with a third person that, if he would purchase the mortgagor's equity of redemption, and pay a specified sum on the mortgage indebtedness, he would extend the time for the payment of the mortgage debt for a specified term, and in accordance with this agreement the equity of redemption was purchased and the amount

the whole sum shall become due and payable upon such a default, although previous to such default, he had extended the time of payment of the mortgage. *Leopold* v. *Hallheimer,* 157 N. Y. 696, 51 N. E. 1091. But see *Beach* v. *Shanley,* 35 App. Div. 566, 55 N. Y. Supp. 130; *Eby* v. *Ryan,* 22 Neb. 470, 35 N. W. 225.

[97] See *Sharpe* v. *Arnott,* 51 Cal. 188; *Pendleton* v. *Rowe,* 34 Cal. 149; *Massaker* v. *Mackerley,* 9 N. J. Eq. (1 Stockt.) 440. As to what is not a binding extension, see *Gottschalk* v. *Noyes, as adm'r, etc.* 225 Ill. 94, 80 N. E. 72.

[98] *Gardner* v. *Watson,* 13 Ill. 347; *Massaker* v. *Mackerley,* 9 N. J. Eq. (1 Stockt.) 440.

[99] *Maher* v. *Lanfrom,* 86 Ill. 513, 517; *Flynn* v. *Mudd,* 27 Ill. 323; *Warner* v. *Campbell,* 26 Ill. 282; *Redman* v. *Deputy,* 26 Ind. 338.

[1] *Pendleton* v. *Rowe,* 34 Cal. 149.

[2] *Trayser* v. *Trustees of Indiana Asbury University,* 39 Ind. 556, 567.

[3] *Newsam* v. *Finch,* 25 Barb. (N. Y.) 175.

designated paid, it was held that this was a sufficient consideration to support the contract for the agreement of extension, and that the right to foreclose was suspended until the expiration of the time for which it was agreed that the mortgage should be extended.[4]

In a New Jersey case [5] it was held that a mortgagor was not entitled to any benefit from an agreement between the mortgagee and his assignee, extending the time of payment in consideration of the mortgagee's guaranty of the prompt payment of the interest.[6]

§ 71. Extension of time by parol.—The time specified for the payment of a mortgage may be extended by parol,[7] when the agreement is founded upon a sufficient consideration,[8] notwithstanding the fact that, as a general rule, parol

[4] *Loomis* v. *Donovan,* 17 Ind. 198. See to the same effect *Fellows* v. *Prentiss,* 3 Den. (N. Y.) 512, 45 Am. Dec. 484; *Charlton* v. *Tardy,* 28 Ind. 452; *Galvin* v. *Wiggan,* 27 Ind. 489; *Redman* v. *Deputy,* 26 Ind. 338; *Dickerson* v. *Board of Com. of Ripley Co.* 6 Ind. 128, 63 Am. Dec. 373; *Harbert* v. *Dumont,* 3 Ind. 346; *Fowler* v. *Brooks,* 13 N. H. 240; *Bailey* v. *Adams,* 10 N. H. 162; *McComb* v. *Kittridge,* 14 Ohio, 348; *Austin* v. *Dorwin,* 21 Vt. 38; *Creath's Adm'r* v. *Sims,* 46 U. S. (5 How.) 192, 12 L. ed. 111.

[5] *Lee* v. *West Jersey Land & Cranberry Co.* 29 N. J. Eq. (2 Stew.) 377.

[6] As to who may enforce agreement extending time of payment of interest, see *Reed* v. *Home Savings Bank,* 127 Mass. 295.

[7] *Tompkins* v. *Tompkins,* 21 N. J. Eq. (6 C. E. Gr.) 338. See also *Flynn* v. *Mudd,* 27 Ill. 232; *Stevens* v. *Cooper,* 1 Johns. Ch. (N. Y.) 429, 7 Am. Dec. 499; *Lattimore* v. *Harsen,* 14 Johns. (N. Y.) 330; *Fleming* v. *Gilbert,* 3 Johns. (N. Y.) 528; *Covenhoven* v. *Seaman,* 1 Johns. Cas. (N. Y.) 23; *Langworthy* v. *Smith,* 2 Wend. (N. Y.) 587, 20 Am. Dec. 652; *Tompkins* v. *Tompkins,* 21 N. J. Eq. (6 C. E. Gr.) 338; *Vanhouten* v. *McCarty,* 4 N. J. Eq. (3 H. W. Gr.) 141; *King* v. *Morford,* 1 N. J. Eq. (1 Saxt.) 274, 280; *Cox* v. *Bennet,* 13 N. J. L. (1 J. S. Gr.) 165, 171. *In re Betts,* 4 Dill. C. C. 93, 7 Rep. 225.

But see *Mead* v. *Mead,* 27 Misc. 459, 59 N. Y. Supp. 444.

[8] *Dodge* v. *Crandall,* 30 N. Y. 294; *Dearborn* v. *Cross,* 7 Cow. (N. Y.) 48; *Townsend* v. *Empire Stone Dress. Co.* 6 Duer (N. Y.) 208; *Fish* v. *Hayward,* 28 Hun (N. Y.) 456; *Lattimore* v. *Harsen,* 14 Johns. (N. Y.) 330; *Fleming* v. *Gilbert,* 3 Johns. (N. Y.) 528; *Keating* v. *Price,* 1 Johns. Cas. (N. Y.) 22, 1

evidence is inadmissible to supply, vary, enlarge, or contradict the terms of a written instrument,[9] especially one under seal,[10] and is inadmissible to support an agreement set up in contradiction to a deed.[11] In Betts's Case [12] the United States circuit court for the eastern district of Missouri, held that a mortgage deed or deed of trust is, in equity, only a lien on the land, and that an agreement to extend the time of payment of the debt thus secured, is not within the statute of frauds and therefore need not be in writing.

Am. Dec. 92; *Delacroix* v. *Bulkley,* 13 Wend. (N. Y.) 71.

[9] *Stevens* v. *Cooper,* 1 Johns. Ch. (N. Y.) 425, 7 Am. Dec. 499. See also *Hill* v. *Syracuse, B. & N. Y. R. R. Co.* 73 N. Y. 351, 29 Am. Rep. 163; *VanBokkelen* v. *Taylor,* 62 N. Y. 105; *Baker* v. *Higgins,* 21 N. Y. 397; *Brewster* v. *Silence,* 8 N. Y. 207, 213; *Cook* v. *Eaton,* 16 Barb. (N. Y.) 439; *Taylor* v. *Baldwin,* 10 Barb. (N. Y.) 586; *Egleston* v. *Knickerbacker,* 6 Barb. (N. Y.) 464; *Sayre* v. *Peck,* 1 Barb. (N. Y.) 464; *Pattison* v. *Hull,* 9 Cow. (N. Y.) 747, 754; *Austin* v. *Sawyer,* 9 Cow. (N. Y.) 41; *Wright* v. *Taylor,* 1 Edw. Ch. (N. Y.) 226; *Webb* v. *Rice,* 6 Hill (N. Y.) 219; *Hull* v. *Adams,* 1 Hill (N. Y.) 601; *Meads* v. *Lansingh,* 1 Hopk. Ch. (N. Y.) 124, 134; *Bayard* v. *Malcolm,* 1 Johns. (N. Y.) 453, 467; *Mann* v. *Mann,* 1 Johns. Ch. (N. Y.) 231; *Parkhurst* v. *VanCortlandt,* 1 Johns. Ch. (N. Y.) 274; *Crosier* v. *Acer,* 7 Paige Ch. (N. Y.) 137; *Jarvis* v. *Palmer,* 11 Paige Ch. (N. Y.) 650; *Lowber* v. *LeRoy,* 2 Sandf. (N. Y.) 202; *Russell* v. *Kinney,* 1 Sandf. Ch. (N. Y.) 38; *Evans* v. *Wells,* 22 Wend. (N. Y.) 324, 337; *Lee* v. *Evans,* 8 Cal. 424, 432; *Beckley* v. *Munson,* 22 Conn. 299; *Mann* v. *Smyser,* 76 Ill. 365; *Harlow* v. *Boswell,* 15 Ill. 56; *Cincinnati, U. & Ft. W. R. R. Co.* v. *Pearce,* 28 Ind. 502; *Pilmer* v. *State Bank,* 16 Iowa, 321; *Jack* v. *Naber,* 15 Iowa, 450; *Peers* v. *Davis,* 29 Mo. 184; *Reed* v. *Jones,* 8 Wis. 392.

[10] *Stevens* v. *Cooper,* 1 Johns. Ch. (N. Y.) 425, 7 Am. Dec. 499. See also *Austin* v. *Sawyer,* 9 Cow. (N. Y.) 41; *Webb* v. *Rice,* 6 Hill (N. Y.) 219; *Evans* v. *Wells,* 22 Wend. (N. Y.) 324, 339; *Powell* v. *Monson & B. Manuf. Co.* 3 Mason C. C. 358.

[11] See *Meads* v. *Lansingh,* 1 Hopk. Ch. (N. Y.) 124; *Movan* v. *Hays,* 1 Johns. Ch. (N. Y.) 339; *Mann* v. *Mann,* 1 Johns. Ch. (N. Y.) 231; *Russell* v. *Kinney,* 1 Sandf. Ch. (N. Y.) 30.

[12] 4 Dill. C. C. 93, 7 Rep. 225.

CHAPTER IV.

WHEN RIGHT OF ACTION BARRED.

§ 72. Limitation of foreclosure actions.
§ 73. Enforcing statutes of limitation in equity.
§ 74. Adverse possession by mortgagor.
§ 75. Presumption arising from mortgagor's possession.
§ 76. Presumption as to payment—How rebutted.
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§ 83. Possession by mortgagee—Presumption of foreclosure.
§ 84. Decree for deficiency when debt barred.
§ 85. Right of mortgagee to retain possession after remedy barred.

§ 72. Limitation of foreclosure actions.—Under the statutes of most states an action to foreclose a mortgage will not be barred until twenty years have elapsed from the time the mortgage became due and payable, or from the date of the last payment made upon it.[13] Where the mortgagor has made

[13] N. Y. Code Civ. Proc. §§ 380, 381.

In West Virginia the statute of limitations barring foreclosure on a deed of trust given as security is twenty years. *Brown* v. *Grove,* 80 Fed. 564, 25 C. C. A. 644.

In Michigan foreclosure must be commenced within 15 years after maturity or last payment. (§ 9725, 3 Comp. Laws). See *Brown* v. *Hayes,* 146 Mich. 474, 109 N. W. 845.

Minnesota also has a 15-year limitation. See *Trudean* v. *Germann,* 101 Minn. 387, 112 N. W. 281.

In North Carolina, an action to foreclose a mortgage, where no part of the mortgaged debt has been paid, and the mortgagor remains in possession, is barred in ten years from the forfeiture. (Code, § 152, sub. sec. 3); *Bunn* v. *Braswell,* 139 N. C. 135, 51 S. E. 927. Or after the last payment. *Sandlin, as adm'r. etc.* v. *Kearney,* 154 N. C. 596, 70 S. E. 942. And the same rule applies where the mortgagor died before

payments upon the mortgage within twenty years from the time it became due, the presumption of payment declared by the statute to arise after the lapse of twenty years from the date when the right of action accrued, is not available as a defence in an action of foreclosure.[14] In some states, however, the statute runs from the date of the mortgage.[15] It is held in California that where a claim founded upon a note secured by a mortgage that has been duly presented to the personal representative of a deceased mortgagor, and allowed and approved, the right of a mortgagee to maintain an action to foreclose the mortgage is not affected by the statute of limitations, pending the proceedings for the settlement of the estate of the mortgagor.[16]

But independent of written law there is a period after which, upon the common law principles from which the statutes of limitation have been deduced, a demand founded upon a note, bond or judgment becomes unrecoverable. It is a general rule that forbearance for twenty years unexplained, unaccounted for and unrebutted will extinguish a judgment as well as all other pecuniary demands.[17]

§ 73. Enforcing statutes of limitation in equity.—While statutes of limitation are as a general rule applicable as such only in proceedings at law, yet courts of equity, acting by

the time expired, and the action is brought against his heirs. *Fraser* v. *Bean,* 96 N. C. 327, 2 S. E. 159. The provision of the South Carolina code (§§ 152, 153) only bars an action to foreclose the mortgage, and does not bar an action to recover the debt secured by the mortgage. See *Fraser* v. *Bean,* 96 N. C. 327, 2 S. E. 159.

[14] *New York Life Ins. & Trust Co.* v. *Covert,* 3 Abb. Ct. App. Dec. (N. Y.) 350, 3 Trans. App. 24, 6 Abb. (N. Y.) Pr. N. S. 154, reversing 29 Barb. (N. Y.) 435.

[15] *Montague* v. *Priester,* 82 S. C. 492, 64 S. E. 393.

[16] *German Sav. & L. Soc.* v. *Hutchinson,* 68 Cal. 52, 8 Pac. 627.

[17] *Gulick* v. *Loder,* 13 N. J. L. (1 J. S. Gr.) 68, 23 Am. Dec. 711. See also *Boardman* v. *De Forest,* 5 Conn. 1; *Buchannan* v. *Rowland,* 5 N. J. L. (2 South.) 721; *Cohen* v. *Thomson,* 2 Mills, (S. C. Const.) 146; *Wells* v. *Washington,* 6 Munf. (Va.) 532; *Ross* v. *Darby,* 4 Munf. (Va.) 428; *Willaume* v. *Gorges,* 1 Campb. 217; *Flower* v. *Bolingbroke,* 1 Str. 639.

analogy, will, in proceedings where they have concurrent jurisdiction with courts of law, apply statutes of limitation and refuse to grant relief where it appears that the statutory period, within which an action might have been maintained at law, has elapsed.[18] This has been the settled rule of decision in the English courts of chancery for the last century and a half.[19] In some of the American states it is held that in equity the lapse of time operates only by way of evidence as affording a presumption of payment,[20] but other states hold that courts of equity are bound by the statutes of limitation as much as courts of law;[21] while in California,[22] Missouri,[23] Nevada [24]

[18] See *Kane* v. *Bloodgood,* 7 Johns. Ch. (N. Y.) 90, 11 Am. Dec. 417; *Livingston* v. *Livingston,* 4 Johns. Ch. (N. Y.) 287, 8 Am. Dec. 562; *Morgan* v. *Morgan,* 10 Ga. 297; *Sloan* v. *Graham,* 85 Ill. 26; *Castner* v. *Walrod,* 83 Ill. 171, 25 Am. Rep. 369; *Kane* v. *Herrington,* 50 Ill. 232, 239; *Manning* v. *Warren,* 17 Ill. 267; *Clay* v. *Clay,* 7 Bush. (Ky.) 95; *Bank of United States* v. *Dallam,* 4 Dana (Ky.) 574; *Fenwick* v. *Macey,* 1 Dana (Ky.) 276; *Thomas* v. *White,* 3 Litt. (Ky.) 177, 14 Am. Dec. 56; *Smith* v. *Carney,* 1 Litt. (Ky.) 295; *Ashley* v. *Denton,* 1 Litt. (Ky.) 86; *Frame* v. *Kenny,* 2 A. K. Marsh (Ky.) 145, 12 Am. Dec. 367; *Breckenridge* v. *Churchill,* 3 J. J. Marsh (Ky.) 12; *Brunk* v. *Means,* 11 B. Mon. (Ky.) 214; *Rogers* v. *Moore,* 9 B. Mon. (Ky.) 401; *Ayres* v. *Waite,* 64 Mass. (10 Cush.) 72; *Ayer* v. *Stewart,* 14 Minn. 97; *McClane* v. *Shepherd,* 21 N. J. Eq. (6 C. E. Gr.) 76; *Neely's Appeal,* 85 Pa. St. 387; *Shelby* v. *Shelby,* Cooke (Tenn.) 179, 5 Am. Dec. 686; *Cocke* v. *McGinnis,* 1 Mart. & Yerg. (Tenn.) 361, 17 Am. Dec. 809; *Pitzer* v. *Burns,* 7 W. Va. 63, 69; *Carroll* v. *Green,* 92 U. S. (2 Otto) 509, 23 L. ed. 738; *Wagner* v. *Baird,* 48 U. S. (7 How.) 234, 258, 12 L. ed. 681; *Badger* v. *Badger,* 2 Cliff. C. C. 137; *Willis* v. *Robinson,* 4 Bligh, 101, 119.

[19] See *Kane* v. *Bloodgood,* 7 Johns. Ch. (N. Y.) 90, 11 Am. Dec. 417; *Cocke* v. *McGinnis,* 1 Mart. & Yerg. (Tenn.) 361, 17 Am. Dec. 809; *Sturt* v. *Mellish,* 2 Atk. 610; *Lockey* v. *Lockey,* Prec. Ch. 518; *Hovenden* v. *Annesley,* 2 Sch. & Lef. 607, a leading case in which all the American and English cases are distinguished; overruling *Coster* v. *Murray,* 5 Johns. Ch. (N. Y.) 522; *Love* v. *Watkins,* 40 Cal. 547, 6 Am. Rep. 624.

[20] See *Livingston* v. *Livingston,* 4 Johns. Ch. (N. Y.) 287, 8 Am. Dec. 562.

[21] See *Shelby* v. *Shelby,* Cooke (Tenn.) 179, 5 Am. Dec. 686.

[22] *Love* v. *Watkins,* 40 Cal. 547; *Boyd* v. *Blankman,* 29 Cal. 19, 87 Am. Dec. 146; *Lord* v. *Morris,* 18 Cal. 484.

[23] *Kelly* v. *Hurt,* 61 Mo. 463.

[24] *White* v. *Sheldon,* 4 Nev. 280.

and Oregon[25] the statutes of limitation are expressly made applicable to all suits and actions.

Thus, following the analogy of the statutes of limitation, a debt is presumed to be paid after the lapse of twenty years.[26] The lapse of this period of time is held to be *prima facie* evidence of payment; and it must, it seems, be so accepted by a court and jury, unless there is other evidence to explain the delay and to rebut the presumption.[27] It has been held that the lapse of even a less number of years than twenty will be sufficient to raise a presumption of payment.[28]

[25] *Anderson* v. *Baxter,* 4 Oreg. 105; Oregon Code Civ. Proc. § 378.

[26] *Bailey* v. *Jackson,* 16 Johns. (N. Y.) 210, 8 Am. Dec. 309; *Livingston* v. *Livingston,* 4 Johns. Ch. (N. Y.) 287, 8 Am. Dec. 562; *Swart* v. *Service,* 21 Wend. (N. Y.) 36, 34 Am. Dec. 211; *Ludlow* v. *Van Camp,* 6 N. J. Eq. (2 Halst.) 113, 11 Am. Dec. 529; *Wanmaker* v. *VanBuskirk,* 1 N. J. Eq. (1 Saxt.) 685, 23 Am. Dec. 748; *Gulick* v. *Loder,* 3 N. J. L. (1 J. S. Gr.) 68, 23 Am. Dec. 711; *Henderson* v. *Lewis,* 9 Serg. & R. (Pa.) 379, 11 Am. Dec. 733; *Ordinary* v. *Steedman,* Harp. (S. C.) L. 287, 18 Am. Dec. 652; *Yarnell* v. *Moore,* 3 Coldw. (Tenn.) 176; *Carter* v. *Wolfe,* 1 Heisk. (Tenn.) 700; *Anderson* v. *Settle,* 5 Sneed. (Tenn.) 203; *Atkinson* v. *Dance,* 9 Yerg. (Tenn.) 424, 30 Am. Dec. 422; *Rogers* v. *Judd,* 5 Vt. 236, 26 Am. Dec. 301.

[27] *Brock* v. *Savage,* 31 Pa. St. 410, 422; *King's Ex'rs* v. *Coulder's Ex'rs,* 2 Grant Cas. (Pa.) 77; *Cope* v. *Humphreys,* 14 Serg. & R. (Pa.) 21; *Lesley* v. *Nones,* 7 Serg. & R. (Pa.) 410; *Tilghman* v. *Fisher,* 9 Watts (Pa.) 442; *Bellas* v. *Lavan,* 4 Watts (Pa.) 297.

[28] Thus, it was said in *Henderson* v. *Lewis,* 9 Serg. & R. (Pa.) 379, 11 Am. Dec. 733, that a presumption of the payment of a bond may be raised by a lapse of less than the statutory period of twenty years when taken in connection with other evidence, but that in the absence of other circumstances, the full statutory period must expire to raise the presumption. See also *Lesley* v. *Nones,* 7 Serg. & R. (Pa.) 410; *Husky* v. *Maples,* 2 Coldw. (Tenn.) 25, 88 Am. Dec. 588; *Leiper* v. *Erwin,* 5 Yerg. (Tenn.) 97; *Freeman on Judgments,* §§ 464, 465, 2 Greenl. Ev. § 528.

And in another case, *Atkins* v. *Dance,* 9 Yerg. (Tenn.) 424, 30 Am. Dec. 422, the court say that "as to what amount of time alone, divested of other circumstances, shall be of weight sufficient to authorize a jury to presume payment, unless the presumption be rebutted, is necessarily arbitrary as a rule and based upon grounds of public policy. Sixteen years having, in the case referred to, *Blackburne* v. *Squib,* Peck (Tenn.) 64, been adopted, and society having acted on it for many years, it would be improper we think to question the correctness of the rule." See also *Yarnell* v.

§ 74. Adverse possession by mortgagor.—Uninterrupted possession by a mortgagor for twenty years after condition broken without entry or claim by the mortgagee, raises the presumption that the mortgage has been paid, and will bar the right of the mortgagee to foreclose.[29] The general presumption, however, is that the mortgagor and his grantees hold subordinate to the mortgagee unless there is some act on the part of the mortgagor or his grantees showing affirmatively that the possession is not held in subordination to the mortgagee's title, and, consequently, until this is shown the bar of the statute of limitations will not begin to run in favor of the mortgagor or his grantees.[30] Recognition by the mortgagor or his grantees during the time of the existence of the mortgage, will rebut the presumption that the mortgage is barred even as to subsequent purchasers.[31]

Possession by the mortgagor for more than twenty years is, at best, but presumptive evidence that the debt has been

Moore, 3 Coldw. (Tenn.) 176; *Carter* v. *Wolfe,* 1 Heisk. (Tenn.) 694, 700; *Anderson* v. *Settle,* 5 Sneed. (Tenn.) 203.

[29] *Belmont* v. *O'Brien,* 12 N. Y. 394; *Jackson* v. *Shauber,* 7 Cow. (N. Y.) 187, 198; *Jackson* v. *Wood,* 12 Johns. (N. Y.) 245, 7 Am. Dec. 312; *Jackson* v. *Pratt,* 10 Johns. (N. Y.) 381; *Collins* v. *Torry,* 7 Johns. (N. Y.) 278, 5 Am. Dec. 273; *Giles* v. *Baremore,* 5 Johns. Ch. (N. Y.) 550; *Haskell* v. *Bailey,* 22 Conn. 569; *Elkins* v. *Edwards,* 8 Ga. 326; *Harris* v. *Mills,* 28 Ill. 46, 81 Am. Dec. 259; *Chick* v. *Rollins,* 44 Me. 104; *Blethen* v. *Dwinal,* 35 Me. 556; *Boyd* v. *Harris,* 2 Md. Ch. Dec. 210; *Bacon* v. *McIntire,* 49 Mass. (8 Metc.) 87; *Howland* v. *Shurtleff,* 43 Mass. (2 Metc.) 26, 35 Am. Dec. 384; *Thayer* v. *Mann,* 36 Mass. (19 Pick.) 535; *Inches* v. *Leonard,* 12 Mass. 379; *Nevitt* v. *Bacon,* 32 Miss. 212, 226, 66 Am. Dec. 609; *Tripe* v. *Marcy,* 39 N. H. 439; *Evans* v. *Huffman,* 5 N. J. Eq. (1 Halst.) 354; *Roberts* v. *Welch,* 8 Ired. (N. C.) Eq. 287; *Richmond* v. *Aiken,* 25 Vt. 324; *Hughes* v. *Edwards,* 22 U. S. (9 Wheat.) 489, 6 L. ed. 141; *Trash* v. *White,* 3 Bro. Ch. 288, 291; *Hillary* v. *Waller,* 12 Ves. 265.

[30] *Boyd* v. *Beck,* 29 Ala. 703; *Noyes* v. *Sturdivant,* 18 Me. 104; *Bacon* v. *McIntire,* 49 Mass. (8 Metc.) 87; *Tripe* v. *Marcy,* 39 N. H. 439; *Zeller* v. *Eckert,* 45 U. S. (4 How.) 295, 11 L. ed. 982; *Hall* v. *Surtees,* 5 B. & Ald. 687.

[31] *Heyer* v. *Pruyn,* 7 Paige Ch. (N. Y.) 465, 34 Am. Dec. 355; *Drayton* v. *Marshall,* Rice (S. C.) Eq. 383, 384, 33 Am. Dec. 84; *Wright* v. *Eaves,* 10 Rich. (S. C.) Eq. 582; *Hughes* v. *Edwards,* 22 U. S. (9 Wheat.) 489, 6 L. ed. 142.

satisfied.[32] The possession of the mortgagor or his grantee, in order to divest the mortgagee of his right to foreclose, must be hostile in its inception and must continue to be hostile, actual, visible and open;[33] because so long as the relation of mortgagor and mortgagee continues, the statute can not commence to run in favor of the mortgagor, his heirs or assigns.[34] The possession of the mortgagor, being consistent with and subject to the rights of the mortgagee at the inception of the mortgage, does not become antagonistic by his simple neglect or refusal to pay the interest. The mortgagor or his grantee must commit some act which amounts to a refusal to recognize the mortgage, or there must exist some other circumstance from which a jury will be induced to find the fact of adverse possession.[35] Yet it is held that the mortgagor's possession is to be termed adverse in law after a breach of the conditions of the mortgage.[36]

§ 75. Presumption arising from mortgagor's possession.—It has sometimes been questioned whether the doctrine of presumption, arising from the lapse of time and entire neglect to take any measure to enforce a claim, can properly be applied to the case of a mortgage of real estate; and in some of the earlier English cases the doctrine was advanced that the common law presumption applicable to bonds, judgments and similar instruments, arising from a delay of twenty years in enforcing them, did not apply to the case of a mortgage, because in such a case the legal estate was in the mortgagee and the mortgagor was a mere tenant at will, his possession of the premises being in theory the

[32] *Cheever* v. *Perley,* 93 Mass. (11 Allen) 584.

[33] *Medley* v. *Elliott,* 62 Ill. 532; *Parker* v. *Banks,* 79 N. C. 480; *Martin* v. *Jackson,* 27 Pa. St. 504, 67 Am. Dec. 489.

[34] See *Rockwell* v. *Servant,* 63 Ill. 424; *Jamison* v. *Perry,* 38 Iowa, 14.

[35] *Jones* v. *Williams,* 5 Ad. & El. 291; *Patridge* v. *Bere,* 5 B. & Ald. 604.

[36] *Wilkinson* v. *Flowers,* 37 Miss. 579, 75 Am. Dec. 78.

possession of the mortgagee. But this doctrine was early repudiated by Lord Thurlow [37] and by the Master of the Rolls [38] in very strong language, and it has not since been asserted in any case either in England or America. It is now the universal doctrine that debts secured by mortgages stand on the same footing as other demands, and are held to be defeated by the same presumptions arising from lapse of time and laches on the part of the martgagee.[39]

While it is true that the mortgagor is not the tenant at will of the mortgagee in any such sense that his possession can not become adverse, yet while the moragagor acknowledges his relation to the mortgagee by paying interest and installments of the debt, his possession is said to be the possession of the mortgagee.[40] But the mortgagor has a right to convey or to lease the mortgaged premises or to deal with them in any way he sees fit as owner, so long as he does not impair the security, without thus rendering his possession hostile to that of the mortgagee; and the constructive possession of the mortgagee will continue until the possession of the mortgagor or his grantee is in actual and open hostility to that of the mortgagee.[41]

Although the doctrine of presumption, arising from posses-

[37] *Trash* v. *White*, 3 Bro. Ch. 289.

[38] *Christopher* v. *Sparke*, 2 Jac. & Walk. 223.

[39] See *Jackson* v. *Wood*, 12 Johns. (N. Y.) 245, 7 Am. Dec. 315; *Jackson* v. *Pratt*, 10 Johns. (N. Y.) 382; *Collins* v. *Torry*, 7 Johns. (N. Y.) 278, 5 Am. Dec. 273; *Giles* v. *Baremore*, 5 Johns. Ch. (N. Y.) 552; *Howland* v. *Shurtleff*, 43 Mass. (2 Metc.) 26, 25 Am. Dec. 344; *Inches* v. *Leonard*, 12 Mass. 379.

[40] See *Harris* v. *Mills*, 28 Ill. 44, 81 Am. Dec. 259.

[41] *Boyd* v. *Beck*, 29 Ala. 703; *Roberts* v. *Littlefield*, 48 Me. 61; *Chick* v. *Rollins*, 44 Me. 104; *Howland* v. *Shurtleff*, 43 Mass. (2 Metc.) 26, 35 Am. Dec. 384; *Inches* v. *Leonard*, 12 Mass. 379; *Benson* v. *Stewart*, 30 Miss. 49; *Sheafe* v. *Gerry*, 18 N. H. 245; *Howard* v. *Hildreth*, 18 N. H. 105; *Bates* v. *Conrow*, 11 N. J. Eq. (3 Stockt.) 137; *Martin* v. *Jackson*, 27 Pa. St. 504, 67 Am. Dec. 489; *Drayton* v. *Marshall*, 1 Rice (S. C.) Eq. 383, 33 Am. Dec. 84; *Atkinson* v. *Patterson*, 46 Vt. 750; *Pitzer* v. *Burns*, 7 W. Va. 63; *Higginson* v. *Mein*, 8 U. S. (4 Cr.) 415, 2 L. ed. 664; *Jones* v. *Williams*, 5 Ad. & E. 291, 6 Nev. & M. 816; *Hall* v. *Surtes*, 5 B. & Ald. 687.

sion by the mortgagor for more than twenty years, has been frequently applied as against the mortgage debt, and may now be said to be fully established everywhere,[42] yet such a presumption is not conclusive, and circumstances may be shown sufficiently strong to repel the presumption.[43] This presumption, arising from the policy of the law, does not necessarily

[42] *Jackson* v. *Wood,* 12 Johns. (N. Y.) 245; *Jackson* v. *Pratt,* 10 Johns. (N. Y.) 382; *Collins* v. *Torry,* 7 Johns. (N. Y.) 278; *Giles* v. *Baremore,* 5 Johns. Ch. (N. Y.) 552; *Newcomb* v. *St. Peter's Church,* 2 Sandf. Ch. (N. Y.) 636; *McDonald* v. *Sims,* 3 Ga. 383; *Field* v. *Wilson,* 6 B. Mon. (Ky.) 479; *Bacon* v. *McIntire,* 49 Mass. (8 Metc.) 87; *Howland* v. *Shurtleff,* 43 Mass. (2 Metc.) 26, 35 Am. Dec. 384; *Inches* v. *Leonard,* 12 Mass. 379; *Hoffman* v. *Harrington,* 33 Mich. 392; *Reynolds* v. *Green,* 10 Mich. 355; *Wilkinson* v. *Flowers,* 37 Miss. 579, 75 Am. Dec. 78; *Nevitt* v. *Bacon,* 32 Miss. 212, 66 Am. Dec. 609; *McNair* v. *Lot,* 34 Mo. 285, 84 Am. Dec. 78; *Martin* v. *Bowker,* 19 Vt. 526; *Hughes* v. *Edwards,* 22 U. S. (9 Wheat.) 489, 6 L. ed. 142; *Kellogg* v. *Dickinson,* 147 Mass. 432, 18 N. E. 223, 1 L.R.A. 346. See *Van Vleet* v. *Blackwood,* 39 Mich. 728, 733; *Peck* v. *Mallams,* 10 N. Y. 509, 543; *Bailey* v. *Jackson,* 16 John. (N. Y.) 210, 214, 8 Am. Dec. 309; *Jackson ex. dem. People* v. *Pierce,* 10 John. (N. Y.) 414; *Collins* v. *Torry,* 7 John. (N. Y.) 278, 5 Am. Dec. 273; *Jackson ex. dem.* v. *Hudson,* 3 John. (N. Y.) 375, 3 Am. Dec. 500; *Giles* v. *Baremore,* 5 John. Ch. (N. Y.) 565; *Dunham* v. *Minard,* 4 Paige Ch. (N. Y.) 441; *Miller* v. *Smith,* 16 Wend. (N. Y.) 425, 436; *Almy* v. *Wilbur,* 2 Woodb. & M. 403; *Hallary* v. *Waller,* 12 Ves. 239. See *Howland* v. *Shurtleff,* 43 Mass. (2 Met.) 26, 28, 85 Am. Dec. 386; *Van Vleet* v. *Blackwood,* 39 Mich. 733; *Jackson ex. dem. People* v. *Wood,* 12 John (N. Y.) 242, 7 Am. Dec. 315; *Collins* v. *Torry,* 7 John. (N. Y.) 278, 5 Am. Dec. 273; *Jackson, ex dem. Klock* v. *Hudson,* 3 John. (N. Y.) 375, 3 Am. Dec. 500, 7 Id. 278; *Dunham* v. *Mainard,* 4 Paige Ch. (N. Y.) 441; *Hillary* v. *Waller,* 12 Ves. 239.

But presumptions of payment founded on the lapse of time are matters of evidence, and not in most cases, *proprio jure,* matters of plea in bar. See *Malloy* v. *Vanderbilt,* 4 Abb. (N. Y.) N. C. 127, 133; *Giles* v. *Baremore,* 5 John. Ch. (N. Y.) 545; *Livingston* v. *Livingston,* 4 John. Ch. (N. Y.) 287, 8 Am. Dec. 562; *Carter* v. *Wolfe,* 1 Heisk. (Tenn.) 694, 702; *Robertson* v. *Campbell,* 2 Call (Va.) 421; *Ritzer* v. *Burns,* 7 W. Va. 63, 72.

[43] *Moore* v. *Cable,* 1 Johns. Ch. (N. Y.) 386; *Cheever* v. *Perley,* 93 Mass. (11 Allen) 584; *Wanmaker* v. *VanBuskirk,* 1 N. J. Eq. (1 Saxt.) 685, 23 Am. Dec. 748; *Booker* v. *Booker,* 29 Gratt. (Va.) 605, 26 Am. Rep. 401; *Hughes* v. *Edwards,* 22 U. S. (9 Wheat.) 489, 6 L. ed. 142.

proceed on the belief that payment has actually been made;[44] at most, the lapse of time and the neglect of the mortgagee to enforce his demand against the mortgagor, and the continuance of the latter in adverse possession, are grounds for a presumption of fact which may authorize a jury to infer the payment or satisfaction of the mortgage, and for that reason may be a sufficient answer in an action of foreclosure.[45] But there are some cases which hold that, where there has been no recognition of the mortgage debt for a period less than the statutory period of limitation, such possession will not raise a presumption of payment.[46]

The presumption as to payment by an adverse possession of twenty years may be rebutted by showing a payment of interest, a promise to pay, an acknowledgment of the debt by the mortgagor or some similar circumstance;[47] but in such cases parol evidence, in order to rebut the presumption as to payment, should show clearly some positive act within that time, which is an unequivocal recognition of the debt.[48] There must be a part payment[49] or a positive new promise,[50] in order to accomplish this purpose; a mere silent acquiescence in the mortgagee's demand of a payment, or an admission of the

[44] *Hillary* v. *Waller,* 12 Ves. 239, 252.

[45] *Jackson* v. *Wood,* 12 Johns. (N. Y.) 245, 7 Am. Dec. 315; *Jackson* v. *Pratt,* 10 Johns. (N. Y.) 382; *Collins* v. *Torry,* 7 Johns. (N. Y.) 278, 5 Am. Dec. 273; *Jackson* v. *Hudson,* 3 Johns. (N. Y.) 375, 3 Am. Dec. 500; *Demarest* v. *Winkoop,* 3 Johns. Ch. (N. Y.) 135, 8 Am. Dec. 467; *Chick* v. *Rollins,* 44 Me. 104; *Crook* v. *Glenn,* 30 Md. 55; *Bacon* v. *McIntire,* 49 Mass. (8 Metc.) 87.

[46] *Boon* v. *Pierpont,* 28 N. J. Eq. (1 Stew.) 7.

[47] *Cook* v. *Parham,* 63 Ala. 456; *Coldcleugh* v. *Johnson,* 34 Ark. 312; *Locke* v. *Caldwell,* 91 Ill. 417; *Murphy* v. *Coates,* 33 N. J. Eq. (6 Stew.) 424; *Snavely* v. *Pickle,* 29 Gratt. (Va.) 27; *Pears* v. *Laing,* L. R. 12 Eq. 41.

[48] *Jarvis* v. *Albro,* 67 Me. 310.

[49] *Schmucker* v. *Sibert,* 18 Kan. 104, 26 Am. Rep. 765. See *Pease* v. *Catlin,* 1 Ill. App. 88.

An acknowledgment or part payment by an administrator or a demand not exhibited as required by law will not stop the running of the statute of limitations. *Clawson* v. *McCune,* 20 Kan. 337.

[50] *Crone* v. *Citizen's Bank of La.* 28 La. An. 449.

debt, is not of itself sufficient to repel the presumption. A new promise, to take the case out of the statute, need not specify the amount nor the time, if it otherwise identifies the debt. Thus a written promise to renew a note and to give a new mortgage, whenever the exact amount due shall be ascertained, amounts to an equitable renewal.[51]

§ 76. Presumption as to payment—How rebutted.—The presumption of payment, arising from an uninterrupted possession by the mortgagor for twenty years after condition broken, may be rebutted[52] by circumstances explaining the delay, as by showing that the plaintiff was ignorant of the defendant's residence,[53] or that the plaintiff being an alien had been prevented from suing by the existence of war,[54] or by showing that the parties resided in a country whose commercial relations were disturbed by the presence of hostile

[51] *Hart* v. *Boyt*, 54 Miss. 547.

[52] *Bailey* v. *Jackson*, 16 Johns. (N. Y.) 210, 8 Am. Dec. 309; *Cheever* v. *Perley*, 93 Mass. (11 Allen) 584, 588; *Creighton* v. *Proctor*, 66 Mass. (12 Cush.) 437; *Ayres* v. *Waite*, 64 Mass. (10 Cush.) 76; *Howland* v. *Shurtleff*, 43 Mass. (2 Metc.) 26, 35 Am. Dec. 384.

[53] *Bailey* v. *Jackson*, 16 Johns. (N. Y.) 210, 8 Am. Dec. 309.

[54] As to when a debt or other liability will be presumed to be paid or discharged, see in addition to cases already cited in the foregoing notes: *Central Bank of Troy* v. *Heydorn*, 48 N. Y. 260, 272; *Lynde* v. *Denison*, 3 Conn. 392; *Tripe* v. *Marcy*, 39 N. H. 439, 449; *Thorpe* v. *Corwin*, 20 N. J. L. (1 Spen.) 317; *Allen* v. *Everly*, 24 Ohio St. 111; *Foulk* v. *Brown*, 2 Watts (Pa.) 215; *Gwyn* v. *Porter*, 5 Heisk. (Tenn.) 253; *Brobst* v. *Brock*, 77 U. S. (10 Wall.) 519, 535, 19 L. ed. 1002.

But it must be remembered that there is a manifest difference between those cases where length of time operates as a bar to an action, and those in which it can be used only as matter of evidence. For in the former cases it may be pleaded in bar and is conclusive, though the debt be not paid; but in the latter cases being merely evidence, it only raises a presumptive fact, which may be repelled by other circumstances to be considered in arriving at the truth. *Bailey* v. *Jackson*, 16 Johns. (N. Y.) 210, 8 Am. Dec. 309; *Shields* v. *Pringle*, 2 Bibb. (Ky.) 387; *Howland* v. *Shurtleff*, 43 Mass. (2 Metc.) 28; *Allen* v. *Everly*, 24 Ohio St. 111; *Bissell* v. *Jaudon*, 16 Ohio St. 498; *Brobst* v. *Brock*, 77 U. S. (10 Wall.) 519, 535, 19 L. ed. 1002.

armies,[55] or by showing any other circumstances which raise an improbability of payment or discharge,[56] as well as by an express acknowledgment of the debt or by acts recognizing it. Thus also relationship between the parties will repel the presumption arising from the lapse of time, that there is no debt,—especially where the exaction of payment might have occasioned distress.[57] And in some states it is held that where the statutory period expires after the death of the debtor, an action may, under the statute, be commenced against his administrator, if brought within eighteen months after the decedent's death;[58] but in no case will the provisions of the statute of limitations be suspended until after administration, where it began to run against the decedent in his lifetime, if the administrator could have taken out letters and sued earlier.[59]

When the statute of limitations has once commenced to run, its operation will not be suspended by any subsequent disability.[60]

§ 77. Adverse possession by several successive owners.—Adverse possession may be held by several successive owners. It is not necessary that the possession should continue for twenty years in the same person. If the time embraced by two or more possessions amounts to the period pre-

[55] *Hale* v. *Pack*, 10 W. Va. 145.

[56] *Snavely* v. *Pickle*, 29 Gratt. (Va.) 27; *Brobst* v. *Brock*, 77 U. S. (10 Wall.) 535, 19 L. ed. 1002.

[57] *Wanmaker* v. *VanBuskirk*, 1 N. J. Eq. (1 Saxt.) 685, 23 Am. Dec. 748; *Leman* v. *Newnham*, 1 Ves. Sr. 51.

[58] See *Wenman* v. *Mohawk Ins. Co.* 13 Wend. (N. Y.) 267, 28 Am. Dec. 464. See also *Flagg* v. *Ruden*, 1 Bradf. (N. Y.) 196; *Scovil* v. *Scovil*, 30 How. (N. Y.) Pr. 262.

[59] *Nicks* v. *Martindale*, 1 Harp. (S. C.) L. 135, 18 Am. Dec. 647.

[60] *Demarest* v. *Wynkoop*, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467; *Jackson* v. *Moore*, 13 Johns. (N. Y.) 513, 7 Am. Dec. 398; *Ruff's Adm'r* v. *Bull*, 7 Harr. & J. (Md.) 14, 16 Am. Dec. 290; *Thompson* v. *Smith*, 7 Serg. & R. (Pa.) 209, 10 Am. Dec. 453; *Adamson* v. *Smith*, 2 Mill. (S. C. Const.) 267, 12 Am. Dec. 665; *Faysoux* v. *Prather*, 1 Nott. & McC. (S. C.) 296, 9 Am. Dec. 691; *Fitzhugh* v. *Anderson*, 2 Hen. & Munf. (Va.) 289, 3 Am. Dec. 625.

scribed by the statute as a bar, it will be competent to join the one adverse possession to the others, in order to make the bar effectual; for it is immaterial whether the possession be held for the entire period by one party or by several parties in succession, each holding part of the time, and all together holding the entire period, provided the possession be continued and uninterrupted, and adverse to the claim of the plaintiff, during the whole period. But if a period of time intervenes in which the possession is not adverse, the statute will only run from the commencement of the last adverse possession.[61]

§ 78. When limitation begins to run against a mortgage.—The statute of limitations begins to run against a mortgage as soon as the right to foreclose it accrues,[62] the time which would bar an action at law to recover possession of the mortgaged property, after condition broken, will in general bar an action in equity to foreclose the mortgage.[63] Generally the right of action to foreclose a mortgage accrues upon the forfeiture of the condition of the mortgage, and from this date the statute of limitations begins to run.[64] The condition of the mortgage having been forfeited, the mort-

[61] *Benson* v. *Stewart,* 30 Miss. 49, 57. See also *Emory* v. *Keighan,* 88 Ill. 482.

[62] *Prouty* v. *Eaton,* 41 Barb. (N. Y.) 409.

Where the mortgagee has the right to declare the entire principal due on default in the payment of interest, the mortgagor cannot take advantage of this provision to set the statute running, where the option is not exercised by the mortgagee. *Quackenbush* v. *Mapes,* 54 Misc. 124, 105 N. Y. Supp. 654.

The supreme court of Pennsylvania, in the case of *Tankin* v. *Baum,* 114 Pa. St. 414, 7 Atl. 185, say that, upon conditional promise to pay a mortgage debt upon the happening of a certain event, the statute of limitations will not begin to run until the happening of the event.

[63] *Wilkinson* v. *Flowers,* 37 Miss. 579, 75 Am. Dec. 78; *Nevitt* v. *Bacon,* 32 Miss. 212, 66 Am. Dec. 609; *Benson* v. *Stewart,* 30 Miss. 49.

[64] *Wilkinson* v. *Flowers,* 37 Miss. 579, 75 Am. Dec. 78.

The statute does not begin to run until the expiration of the period of extension, where the time for payment has been extended. *Trudeau* v. *Germann,* 101 Minn. 387, 112 N. W. 281.

gagor holds from that time subject to the rights of the mortgagee to foreclose; and if the latter sleeps upon his rights for the length of time fixed by the statute of limitations for barring an action for the recovery of the possession of the mortgaged premises, his rights will be lost.[65] However, in South Carolina the statute begins to run from the date of the mortgage,[66] and in Illinois from the date of the last payment on the obligation secured.[67]

The absence from the state of the mortgagor or any one liable for the mortgage debt, will not prevent the statute of limitations from running against the mortgagee's right to foreclose.[68] Limitations in equity act only by analogy to the rules of law; and a suit for foreclosure being, in effect, a proceeding *in rem,* there is no analogy in the application of the statute of limitations to such proceedings, so far as the effect of the defendant's absence from the state upon the running of the statute is concerned.[69]

Where the mortgage debt is payable in installments falling due at different times, the condition of the mortgage is a continuing one, and the mortgagee may await the maturity of the last note or installment before an entry and sale, or before treating the non-payment of the first installment as a forfeiture of the mortgage. And in such cases the mortgagor's possession will not be adverse to that of the mortgagee until the maturity of the last installment; for it is not until that date that the final breach of the condition of the mortgage occurs.[70]

[65] *Jackson* v. *Wood,* 12 Johns. (N. Y.) 242, 7 Am. Dec. 315; *Wilkinson* v. *Flowers,* 37 Miss. 579, 75 Am. Dec. 78; *Nevitt* v. *Bacon,* 32 Miss. 212, 227, 66 Am. Dec. 609; *Benson* v. *Stewart,* 30 Miss. 49, 4 Kent Com. 402.

[66] *Montague* v. *Priester,* 82 S. C. 492, 64 S. E. 393.

[67] *Lathrop* v. *Carrol,* 155 Ill. App. 653.

[68] *Adams & Freeze Co.* v. *Kenoyer,* 17 N. D. 302, 16 L.R.A.(N.S.) 681, 116 N. W. 98.

[69] *Anderson* v. *Baxter,* 4 Org. 105.

[70] *Parker* v. *Banks,* 79 N. C. 480.

§ 79. When foreclosure of mortgage barred.—The right to foreclose a mortgage is not barred by the same lapse of time which bars an action upon a note secured by a mortgage;[71] but it will be barred by that lapse of time which

[71] *Nevitt* v. *Bacon,* 32 Miss. 212, 66 Am. Dec. 609; *Trotter* v. *Erwin,* 27 Miss. 772; *Bush* v. *Cooper,* 26 Miss. 611, 59 Am. Dec. 270; *Miller* v. *Trustees of Jefferson College,* 13 Miss. (5 Smed. & M.) 651; *Miller* v. *Helm,* 10 Miss. (2 Smed. & M.) 687, 697. It is held by the supreme court of Illinois, in the case of *McMillan* v. *McCormick,* 117 Ill. 79, 7 N. E. 132, that the statute of limitations which bars the debt, which is the principal, can alone bar the mortgage, which is the incident. In the course of the opinion the court say: "In *Harris* v. *Mills,* 28 Ill. 44, 81 Am. Dec. 259, it was held, in a proceeding to foreclose a mortgage, that when the note for the security of which the mortgage is given is barred by the statute of limitations, so that there could be no recovery thereon in an action at law, the right to foreclose is also barred (Compare *post,* § 80) and this was said to be because it is held that the debt is the principal thing and the mortgage is but the incident; the consideration which supports the note supports the mortgage; an assignment of the note operates, *ipso facto,* to transfer the mortgage; and a payment, release, or other discharge of a note, satisfies and releases the mortgage.

"In *Pollock* v. *Watson,* 41 Ill. 516, ejectment was brought by the grantee of the mortgagee against the heirs at law of the mortgager; and it was held that the debt secured by the mortgage being barred, there could be no recovery. The court, among other things, said: 'The notes were barred by the statute at the expiration of sixteen years after their maturity, and the bar to the debt having become complete, plaintiff in error had a right to interpose that bar to prevent a recovery in ejectment.'

"Of course the ejectment was not a suit for foreclosure, but it was a legal mode for enforcing rights of the mortgagee under the mortgage; and if the mortgage was not barred at law, the mortgagee was entitled to recover. The case shows that the statute of limitations of sixteen years was held a good defense, in an action at law on a mortgage given to secure the payment of a promissory note.

"In *Medley* v. *Elliott,* 62 Ill. 532, the above cases were cited with approval, and in discussing what period of limitation applied in that case, it was said, after quoting from Chancellor Kent's opinion in *Jackson ex dem. Horton* v. *Willard,* 4 John. (N. Y.) 41, that, until foreclosure, or at least until possession taken, the mortgage remains in the light of a chose in action. It is but an incident attached to the debt, and in reason and propriety it cannot and ought not to be detached from its principal. The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. If it should be assigned the assignee must hold the interest at the will and disposal

would bar an action for the recovery of the mortgaged premises.[72] Uninterrupted possession for the period of twenty years after condition broken, without any payment or demand of principal or interest,[73] or any claim on the part of the mortgagee, raises the presumption that the mortgage debt has been paid,[74] and, in the absence of circumstances excusing the delay, bars the right of the mortgagee to foreclose his mortgage.[75] But it has been said that no presumption of the

of the creditor who holds the bonds. It was added: 'It naturally follows that the statute of limitations which bars the debt, the principal, can alone bar the mortgage, the incident.'"

[72] *Jackson* v. *Wood,* 12 Johns. (N. Y.) 242, 7 Am. Dec. 315; *Wilkinson* v. *Flowers,* 37 Miss 579, 75 Am. Dec. 78; *Nevitt* v. *Bacon,* 32 Miss. 212, 227, 66 Am. Dec. 609; *Benson* v. *Stewart,* 30 Miss. 49, 4 Kent Com. 402.

[73] *Barned* v. *Barned,* 21 N. J. Eq. (6 C. E. Gr.) 245; *Hayes* v. *Whitall,* 13 N. J. Eq. (2 Beas.) 242; *Wanmaker* v. *VanBuskirk,* 1 N. J. Eq. (1 Saxt.) 685, 23 Am. Dec. 748; *Evans* v. *Huffman,* 5 N. J. Eq. (1 Halst.) 360.

See *Sprague* v. *Lovett,* 20 S. D. 328, 106 N. W. 134.

[74] *Harrington* v. *Slade,* 22 Barb. (N. Y.) 161; *Bailey* v. *Jackson,* 16 Johns. (N. Y.) 210, 8 Am. Dec. 309; *Giles* v. *Baremore,* 5 Johns. Ch. (N. Y.) 545; *Livingston* v. *Livingston,* 4 Johns. Ch. (N. Y.) 287, 8 Am. Dec. 562; *Heyer* v. *Pruyn,* 7 Paige Ch. (N. Y.) 465, 34 Am. Dec. 355; *Swart* v. *Service,* 21 Wend. (N. Y.) 36, 34 Am. Dec. 211; *Perkins* v. *Cartmell,* 4 Harr. (Del.) 275, 42 Am. Dec. 753; *Records* v. *Melson,* 1 Houst. (Del.) 139; *VanDuyn* v. *Hepner,* 45 Ind. 589; *Jarvis* v. *Albro,* 67 Me. 310; *Baltimore & O. R. R. Co.* v. *Trimble,* 51 Md. 99; *Cheever* v. *Perley,* 93 Mass. (11 Allen) 584; *Creighton* v. *Proctor,* 66 Mass. (12 Cush.) 437; *Ayres* v. *Waite,* 64 Mass. (10 Cush.) 76; *Bacon* v. *McIntire,* 49 Mass. (8 Metc.) 87; *Howland* v. *Shurtleff,* 43 Mass. (2 Metc.) 26, 35 Am. Dec. 384; *Sheafe* v. *Gerry,* 18 N. H. 245; *Howard* v. *Hildreth,* 18 N. H. 105; *Downs* v. *Sooy,* 28 N. J. Eq. (1 Stew.) 55; *Barned* v. *Barned,* 21 N. J. Eq. (6 C. E. Gr.) 245; *Hayes* v. *Whitall,* 13 N. J. Eq. (2 Beas.) 242; *Wanmaker* v. *VanBuskirk,* 1 N. J. Eq. (1 Saxt.) 685, 23 Am. Dec. 748; *Evans* v. *Huffman,* 5 N. J. Eq. (1 Halst.) 360; *Todd's Appeal,* 24 Pa. St. 429; *Bank of United States* v. *Biddle,* 2 Pars. Cas. (Pa.) 31; *Drayton* v. *Marshall,* Rice (S. C.) Eq. 373, 33 Am. Dec. 84; *Atkinson* v. *Dance,* 9 Yerg. (Tenn.) 424, 30 Am. Dec. 422; *Booker* v. *Booker,* 29 Gratt. (Va.) 605, 26 Am. Rep. 401; *Whipple* v. *Barnes,* 21 Wis. 327; *Hughes* v. *Edwards,* 22 U. S. (9 Wheat.) 489, 6 L. ed. 142, N. Y. Code Civ. Proc. §§ 365, 379.

[75] *Belmont* v. *O'Brien,* 12 N. Y. 394; *Jackson* v. *Wood,* 12 Johns. (N. Y.) 242, 7 Am. Dec. 315; *Jackson* v. *DeLancey,* 11 Johns. (N. Y.)

payment of the mortgage will be raised from the lapse of a less period;[76] and this is particularly true where for a part of the time the business of the courts and the commercial intercourse of the country are interrupted by war.[77]

The supreme court of California say that under the laws of that state an action to foreclose a mortgage given by a decedent to secure a note can be maintained, although the claim has been presented to and allowed by the personal representatives; and the debt will not become barred pending administration.[78] And it is well settled that a foreclosure of a part of mortgaged lands, to satisfy one of several notes secured by mortgage maturing, at different dates, is no bar to a subsequent foreclosure of the rest of the lands to satisfy the balance of such note and to pay other notes maturing at later date.[79]

§ 80. Foreclosure of mortgage when debt barred.— While the lapse of time may afford persumptive evidence of the payment of a mortgage and bar a right to foreclose,[80] yet such presumption will not arise, and an action to foreclose a mortgage will not be barred by the same lapse of time, which bars an action upon a note secured by the mortgage;[81] but the right to foreclose will be barred by the same lapse of

365, 13 Johns. (N. Y.) 537, 7 Am. Dec. 403; *Jackson* v. *Pierce,* 10 Johns. (N. Y.) 415; *Collins* v. *Torry,* 7 Johns. (N. Y.) 278, 5 Am. Dec. 273; *Jackson* v. *Hudson,* 3 Johns. (N. Y.) 375, 3 Am. Dec. 500; *Giles* v. *Baremore,* 5 Johns. Ch. (N. Y.) 545; *Dunham* v. *Minard,* 4 Paige Ch. (N. Y.) 441; *Chick* v. *Rollins,* 44 Me. 104; *Blethen* v. *Dwinal,* 35 Me. 556; *Cheever* v. *Perley,* 93 Mass. (11 Allen) 584; *Gould* v. *White,* 26 N. H. 178; *Evans* v. *Hoffman,* 5 N. J. Eq. (1 Halst.) 354; *Eddy* v. *Campbell,* 23 R. I. 192, 49 A. 702.

[76] *Boon* v. *Pierpont,* 28 N. J. Eq. (1 Stew.) 7.

[77] *Montgomery* v. *Bruere,* 4 N. J. L. (1 South.) 266.

[78] *Moran* v. *Gardemeyer,* 82 Cal. 96, 23 Pac. 6.

[79] *Bressler* v. *Martin,* 133 Ill. 278, 24 N. E. 518.

[80] *Swart* v. *Service,* 21 Wend. (N. Y.) 36, 34 Am. Dec. 211; *Wanmaker* v. *VanBuskirk,* 1 N. J. Eq. (1 Saxt.) 685, 23 Am. Dec. 748.

[81] *Green* v. *Gaston,* 56 Miss. 751; *Wilkinson* v. *Flowers,* 37 Miss. 579, 75 Am. Dec. 78; *Nevitt* v. *Bacon,* 32 Miss. 212, 66 Am. Dec. 609;

time only that would bar an action for the recovery of the possession of the mortgaged premises.[82] Thus, it is generally held that uninterrupted possession by the mortgagor for twenty years, after condition broken, without entry or claim on the part of the mortgagee, where such delay is not explained, will bar the right to foreclose the mortgage.[83] The running of the statute of limitations against a note secured by mortgage, or other lien, raises no presumption of payment so as to cut off the lien, and such mortgage or pledge may be resorted to in equity, notwithstanding the fact that the remedy on the note is barred;[84] consequently a mortgage may be foreclosed and the premises sold to pay the mortgage debt, although the note secured by the mortgage is barred by the

Trotter v. *Irwin,* 27 Miss. 772; *Bush* v. *Cooper,* 26 Miss. 611, 59 Am. Dec. 270; *Miller* v. *Trustees of Jefferson College,* 13 Miss. (5 Smed. & M.) 651; *Miller* v. *Helm,* 10 Miss. (2 Smed. & M.) 697; *Norton* v. *Palmer,* 142 Mass. 433, 8 N. E. 346; *Cerney* v. *Pawlot,* 66 Wis. 262, 28 N. W. 183. See *Hannan* v. *Hannan,* 123 Mass. 441, 442, 25 Am. Rep. 121; *Hancock* v. *Franklin Ins. Co.* 114 Mass. 155, 156; *Thayer* v. *Mann,* 36 Mass. (19 Pick.) 535. Also 4 Cent. L. J. 412; *Demuth* v. *Old Town Bank,* 85 Md. 315, 37 A. 266, 60 Am. St. Rep. 322.

[82] *Jackson* v. *Wood,* 12 Johns. (N. Y.) 242, 7 Am. Dec. 315; *Wilkinson* v. *Flowers,* 37 Miss. 579, 75 Am. Dec. 78; *Nevitt* v. *Bacon,* 32 Miss. 212, 217, 66 Am. Dec. 609; *Benson* v. *Stewart,* 30 Miss. 49, 4 Kent Com. 402.

[83] *Mayor, etc. of New York* v. *Colgate,* 12 N. Y. 140; *Gould* v. *Holland Purchase Ins. Co.* 16 Hun (N. Y.) 540; *Fisher* v. *Mayor,* 3 Hun (N. Y.) 652; *Heyer* v. *Pruyn,* 7 Paige Ch. (N. Y.) 465, 34 Am. Dec. 359; *Howland* v. *Shurtleff,* 43 Mass. (2 Metc.) 28, 35 Am. Dec. 384.

[84] *Brost* v. *Corey,* 15 N. Y. 510; *Waltermire* v. *Westover,* 14 N. Y. 16; *New York Life Ins. & T. Co.* v. *Covert,* 29 Barb. (N. Y.) 441; *Pratt* v. *Huggins,* 29 Barb. (N. Y.) 285; *Gillette* v. *Smith,* 18 Hun (N. Y.) 12; *Heyer* v. *Pruyn,* 7 Paige Ch. (N. Y.) 465, 34 Am. Dec. 355; *Jones* v. *Merchants' Bank of Albany,* 4 Robt. (N. Y.) 227; *Ware* v. *Curry,* 67 Ala. 274; *Scott* v. *Ware,* 64 Ala. 174; *Bizzell* v. *Nix,* 60 Ala. 281, 31 Am. Rep. 38; *Birnie* v. *Main,* 29 Ark. 591; *Hough* v. *Bailey,* 32 Conn. 289; *Haskell* v. *Bailey,* 22 Conn. 573; *Belknap* v. *Gleason,* 11 Conn. 160, 27 Am. Dec. 721; *Browne* v. *Browne,* 17 Fla. 607, 38 Am. Rep. 96; *Elkins* v. *Edwards,* 8 Ga. 325; *Wright* v. *Leclaire,* 3 Iowa, 231; *Crooker* v. *Holmes,* 65 Me. 195, 20 Am. Rep. 687; *Ozmun* v. *Reynolds,* 11 Minn. 459, 473; *Trustees of Jefferson College* v.

statute of limitations, because the mortgage has a legal import more extensive than the mere evidence of the debt,[85] and remains in full force uutil the debt, which it secures is paid,[86]

Dickson, Freem. Ch. (Miss.) 482; *Savings Bank* v. *Ladd,* 40 N. H. 463; *Fisher* v. *Mossman,* 11 Ohio St. 46; *Gary* v. *May,* 16 Ohio, 66; *Sparhawk* v. *Buell,* 9 Vt. 74; *Coles* v. *Withers,* 33 Gratt. (Va.) 186; *Wayt* v. *Carwithen,* 21 W. Va. 516; *Pitzer* v. *Burns,* 7 W. Va. 77; *Knox* v. *Galligan,* 21 Wis. 470; *Wiswell* v. *Baxter,* 20 Wis. 680; *Almy* v. *Wilbur,* 2 Woodb. & M. C. C. 404. See *Waltermire* v. *Westover,* 14 N. Y. 20; *Jackson* v. *Sackett,* 7 Wend. (N. Y.) 94; *Baldwin* v. *Norton,* 2 Conn. 163; *Elkins* v. *Edwards,* 8 Ga. 326; *Kellar* v. *Sinton,* 14 B. Mon. (Ky.) 307; *Crain* v. *Paine,* 58 Mass. (4 Cush.) 483, 50 Am. Dec. 807; *Eastman* v. *Foster,* 49 Mass. (8 Metc.) 19; *Thayer* v. *Mann,* 36 Mass. (19 Pick.) 536; *Trotter* v. *Erwin,* 27 Miss. 772; *Wood* v. *Augustine,* 61 Mo. 46; *Cookes* v. *Culbertson,* 9 Nev. 199; *Mackie* v. *Lansing,* 2 Nev. 302; *Read* v. *Edwards,* 2 Nev. 262; *Henry* v. *Confidence Gold & Silver M. Co.* 1 Nev. 619; *Longworth* v. *Taylor,* 2 Cin. Sup. Ct. Rep. (Ohio) 39; *Myer* v. *Beal,* 5 Oreg. 130; *Harris* v. *Vaughn,* 2 Tenn. Ch. 483; *Richmond* v. *Aiken,* 25 Vt. 324; *Kennedy* v. *Knight,* 21 Wis. 340, 94 Am. Dec. 543; *Whipple* v. *Barnes,* 21 Wis. 327; *Cleveland* v. *Harrison,* 15 Wis. 670; *Union Bank of La.* v. *Stafford,* 53 U. S. (12 How.) 327, 340, 13 L. ed. 1008; *Townsend* v. *Jemison,* 50 U. S. (9 How.) 413, 13 L. ed. 880; *McElmoyle* v. *Cohen,* 38 U. S. (13 Pet.) 312, 10 L. ed. 177; *Hughes* v. *Edwards,* 22 U. S. (9 Wheat.) 489, 6 L. ed. 142; *Sturges* v. *Crowninshield,* 17 U. S. (4 Wheat.) 122, 4 L. ed. 529; *Sparks* v. *Pico,* 1 McAll. C. C. 497; *Higgins* v. *Scott,* 2 Barn. & Ad. 413; *Spears* v. *Hartly,* 3 Esp. 81.

The supreme court of Ohio say in the case of *Fisher* v. *Mossman, supra,* that: "A discussion of the question on principle, and a review of the authorities bearing upon it, would be a work of supererogation, after it has been so thoroughly done already in *Belknap* v. *Gleason,* and we content ourselves with saying, that it seems to us that that case was correctly decided, and that it is decisive of the one before us on the point under consideration." 11 Ohio St. 46.

[85] See *Borst* v. *Corey,* 15 N. Y. 506; *Heyer* v. *Pruyn,* 7 Paige Ch. (N. Y.) 465; *Baldwin* v. *Norton,* 2 Conn. 161; *Elkins* v. *Edwards,* 8 Ga. 325; *Joy* v. *Adams,* 26 Me. 330; *Balch* v. *Onion,* 58 Mass. (4 Cush.) 559; *Thayer* v. *Mann,* 36 Mass. (19 Pick.) 535; *Michigan Ins. Co.* v. *Brown,* 11 Mich. 265; *Wilkinson* v. *Flowers,* 37 Miss. 579, 75 Am. Dec. 78; *Nevitt* v. *Bacon,* 32 Miss. 212, 66 Am. Dec. 609; *Trotter* v. *Erwin,* 27 Miss. 772; *Miller* v. *Trustees of Jefferson College,* 13 Miss. (5 Smed. & M.) 651; *Richmond* v. *Aiken,* 25 Vt. 324; *Whipple* v. *Barnes,* 21 Wis. 327; *Wiswell* v. *Baxter,* 20 Wis. 680. But see *Haskell* v. *Bailey,* 22 Conn. 569.

[86] *Joy* v. *Adams,* 26 Me. 330.

except in those cases where, by negligence, the mortgagee has lost his rights.

In some of the states, however, the rule has been adopted that when an action upon a promissory note, which is secured by mortgage upon real property, is barred by the statute of limitations, the remedy of the mortgagee upon the mortgage is also barred.[87] Where such a rule prevails, a grantee of the mortgagor, purchasing subsequently to the execution of mortgage, has a right to plead the statute of limitations as to that part of the claim of the plaintiff which asks for a decree foreclosing the mortgage and for a sale of the mortgaged premises, or at least that portion of such premises which has been transferred to the grantee.[88] Such a statute, however,

[87] *Lent* v. *Morrill,* 25 Cal. 492; *McCarthy* v. *White,* 21 Cal. 495, 82 Am. Dec. 754; *Lord* v. *Morris,* 18 Cal. 482; *Emory* v. *Keighan,* 94 Ill. 543; *Brown* v. *Rockhol,* 49 Iowa, 282; *Clinton Co.* v. *Cox,* 37 Iowa, 570; *Hubbard* v. *Missouri V. L. Ins. Co.* 25 Kan. 172; *Schmucker* v. *Sibert,* 18 Kan. 104, 26 Am. Rep. 765; *Hurley* v. *Cox,* 9 Neb. 230; *Blackwell* v. *Barnett,* 52 Tex. 326; *Ross* v. *Mitchell,* 28 Tex. 150; *Daggs* v. *Ewell,* 3 Woods C. C. 344; *McMillan* v. *McCormick,* 117 Ill. 79, 7 N. E. 132. See *ante,* § 79.

Illinois Statutes of Limitations is prospective only in its operation, and § 11 (2 *Starr* v. *C. Stats,* c. 83, ¶ 11) does not apply to mortgages previously executed and delivered. See *McMillan* v. *McCormick,* 117 Ill. 79; 7 N. E. 132; *Means* v. *Harrison,* 114 Ill. 248, 2 N. E. 64; *Dobbins* v. *National Bank,* 112 Ill. 553; *Dickson* v. *Chicago, B. & Q. R. Co.* 77 Ill. 331; *Thompson* v. *Alexander,* 11 Ill. 55.

This construction of the statute is in accordance with the well established rules that a statute is to operate *in futuro* only, and is not to be so construed as to affect past transactions. See *Means* v. *Harrison,* 114 Ill. 248, 2 N. E. 64.

(Kirby's Digest, § 5399); *Mueller* v. *Light,* 92 Ark. 522, 31 L.R.A. (N.S.) 1013, 123 S. W. 646.

(§§ 4276, 4277 Rev. Stat.). But the statute does not apply to an action to foreclose a mortgage executed before its passage to secure a debt not barred at the date of passage. *Martin* v. *Teasdale,* 212 Mo. 611, 111 S. W. 511; *McCauley* v. *Brady,* 123 Mo. App. 558, 100 S. W. 541; *Morrison, as trustee, etc.* v. *Roehl,* 215 Mo. 545, 114 S. W. 981.

[88] *Wood* v. *Goodfellow,* 43 Cal. 185; *Lent* v. *Shear,* 26 Cal. 361; *Grattan* v. *Wiggins,* 23 Cal. 16; *McCarthy* v. *White,* 21 Cal. 495, 82 Am. Dec. 754; *Lord* v. *Morris,* 18 Cal. 482, 490; *Medley* v. *Elliott,* 62 Ill. 532; *Pollock* v. *Maison,* 41 Ill. 517; *Harris* v. *Mills,* 28 Ill. 44, 81 Am. Dec. 259; *Schmucker* v. *Sibert,* 18 Kan. 104, 26 Am. Rep. 765; *Low* v. *Allen,* 41 Me. 248.

simply takes away the remedy upon the mortgage; it does not discharge the debt nor in any way extinguish the right or destroy the obligation;[89] the debt still remains unsatisfied and unextinguished and is a sufficient consideration to support a new promise.[90]

The same rule applies to a special statute, limiting the time for instituting a suit, that applies to the general statute of limitations. Thus where a claim is barred by a special statute, limiting the time within which claims against the estate of a deceased person may be presented or sued, such claim is not paid or satisfied by a failure to present or sue it within the time thus limited; and in those instances where the claim is secured by mortgage, the mortgage may be foreclosed, notwithstanding the fact that an action on the debt is barred at law.[91]

In some states a transfer of two of several mortgage notes of different dates, with an agreement by the mortgagee to hold the mortgage in trust to secure the two notes, will sustain a writ of entry to foreclose the mortgage against a tenant of the mortgagor holding under an instrument containing a reference to a mortgage as outstanding, which the the court finds to be the mortgage in suit, although the mortgage and remaining notes had been assigned with notice of the agreement, and the other notes thereafter paid, and upon such payment the mortgage transferred to the demandant; the notes, but not the mortgage, being barred by the statute of limitations.[92]

§ 81. Removal of bar of the statute.—The bar of the statute of limitations may be removed by an acknowledgment of the debt.[93] The cases differ widely as to what constitutes

[89] *Sichel* v. *Carrillo,* 42 Cal. 493.

[90] *Sichel* v. *Carrillo,* 42 Cal. 493.

[91] *Sichel* v. *Carrillo,* 42 Cal. 493; *Duty* v. *Graham,* 12 Tex. 427, 62 Am. Dec. 534; *Graham* v. *Vining,* 1 Tex. 639.

[92] *Norton* v. *Palmer,* 142 Mass. 433, 8 N. E. 346.

[93] *Danforth* v. *Culver,* 11 Johns. (N. Y.) 146, 6 Am. Dec. 361; *Lord* v. *Shaler,* 3 Conn. 132, 8 Am. Dec. 160; *Mellick* v. *DeSeelhorst,* 1 Ill.

a sufficient acknowledgment for this purpose, some of them holding that any acknowledgment, however slight, without a new promise to pay, is sufficient to remove the bar of the statute;[94] but other cases require a specific agreement to pay.[95]

From a careful consideration of the cases it will be found that it is clearly established both in this country and in England, (1) that a debt barred by the statute of limitations may be revived by a new promise; (2) that such new promise may be either an express or an implied promise; (3) that the latter is created by a clear and unqualified acknowledgment of the debt; and (4) that if the acknowledgment be accompanied by such qualifying expressions or circumstances as repel the idea of an intention or a contract to pay, an implied promise will not be created.[96] Where the acknowl-

(Breese) 171, 12 Am. Dec. 172; *Bell* v. *Rowland,* Hard. (Ky.) 301, 3 Am. Dec. 729; *Seward* v. *Lord,* 1 Me. (1 Greenl.) 163, 10 Am. Dec. 50; *Bangs* v. *Hall,* 20 Mass. (2 Pick.) 379, 13 Am. Dec. 437; *Jones* v. *Moore,* 5 Binn. (Pa.) 573, 6 Am. Dec. 428; *Fries* v. *Boisselet,* 9 Serg. & R. (Pa.) 128, 11 Am. Dec. 683; *Glenn* v. *McCullough,* 1 Harp. (S. C.) L. 484, 18 Am. Dec. 661; *Lee* v. *Perry,* 3 McC. (S. C.) 552, 15 Am. Dec. 650; *Burden* v. *McElhenny,* 2 Nott. & McC. (S. C.) 60, 10 Am. Dec. 570; *Olcott* v. *Scales,* 3 Vt. 173, 21 Am. Dec. 585.

[94] *Lord* v. *Shaler,* 3 Conn. 132, 8 Am. Dec. 160; *Glenn* v. *McCullough,* 1 Harp. (S. C.) L. 484, 18 Am. Dec. 661; *Burden* v. *McElhenny,* 2 Nott. & McC. (S. C.) 60, 10 Am. Dec. 570.

[95] *Danforth* v. *Culver,* 11 Johns. (N. Y.) 146, 6 Am. Dec. 361; *Bell* v. *Roland,* Hard. (Ky.) 301, 3 Am. Dec. 729. See *Newhouse* v. *Redwood,* 7 Ala. 599; *McCormick* v. *Brown,* 36 Cal. 180, 95 Am. Dec. 170; *Kimmel* v. *Schwartz,* 1 Ill. (Breese) 216; *Gray* v. *Lawridge,* 2 Bibb (Ky.) 285; *Hopkins* v. *Stout,* 6 Bush (Ky.) 384; *Smith* v. *Dawson,* 10 B. Mon. (Ky.) 114; *Fischer* v. *Hess,* 9 B. Mon. (Ky.) 617; *French* v. *Frazier,* 7 J. J. Marsh. (Ky.) 431; *Head* v. *Manner,* 5 J. J. Marsh. (Ky.) 259; *Rochester* v. *Buford,* 5 J. J. Marsh. (Ky.) 32; *Hord* v. *Lee,* 4 T. B. Mon. (Ky.) 36; *Lansdale* v. *Brashear,* 3 T. B. Mon. (Ky.) 332; *McLean* v. *Thorp,* 4 Mo. 259; *Shaw* v. *Newell,* 2 R. I. 269; *Belote* v. *Wynne,* 7 Yerg. (Tenn.) 541; *Bell* v. *Morrison,* 26 U. S. (1 Pet.) 351, 363, 7 L. ed. 179.

[96] *Blakeman* v. *Fonda,* 41 Conn. 561; *Wachter* v. *Albee,* 80 Ill. 47; *Carroll* v. *Forsyth,* 69 Ill. 127; *Collins* v. *Bane,* 34 Iowa, 385; *Gray* v. *McDowell,* 6 Bush (Ky.) 475; *Citizens' Bank* v. *Johnson,* 21 La. An. 128; *Parker* v. *Shuford,* 76 N. C. 219; *Miller* v. *Baschore,* 83 Pa. St. 356, 24 Am. Rep. 187; *Senseman* v. *Hershman,* 82 Pa. St. 83.

edgment of a debt is accompanied by a promise to pay conditionally, it will be of no avail unless the condition upon which the promise is made by the defendant is complied with, or the event happens upon which the promise depends.[97] But the acknowledgment or promise, to take the case out of the statute of limitations, must be made by the debtor or by some one in his behalf, and must be made to the creditor or to some one acting for him and not to a mere stranger.[98]

Part payment of a debt is evidence of a promise to pay the remainder, and will prevent the operation of the statute of limitations as a bar;[99] and it is a universally recognized rule that a payment of the interest or of a part of the principal will remove the bar of the statute of limitations and renew a mortgage, so that an action may be brought to enforce it within the statutory period after such last payment.[1] But it would seem that the payment of interest by a mortgagor, after he has sold the property to another, will not prevent or remove the bar of the statute of limitations so

[97] *Sedgwick* v. *Gerding,* 55 Ga. 264; *Carroll* v. *Forsyth,* 69 Ill. 127. See *Norton* v. *Colby,* 52 Ill. 198; *Parsons* v. *Northern Illinois Coal & I. Co.* 38 Ill. 433; *Ayers* v. *Richards,* 12 Ill. 148.

[98] *Wakeman* v. *Sherman,* 9 N. Y. 85; *Bloodgood* v. *Bruen,* 8 N. Y. 362; *Ringo* v. *Brooks,* 26 Ark. 540; *Farrell* v. *Palmer,* 36 Cal. 187; *Keener* v. *Crull,* 19 Ill. 189; *Collins* v. *Bane,* 34 Iowa, 385; *Roscoe* v. *Hale,* 73 Mass. (7 Gray) 274; *Taylor* v. *Hendrie,* 8 Nev. 243; *Johns* v. *Lantz,* 63 Pa. St. 324; *Kyle* v. *Wells,* 17 Pa. St. 286; 55 Am. Dec. 555; *Christy* v. *Flemington,* 10 Pa. St. 129, 49 Am. Dec. 590; *F. & M. Bank* v. *Wilson,* 10 Watts (Pa.) 261; *Georgia Ins. & T. Co.* v. *Ellicott,* Tanney C. C. 130, 3 Parsons on Cont. (5th ed.) 85. See *Sibert* v. *Wilder,* 16 Kan. 176, 22 Am. Rep. 280; *Trammell* v. *Salmon,* 2 Bail. (S. C.) 308; *Robbins* v. *Farley,* 2 Strobh. (S. C.) 348.

[99] *Newlin* v. *Duncan,* 1 Harr. (Del.) 204, 25 Am. Dec. 66; *Hunt* v. *Bridgham,* 20 Mass. (2 Pick.) 581, 13 Am. Dec. 458. See *Reid* v. *McNaughton,* 15 Barb. (N. Y.) 179; *Carshore* v. *Huyck,* 6 Barb. (N. Y.) 588; *Bell* v. *Morrison,* 26 U. S. (1 Pet.) 370, 7 L. ed. 182; *Ross* v. *Jones,* 89 U. S. (22 Wall.) 593, 22 L. ed. 730.

[1] See *Wenman* v. *Mohawk Ins. Co.* 13 Wend. (N. Y.) 267, 28 Am. Dec. 464; and *Kincaid* v. *Archibald,* 10 Hun (N. Y.) 9; *Gillilan* v. *Fletcher,* 80 Neb. 237, 114 N. W. 161.

far as a subsequent purchaser is concerned.[2] But a payment by the mortgagor's widow during her occupancy will prevent the statute from running.[3] Where there are several persons interested in the equity of redemption, however, a payment of interest by one of them will remove the bar or prevent the running of the statute as to all,[4] and a payment by a duly authorized agent of the mortgagor, or other person interested in the equity of redemption, will have the same effect;[5] but a payment by a mere stranger will not have such effect.[6]

Although the payment of interest by one party interested in the equity of redemption will be valid and binding upon all, yet where mortgaged lands are sold to different persons, one of whom pays the entire interest on the mortgage for more than twenty years, without calling upon the others for contribution, he can not, upon subsequently purchasing the mortgage, enforce it against such non-contributing parties or their grantees.[7]

§ 82. Rights and liabilities of grantee of mortgagor.— The grantees of a mortgagor have no greater rights and succeed to no better title than the mortgagor himself possessed at the time the conveyance was made; therefore, a purchaser with actual or constructive notice of the existence of a mortgage on the premises can avail himself of the defence of the bar of the statute of limitations, only when his grantor could have done so.[8] A purchaser of mortgaged premises, who assumes and agrees to pay the mortgage debt, recognizes it as a subsisting incumbrance, and his grantee

[2] *New York Life Ins. & T. Co.* v *Covert,* 29 Barb. (N. Y.) 435; *Jarvis* v. *Albro,* 67 Me. 310.

[3] *Montgomery* v. *Gantt,* 140 S. W. 260 (Ark.).

[4] *Pears* v. *Laing,* L. R. 12 Eq. 51, 54; *Roddam* v. *Morley,* 1 DeG. & J. 1. See *Brown* v. *Hayes,* 146 Mich. 474, 109 N. W. 845.

[5] *Ward* v. *Carttar,* L. R. 1 Eq. 29.

[6] *Chinnery* v. *Evans,* 11 H. L. Cas. 115.

[7] *Pike* v. *Goodnow,* 94 Mass. (12 Allen) 472.

[8] *Medley* v. *Elliott,* 62 Ill. 532; *Waterson* v. *Kirkwood,* 17 Kan. 9; *Willette as adm'r etc.* v. *Gifford,* 46 Ind. App. 185, 92 N. E. 186.

will be bound by such admission[9] and will not be entitled to set up the statute of limitations after the lapse of twenty years, unless he has by act or word renounced the mortgage, and thereafter held adversely to the mortgagee. And the recital in a deed of an existing mortgage will constitute an acknowledgment which will remove the bar of the statute, and will have the same effect upon the purchaser and his grantees as a direct assumption of the mortgage debt.[10] Such purchaser will be bound by the acts and declarations of his vendor in reference to the mortgage while he retains the equity of redemption or any part of it.

Thus the purchasers of mortgaged premises are bound by an acknowledgment of the mortgage as a valid and subsisting incumbrance, made by their grantor within twenty years before the commencement of the suit to foreclose such mortgage, and can not for that reason rely upon the statute of limitations as a bar.[11] A purchaser with notice from a mortgagor takes under the mortgage and subject to the rights and interests of the mortgagee; his rights and title are no better than those of his grantor, and the statute of limitations will not begin to run in his favor, until after some hostile act or declaration which makes his possession adverse to that of the mortgagee.[12]

While an acknowledgment of a mortgage by the mortgagor is binding upon his grantees, where made before the statute of limitations has run, yet an acknowledgment or a part payment made by the mortgagor, after the note and mortgage are once barred, will not revive them as against his grantees or any other person who has acquired an interest in the

[9] *Harrington* v. *Slade,* 22 Barb. (N. Y.) 161; *Schmucker* v. *Sibert,* 18 Kan. 104, 26 Am. Rep. 765.

[10] *Palmer* v. *Butler,* 36 Iowa, 576.

[11] *Heyer* v. *Pruyn,* 7 Paige Ch. (N. Y.) 465, 34 Am. Dec. 355; *Hughes* v. *Edwards,* 22 U. S. (9 Wheat.) 489, 6 L. ed. 142.

[12] *Thayer* v. *Cramer,* 1 McC. (S. C.) Eq. 395; *Mitchell* v. *Bogan,* 11 Rich. (S. C.) 686, 706; *Wright* v. *Eaves,* 5 Rich. (S. C.) Eq. 81.

premises prior to such acknowledgment or part payment.[13] And it is the settled doctrine in some states that the mortgagor has no power, by express stipulation or otherwise, or by absenting himself from the state to suspend the running of the statute of limitations, or in any manner to prolong the time for the payment of his mortgage against persons who have subsequently acquired an interest in the equity of redemption, either as purchasers or incumbrancers.[14]

§ 83. Possession by mortgagee—Presumption of foreclosure.—It is a well settled rule that the possession of mortgaged premises for twenty years by the mortgagee, without any payment of principal or interest by the mortgagor, and without an accounting or an acknowledgment of a subsisting mortgage and without any dealing between the mortgagee and mortgagor in relation to the land, is presumptive evidence that the mortgage has been foreclosed,[15] and is a bar to an action for redemption unless the mortgagor can bring himself within the provisions of the statute of limitations.[16] The whole doctrine has been fully unfolded in a every elaborate opinion in a leading English case,[17] in the course of which the court remark: "The actual possession

[13] *Schmucker* v. *Sibert,* 18 Kan. 104, 26 Am. Rep. 765.

[14] *Wood* v. *Goodfellow,* 43 Cal. 185; *Sichel* v. *Carrillo,* 42 Cal. 493; *Barber* v. *Babel,* 36 Cal. 1; *Lent* v. *Shear,* 26 Cal. 361. See also *Clinton Co. v. Cox,* 37 Iowa, 570; *Schmucker* v. *Sibert,* 26 Am. Rep. 765, 18 Kan. 104; *Waterson* v. *Kirkwood,* 17 Kan. 9.

[15] *Demarest* v. *Wynkoop,* 3 Johns. Ch. (N. Y.) 135, 8 Am. Dec. 467; *Blethen* v. *Dwinal,* 35 Me. 556; *Dexter* v. *Arnold,* 1 Sumn. C. C. 109; *Ashton* v. *Milne,* 6 Sim. 369, *Cholmondeley* v. *Clinton,* 2 Jac. & W. 1, 186

[16] *Demarest* v. *Wynkoop,* 3 Johns. Ch. (N. Y.) 129, 136, 8 Am. Dec. 467. See Anonymous, 3 Atk. 313; *Aggas* v. *Pickerell,* 3 Atk. 225; *Lytton* v. *Lytton,* 4 Bro. Ch. 458; *Reeks* v. *Postlethwaite,* Coop. Eq. 161; *Barron* v. *Martin,* Coop. Eq. 189; *Jenner* v. *Tracy,* 3 P. Wms. 287, note; *Belch* v. *Harvey,* 3 P. Wms. 287; *Bonney* v. *Ridgard,* 17 Ves. 99, 4 Bro. Ch. 138, 1 Cox. Eq. 145; *Hodle* v. *Healey,* 1 Ves. & B. 536. *Investment Securities Co.* v. *Adams,* 37 Wash. 211, 79 P. 625.

[17] *Cholmondeley* v. *Clinton,* 2 Jac. & W. 187.

of the mortgagee, continued for twenty years without any payment of interest by the mortgagor, or anything done or said during that period to recognize the existence of the mortgage or to acknowledge it on the part of the mortgagee, would clearly operate as a bar to redemption by the mortgagor."

§ 84. Decree for deficiency when debt barred.—In an action to foreclose a mortgage a court of equity may render a decree *in personam* against the mortgagor for any part of the debt remaining unsatisfied on the sale, notwithstanding the fact that the remedy on the note has been barred by the statute of limitations.[18]

§ 85. Right of mortgagee to retain possession after remedy barred.—After forfeiture the mortgagee or his heirs, having obtained possession of the mortgaged premises, are entitled to retain such possession until the mortgage debt is satisfied.[19] The assignee of a mortgagee in possession will be protected by the mortgage to the same extent as the mortgagee, although no foreclosure may be shown;[20] and

[18] *Birnie* v. *Main,* 29 Ark. 591. See 1 Story Eq. Jur. § 64 k. citing *Middletown Bank* v. *Russ,* 3 Conn. 135, 8 Am. Dec. 164; *Jesus College* v. *Bloom,* 3 Atk. 262; *Pearce* v. *Creswick,* 2 Hare, 293, 1 Foubl. Eq. 1, Ch. 1, § 3, note f.; Cooper Eq. Pl. Introd. p. xxxi.

[19] *Chase* v. *Peck,* 21 N. Y. 581; *Siahler* v. *Singner,* 44 Barb. (N. Y.) 606; *Monroe* v. *Merchant,* 26 Barb. (N. Y.) 383; *Casey* v. *Buttolph,* 12 Barb. (N. Y.) 637; *Jackson* v. *Delancy,* 13 Johns. (N. Y.) 537, 7 Am. Dec. 403; *Moore* v. *Cable,* 1 Johns. Ch. (N. Y.) 385; *Watson* v. *Spence,* 20 Wend. (N. Y.) 260; *Phyfe* v. *Riley,* 15 Wend. (N. Y.) 248, 30 Am. Dec. 55; *VanDuyne* v. *Thayre,* 14 Wend. (N. Y.) 234; *Bussey* v. *Page,* 14 Me. 132; *Pace* v. *Chadderdon,* 4 Minn. 499; *Pettengill* v. *Evans,* 5 N. H. 54; *Henry* v. *Confidence Gold & Silver Mining Co.* 1 Nev. 619; *Den* v. *Wright,* 7 N. J. L. (2 Halst.) 175, 11 Am. Dec. 543; *Harris* v. *Haynes,* 34 Vt. 220; *Hennesy* v. *Farrell,* 20 Wis. 42.

[20] *Jackson* v. *Bowen,* 7 Cow. (N. Y. 13; *Jackson* v. *Minkler,* 10 Johns. (N. Y.) 480. See also *Madison Ave. Baptist Church* v. *Baptist Church in Oliver St.* 73 N. Y. 82; *Trimm* v. *Marsh,* 54 N. Y. 599, 13 Am. Rep. 623; *Winslow* v. *McCall,* 32 Barb. (N. Y.) 241; *Bolton* v. *Brewster,* 32 Barb. (N. Y.) 389; *Watson* v. *Spence,* 20 Wend. (N. Y.) 261, 264; *Jackson* v. *De-*

this is true although the assignment was obtained on an usurious consideration.[21] The reason for this is because the mortgagee is still, independent of statute,[22] to be considered the absolute owner at law after default of payment.[23]

Lancey, 11 Johns. (N. Y.) 365, 13 Johns. (N. Y.) 537, 7 Am. Dec. 403; *Randall* v. *Raab,* 2 Abb. (N. Y.) Pr. 307, 314; *Casey* v. *Buttolph,* 12 Barb. (N. Y.) 637, 640.

[21] *Jackson* v. *Bowen,* 7 Cow. (N. Y.) 13.

[22] See 2 N. Y. Rev. Stat. (2d ed.) 236, § 57.

[23] *Edwards* v. *Farmers' Fire Ins. Co.* 21 Wend. (N. Y.) 467, 484. See also *Jackson* v. *Pierce,* 10 Johns. (N. Y.) 414; *Smith* v. *Shuler,* 12 Serg. & R. (Pa.) 240; *Simpson's Lessee* v. *Ammons,* 1 Binn. (Pa.) 175, 2 Am. Dec. 425.

CHAPTER V.

PARTIES PLAINTIFF.

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§ 86. Introductory.—In the conduct of an action in a court, or of a proceeding under a statute, it has always been of the first importance that the persons to be bound by the result should be brought within the jurisdiction of the authority intended to be exercised. With some classes of actions the practitioner has no difficulty in determining who should be brought into court; but in the enforcement of the rights which attach to a mortgage and the debt it secures, difficult and complicated questions are often presented as to who should be brought within the cognizance of the court, that a complete remedy may be obtained by the prosecutor,

and that the rights of no claimant of an interest in the subject matter or in the object of the proceeding, may be made to suffer an injury, or allowed to pass unprotected—and this is necessarily so from the peculiar character and history of mortgage securities, and from the large place that the law of mortgages fills in the general jurisprudence and practice of our states. Attention will be given in the following chapters on parties to a consideration of the questions, who may be and who should be brought into an action or a proceeding to enforce a mortgage, and what are the rights of parties with reference to such enforcement.

§ 87. Parties generally in equitable foreclosures.—There are two leading principles which control courts of equity the world over in determining the proper parties to a suit: first, that the rights of no man shall be decided in a court of justice unless he himself is present; second, that the decree rendered shall provide for the rights of all persons whose interests are in any way connected with the subject-matter of the action. The combination of these two principles has given rise to the general rule that all persons having an interest in the object of the suit ought to be made parties. As expressed by an eminent English jurist, "all persons materially interested in the subject ought generally to be parties to the suit—plaintiffs or defendants—however numerous they may be, so that the court may be enabled to do complete justice by deciding upon and settling the rights of all persons interested, and that the orders of the court may be safely executed by those who are compelled to obey them, and future litigation may be prevented." [24] It is only by the application of such broad principles that that complete justice which equity courts "delight to render," [25] can be administered to the numerous persons who, in nearly every case, have some interest in the mortgage debt or in the mortgaged premises under

[24] Lord Redesdale in Red. Pl. 164.

[25] *Knight* v. *K.*, 3 P. Wms. 333.

foreclosure. In their practical application, however, these principles are subject to many limitations and modifications, due mainly to local interpretation and to statutory enactments.

§ 88. Application of general rules by American courts.— These general principles, established by such eminent English judges as Lords Talbot,[26] Redesdale,[27] Hardwicke,[28] Eldon,[29] Langsdale [30] and Sir William Grant,[31] have been adopted by all our equity courts, state and federal; and in many states the general principles of equity, respecting parties to suits, have been incorporated into their codes. In New York it is provided that "all persons having an interest in the subject of the action and in obtaining the judgment demanded, may be joined as plaintiffs." [32] "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party defendant, for a complete determination or settlement of a question involved therein." [33] But in the details of practice, various and often antagonistic rules have grown up in the different states respecting the proper and necessary parties to foreclosures, as will be seen from an examination of the cases cited under almost any of the following sections. It is only in rare or complicated cases, however, that the rules differ materially, especially where questions of trust, assignment, representation and personal liability are concerned; in simple cases the rules are substantially alike. When a mortgage and the parties to it remain the same at the time of foreclosure as at the time of delivery, it is a universal rule that the mortgagee and the mortgagor are the only parties to be brought before the court.[34]

It is said that inasmuch as a mortgagee is always a necessary party to foreclosure, an insolvent bank holding a

[26] *Knight* v. *K.*, 3 P. Wms. 333.
[27] Red Pl. 164.
[28] *Poore* v. *Clarke*, 2 Atk. 515.
[29] *Cockburn* v. *Thompson*, 16 Ves. Jr. 321.
[30] *Richardson* v. *Hastings*, 7 Beav. 323, 326.
[31] *Palk* v. *Clinton*, 12 Ves. Jr. 58.
[32] N. Y. Code Civ. Proc. § 446.
[33] N. Y. Code Civ. Proc. § 447. See also *Belk* v. *Fossler*, 96 N. E. 15 (Ind. App.)
[34] *Tug River Coal & Salt Co.* v. *Brigel*, 86 Fed. 818, 30 C. C. A. 415.

mortgage is a necessary party to foreclosure by its receiver.[35] In Alabama it is held that a mortgagee, being the trustee in the mortgage, and as such the holder of the legal title, he is an indispensable party to a suit for foreclosure.[36] It is said by the supreme court of New York that all parties interested in a trust fund should be made parties to an action to foreclose a mortgage thereon.[37] And in California, under the code of civil procedure,[38] a trustee to whom a mortgage has been assigned as security for a debt of the mortgagee may be joined with the latter as plaintiff in an action to foreclose the mortgage; and if the trustee is not originally made a plaintiff, he may be brought in by amendment.[39] Yet a mortgagee is not required to make a creditor who has no lien a party to his action to enforce his mortgage lien.[40]

Where a person in interest seeks to be made a party to a mortgage foreclosure proceeding, conditions should not be imposed on granting the application.[41]

§ 89. Parties plaintiff generally.—Mortgages are now universally recognized as securities upon, and not titles in, real estate. The party holding the security has such an interest in the title, however, that so long as his debt exists the security binds the title to its ultimate payment. That the title may be cleared of this lien by the process of foreclosure, the equitable rule has been established that every party who has any interest in the mortgage debt must be brought before the court, that the rights and interests of all in the security may be adjudged in relation to the mortgaged premises.

[35] *Comer* v. *Bray,* 83 Ala. 217, 3 So. 554.

[36] *Hambrick* v. *Russell,* 86 Ala. 199, 5 So. 298.

[37] *United States Trust Co.* v. *Roche,* 41 Hun (N. Y.) 549, reversed on on other grounds in 116 N Y. 120.

[38] Cal. Code Civ. Proc. §§ 378, 385.

[39] *Cerf* v. *Ashley,* 68 Cal. 419, 9 Pac. 658.

[40] *McMurtry* v. *Montgomery Masonic Temple Co.* 86 Ky. 206, 5 S. W. 570.

[41] *Lawton* v. *Lawton,* 54 Hun (N. Y.) 415, 7 N. Y. Supp. 556; 27 N. Y. S. R. 302.

All parties interested in the mortgage debt may come before the court together; and in some states it is provided by statute that "all persons having an interest in the subject of the action and in obtaining the judgment demanded may be joined as plaintiffs." [42] It is indispensable that the plaintiff have a real interest in the action; and the codes of some states have provided that every action must be prosecuted in the name of the real party in interest,[43] except that since the abolition of uses and trusts, a personal representative and a trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted.[44]

There are many cases in which more than one person has an interest in the mortgage, and in which all interested may join as plaintiffs. Some, however, may refuse to join as co-plaintiffs, and such parties may, as a general rule, be made defendants to the action. It is not material who begins the action, for it is sufficient in equity that all parties interested in the subject of the suit be before the court, in the form of plaintiffs or of defendants; but no person can be a plaintiff unless he has a real interest in the mortgage or in the debt thereby secured. It is generally true that any person who is so interested, even in a remote or conditional way, may, as plaintiff, commence an action to foreclose, making defendants all other parties interested in any way in the bond and mortgage, upon their refusal to join as co-plaintiffs.[45]

[42] N. Y. Code Civ. Proc. § 446. Oregon, B. & C. Comp. § 394. See *Stewart* v. *Templeton,* 55 Oreg. 364, 104 Pac. 978.

§ 6005, Kirby's Dig. (Ark.) See *Porter* v. *Hamil,* 128 S. W. 570 (Ark.).

[43] Oregon B. & C. Comp. § 393. See *Stewart* v. *Templeton,* 55 Or. 364, 104 Pac. 978.

[44] N. Y. Code Civ. Proc. § 449.

[45] This general equitable rule has been embodied in the codes of some states. See the N. Y. Code Civ. Proc. § 448: "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants, except as otherwise expressly prescribed in this act. But if the consent of any one, who ought to be joined as a plaintiff, cannot be obtained, he may be made a defendant, the reason therefor being stated in the complaint. And

As no one but the mortgagee, or those claiming under him, can have any cause for commencing a foreclosure, he or his successor in interest generally becomes a party to the action by voluntarily instituting it as plaintiff.

Those persons who are directly interested in the payment of a debt which a mortgage is given to secure may, as a general rule, maintain an action to foreclose the mortgage. But it is held that in a foreclosure by the trustee named in a mortgage given to secure bonds, the bondholders are not necessary parties; they are represented by their trustee.[46] In those cases, however, where the trustee refuses to foreclose, a bondholder who has applied to him to do so may bring an action for that purpose.[47] An administrator of the mortgagee is a proper party to commence proceedings for the foreclosure of a mortgage.[48] Thus it has been said that where a man made a voluntary conveyance in trust for himself, his wife, and children, and took back a mortgage as security for the performance of the trust, in a suit after his death to foreclose it, his administrator and surviving children were proper parties.[49] But the fact that the payee of a note upon transferring it guarantees the prompt payment of the interest coupons, and also the principal at maturity, does not constitute him the transferee's agent in such a sense as to authorize him to take any steps which the latter might take to enforce collection, such as taking possession and selling the maker's property under a mortgage with power of sale.[50]

The rule is well settled that on a bill in foreclosure by

where the question is one of a common or general interest of many persons; or where the persons, who might be made parties, are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." See *Stewart* v. *Templeton*, 55 Or. 364, 104 Pac. 978; *Snyder* v. *Harris*, 61 N. J. Eq. 480, 48 A. 329.

[46] *Richter* v. *Jerome*, 123 U. S. 233, 31 L. ed. 132, 8 Sup. Ct. Rep. 106.

[47] *Davies* v. *New York Concert* Co. 41 Hun (N. Y.) 492.

[48] *Plummer* v. *Doughty*, 78 Me. 341, 5 Atl. 526.

[49] *Sargent* v. *Baldwin*, 60 Vt. 17, 13 Atl. 854.

[50] *Dewing* v. *Crueger*, 7 Wash. 590, 35 Pac. 393.

citizens of a state against a railroad corporation of another state, in the United States circuit court for the latter state, owners of the bonds who are citizens of the state where the suit is brought cannot be made co-plaintiffs.[51]

Bonds and mortgages have become such favorite securities and investments with capitalists and others, that the law determining the rights of parties holding them has grown into unusual importance in many states, so that complicated questions have arisen in the courts as to who can maintain an action for foreclosure. This chapter will be devoted to the consideration of parties plaintiff, or those who may commence the foreclosure of a mortgage.

§ 90. Sole mortgagee, owning the mortgage, may foreclose.—It is almost axiomatic that a sole mortgagee, who continues to own his mortgage, may be plaintiff in an action to foreclose the same. He is a party to the contract, and the only person who can be injured by a breach of it on the part of the mortgagor, or those who succeed to the mortgagor's interest; he is the only person who can be plaintiff, as no one else has any interest in the mortgage or in the indebtedness thereby secured.[52] The same rule is true in statutory foreclosures.[53]

The fact that a mortgagee has been appointed administrator of his mortgagor's estate will not prevent his foreclosing against the heirs of the mortgagor.[54] And where a decree of foreclosure has been vacated for irregularity, the mortgage is not cancelled, but will be restored, and the mortgagee may foreclose again. A surety may foreclose an indemnifying mortgage which he holds in his own name, without joining his

[51] *Jackson & Sharp Co.* v. *Burlington & L. R. Co.* 24 Blatchf. C. C. 194, 29 Fed. 474.

[52] *Haskell* v. *Bailey,* 22 Conn. 573; *Newall* v. *Wright,* 3 Mass. 138, 3 Am. Dec. 198; *Wendell* v. *New Hampshire Bank,* 9 N. H. 404, 417; *Sutton* v. *Stone,* 2 Atk. 101.

[53] *Hubbell* v. *Sibley,* 5 Lans. (N. Y.) 51.

[54] *Hunsucker* v. *Smith,* 49 Ind. 114.

principal in the action.[55] And a person holding a mortgage conditioned to pay an annuity in certain quantities of produce, may foreclose upon a breach of the condition, and have the premises sold for the amount of damages that he may be able to prove.[56]

§ 91. Assignor of mortgage cannot foreclose.—If the mortgagee has assigned his bond and mortgage absolutely and unconditionally, he has, of course, no further interest in it, and cannot, even nominally, be plaintiff in an action to foreclose.[57] A foreclosure by a mortgagee, who had parted with all his interest in the bond and mortgage, has been held nugatory.[58] And in an action brought by a mortgagee "for the use of his assignee," the complaint was dismissed for the reasons that the assignee was not made a party and that the plaintiff did not have a real interest in the action; [59] but where an assignment was defective, the action was allowed to be maintained in the name of the mortgagee.[60] After

[55] An acceptor of a bill can foreclose after payment, *Planters' Bank* v. *Douglass,* 2 Head (Tenn.) 699; so can a surety of a note after payment, *Tilford* v. *James,* 7 B. Mon. (Ky.) 337; *McLean* v. *Ragsdale,* 31 Miss. 701; also an indorser, *Lewis* v. *Starke,* 18 Miss. (10 Smed. & M.) 120.

[56] *Peterson* v. *Oleson,* 47 Wis. 122, citing similar cases. See *Morrison* v. *Morrison,* 4 Hun (N. Y.) 410.

[57] *Barraque* v. *Manuel,* 7 Ark. (2 Eng.) 516. Consequently further proceedings on foreclosure of a mortgage after an assignment of the decree cannot be prosecuted in the name of the assignor. *Moore* v. *Smith,* 103 Mich. 387, 61 N. W. 538.

[58] *Cushing* v. *Ayer,* 25 Me. 383; *Call* v. *Leisner,* 23 Me. 25.

[59] *Burton* v. *Baxter,* 7 Blackf. (Ind.) 297. See *Winkelman* v. *Kiser,* 27 Ill. 21; *Pryor* v. *Wood,* 31 Pa. St. 142. And it is held by the New York supreme court that an agreement by the assignee of a mortgage, that the assignor shall bring the action for its foreclosure, in violation of the code (Code Civ. Proc. § 449) providing "that every action must be prosecuted in the name of the real party in interest," does not deprive the assignee of his title to the mortgage, or entitle the assignor to the proceeds of the mortgage, if collected by him. *Winegard* v. *Fanning,* 76 Hun (N Y.) 170, 27 N. Y. Supp. 566, 57 N. Y. S. R. 330.

[60] *Partridge* v. *Partridge,* 38 Pa. St. 78, distinguishing *Pryor* v. *Wood,* 31 Pa. St. 142.

an assignment, the mortgagee is neither a proper nor a necessary defendant to the action.[61]

§ 92. Assignee, sole owner of mortgage, may foreclose.—A person who acquires the absolute and unconditional ownership of a bond and mortgage by assignment from the mortgagee, or from a mesne assignee, may maintain an action for the foreclosure of the same;[62] he is, indeed, the only possible plaintiff,[63] as he has "contracted to stand in the place of the original mortgagee and of all assignors." No

[61] *Andrews* v. *Gillespie,* 47 N. Y. 487; *Whitney* v. *McKinney,* 7 Johns. Ch. (N. Y.) 144. See *post,* §§ 92, 198, and cases cited.

[62] *Andrews* v. *Gillespie,* 47 N. Y. 487; *Christie* v. *Herrick,* 1 Barb. Ch. (N. Y.) 254; *Franklyn* v. *Hayward,* 61 How. (N. Y.) Pr. 43; *Whitney* v. *McKinney,* 7 Johns. Ch. (N. Y.) 144 . See *Meeker* v. *Claghorn,* 44 N. Y. 349, and *Allen* v. *Brown,* 44 N. Y. 228, for a general discussion of the rights of an assignee of a chose in action to maintain a suit in his own name. *Brown* v. *Snell,* 6 Fla. 741; *Strother* v. Law, 54 Ill. 413; *Crooker* v. *Jewell,* 31 Me. 306, where the assignor was an administrator; *Hills* v. *Eliot,* 12 Mass. 26, 7 Am. Dec. 26; *Gould* v. *Newman,* 6 Mass. 239; *Fisher* v. *Meister,* 24 Mich. 447; *McGuffey* v. *Finley,* 20 Ohio, 474, relying upon *Miller* v. *Bear,* 3 Paige Ch. (N. Y.) 466, and collating authorities. *Kinna* v. *Smith,* 3 N. J. Eq. (2 H. W. Gr.) 14, where the assignor was an executor; *Dolman* v. *Cook,* 14 N. J. Eq. (1 McCart.) 56; *Horstman* v. *Gerker,* 49 Pa. St. 282, 88 Am. Dec. 501; *Knox* v. *Galligan,* 21 Wis. 470. In *Douglass* v. *Durin,* 51 Me. 121, the assignor was an heir, and as the assignment passed no title to the assignee, the foreclosure was void. In *Casper* v. *Munger,* 62 Ind. 481, the assignee of a mortgage, given to indemnify the mortgagee against certain contingencies, was allowed to foreclose on the accruing of the liability. *Wood* v. *Williams,* 4 Madd. 186; Fisher on Mortgages, § 355. The supreme court of Louisiana, in *Thompson* v. *Whitbeck* (47 La. An. 49, 16 So. 570) say that one who has for value and in good faith taken a mortgage from one to whom a married woman has made a simulated sale of her property to serve her husband's purposes may, foreclose such mortgage in proceedings against the mortgagor under the non-alienation clause of the Louisiana statute authorizing the creditor to seize and sell the property as if it were that of his debtor, notwithstanding a subsequent judgment in favor of such married woman annulling the sale as against the mortgagor.

[63] In Georgia a foreclosure action may be brought in the name of the mortgagee suing for the use of the assignee. *Montgomery* v. *King,* 123 Ga. 14, 50 S. E. 963.

other person can be interested in the mortgage debt. But if the pretended assignee has no title whatever to the mortgage, a foreclosure conducted by him will be absolutely void and will pass no title to the purchaser.[64]

It has been held that if the husband of a married woman fails to unite with her in executing an assignment of her separate bond and mortgage, the assignee will not obtain a title upon which he can maintain a foreclosure.[65] And the assignment to a wife of a mortgage executed by her husband upon lands which he still owned at the time of the assignment has been held to extinguish the debt, so that no action would lie;[66] but in New York and most states such an assignment would not now impair the security. So where a husband became the assignee of a mortgage executed by himself and wife upon her separate real estate, he was allowed to foreclose it as a valid and subsisting lien.[67] The assignee of a land contract may also foreclose by an equitable action;[68] so may the assignee of a "title bond," which is much in the nature of an ordinary land contract.[69] Mortgages containing a power of sale may be enforced by an assignee, the same as by the original mortgagee.[70]

On the assignment of a mortgage both the assignee and the mortgagee are proper parties plaintiff to an action to enforce the lien of the mortgage against land omitted therefrom by mutual mistake, and alleged to have been afterwards fraudulently conveyed by the mortgagor to his daughters, where the mortgagee represented to the assignee that the

[64] *Gale* v. *Battin,* 12 Minn. 287; *Bolles* v. *Carli,* 12 Minn. 113.

[65] *Stoops* v. *Blackford,* 27 Pa. St. 213.

[66] *Clark* v. *Wentworth,* 6 Me. (6 Greenl.) 259.

[67] *Faulks* v. *Dimock,* 27 N. J. Eq. (12 C. E. Gr.) 65.

[68] *Wright* v. *Troutman,* 81 Ill. 374. See also *Hutchinson* v. *Crane,* 100 Ill. 269.

[69] *Semour* v. *Freeman,* Smith (Ind.) 25.

[70] *Mason* v. *Ainsworth,* 58 Ill. 163; *Heath* v. *Hall,* 60 Ill. 344; seemingly contra, *Wilson* v. *Spring,* 64 Ill. 14; *Dempster* v. *West,* 69 Ill. 613.

mortgage covered the premises omitted.[71] It has been said that the assignee of a mortgage, who holds it under an assignment as collateral security for notes, which shows on its face that his title is not absolute, must set forth in his bill of foreclosure the existence and amount of the notes secured, and must make the assignor a party.[72] And it has been said that the delivery, without a written assignment, of an agreement and trust deed to a third person who has paid the sum secured thereby, at the request of the grantor in the deed, constitutes such third person the equitable assignee thereof, and entitles him to maintain a bill of foreclosure.[73]

§ 93. Form of assignment to enable assignee to foreclose.—The form of the assignment should be in writing, but that is not indispensable. A parol assignment will give the assignee such an equitable interest in the mortgage that he can maintain a foreclosure in his own name;[74] and mere delivery has been held sufficient.[75] But in such cases the assignor has been held a necessary party,[76] and it would certainly be unsafe to omit him. In Massachusetts and Maine a parol assignee cannot foreclose in his own name.[77] A quit-claim deed from a mortgagee has been held to work an equitable assignment of the mortgage to a grantee,[78] and in Maine it seems to be a common form of assignment.

[71] *Sprague* v. *Cochran,* 84 Hun (N. Y.) 240, 32 N. Y. Supp. 572, 65 N. Y. S. R. 630.

[72] *Cooper* v. *Smith,* 75 Mich. 247, 42 N. W. 815.

[73] *Stelzich* v. *Weidel,* 27 Ill. App. 177.

[74] *Slaughter* v. *Foust,* 4 Blackf. (Ind.) 379; *Clearwater* v. *Rose,* 1 Blackf. (Ind.) 137; *Green* v. *Marble,* 37 Iowa, 95; *Pease* v. *Warren,* 29 Mich. 9, 18 Am. Rep. 58; *Denton* v. *Cole,* 30 N. J. Eq. (3 Stew.) 244; *Andrews* v. *McDaniel,* 68 N. C. 385.

[75] *Galway* v. *Fullerton,* 17 N. J. Eq. (2 C. E. Gr.) 390. See *post,* §§ 107, 110.

[76] *Denby* v. *Mellgrew,* 58 Ala. 147.

[77] *Smith* v. *Kelly,* 27 Me. 237, 46 Am. Dec. 595; *Prescott* v. *Ellingwood,* 23 Me. 345; *Adams* v. *Parker,* 78 Mass. (12 Gray) 53.

[78] *Johnson* v. *Leonards,* 68 Me. 237; *Dixfield* v. *Newton,* 41 Me. 221; *Dorkay* v. *Noble,* 8 Me. (8 Greenl.) 278; *Carll* v. *Butman,* 7 Me. (7 Greenl.) 102; Bullard v. *Hinckley,* 5 Me. (5 Greenl.) 272; *Stewart* v. *Thompson,* 3 Vt. 255.

The assignee of one of several notes or bonds secured by a mortgage, may foreclose the mortgage in his own name,[79] for the reason that by the assignment of the note he acquires an equitable interest in the mortgage, and *pro tanto* becomes an assignee of the mortgage.[80] In some states the courts hold that the assignee of a note acquires only a *pro rata* [81] interest in the mortgage security, unless the contract of assignment otherwise provides.[82] But all courts are agreed that the assignee obtains such an interest in the mortgage that he can maintain a foreclosure and sale for the recovery of his part of the debt.

§ 94. When assignor and assignee should or should not both be parties.—It is not necessary for the assignee to join his assignor with him as co-plaintiff, as the assignor no longer has any interest in the bond and mortgage.[83] This is also true where it is the assignor's intention simply to authorize the assignee to collect for his benefit the moneys secured by the mortgage.[84] Neither is it necessary to make the assignor, under either of such circumstances, a party defendant to the action;[85] but if an answer is pleaded, setting up a defense growing out of the bond and mortgage while in the hands of the assignor, the assignee, as plaintiff, may give notice of the action to his assignor, and offer to him

[79] *Gower* v. *Howe,* 20 Ind. 396; *Hough* v. *Osborne,* 7 Ind. 140; *Stanley* v. *Beatty,* 4 Ind. 134; *Johnson* v. *Candage,* 31 Me. 28; *Swartz* v. *Leist,* 13 Ohio St. 419. See *post,* §§ 101, 102, 103, and notes.

[80] *Grattan* v. *Wiggins,* 23 Cal. 16; *Andrews* v. *Fiske,* 101 Mass. 422; *Brown* v. *Delaney,* 22 Minn. 349; *Chappell* v. *Allen,* 38 Mo. 213; *Anderson* v. *Baumgartner,* 27 Mo. 80; *Page* v. *Pierce,* 26 N. H. (6 Fost.) 317; *Furbush* v. *Goodwin,* 25 N. H. (5 Fost.) 425. See *post,* §§ 101, 102, 103.

[81] *Smith* v. *Day,* 23 Vt. 662; *Belding* v. *Manley,* 21 Vt. 550; *Keyes* v. *Wood,* 21 Vt. 331; *Wright* v. *Parker,* 2 Aik. (Vt.) 212.

[82] *Langdon* v. *Keith,* 9 Vt. 299; *Wright* v. *Parker,* 2 Aik. (Vt.) 212. See *post,* §§ 101, 102, 103.

[83] See *Thulin* v. *Anderson,* as *adm'r, etc.* 154 Ill. App. 41.

[84] *Christie* v. *Herrick,* 1 Barb. Ch. (N. Y.) 254.

[85] *Thayer* v. *Campbell,* 9 Mo. 277. See *post,* § 198. *McNamara* v. Clark, 85 Ill. App. 439.

the conduct of the defence; upon his giving such notice the assignor will be bound by the judgment in the action, whether he undertakes the defence or not.[86]

After an absolute assignment, the suit cannot ordinarily be prosecuted by the assignee in the name of the mortgagee, for, as has been stated, it is a cardinal principle of foreclosures that they must be brought in the name of the real party in interest.[87] An allegation in the pleading that the suit is for the benefit of the assignee will not vary the rule;[88] and where an assignment authorized the assignee "to foreclose or release the mortgage at pleasure," the mortgagee was considered such a necessary party to a foreclosure that the title offered at the sale would be defective without him.[89] Where foreclosure is conducted by the process of *scire facias,* it cannot be in the name of the assignee, but must always be in the name of the original mortgagee.[90]

It may be remarked here that the assignee of a bond and mortgage takes it subject to the equities between the original parties, and to the equities which third persons could enforce against the assignor.[91] The assignee can generally acquire no

[86] *Andrews* v. *Gillespie,* 47 N. Y. 487.

[87] *Graham* v. *Newman,* 21 Ala. 497; *Irish* v. *Sharp,* 89 Ill. 261; *Winkelman* v. *Kiser,* 27 Ill. 21; *Pryor* v. *Wood,* 31 Pa. St. 142. For cases holding that the suit may be maintained in the name of the mortgagee, see *Holmes* v. *French,* 70 Me. 341; *Hurd* v. *Coleman,* 42 Me. 182; also *Gable* v. *Scarlett,* 56 Md. 169, indicating that the rule is fixed by statute. In *Calhoun* v. *Tullass,* 35 Ga. 119, an assignee was allowed to foreclose in the name of the mortgagee, and against his will, on giving him an indemnifying undertaking against costs and damages. See *ante,* §§ 90, 91, and notes.

[88] *Prior* v. *Wood,* 31 Pa. St. 142, distinguished in *Partridge* v. *Partridge,* 38 Pa. St. 78, where the assignment was defective and the assignor foreclosed for the benefit of the assignee. See *Clow* v. *Derby Coal Co.* 98 Pa. St. 432, which seems contrary in practice to the other Pennsylvania cases cited. See *ante,* §§ 90, 91.

[89] *Wright* v. *Sperry,* 21 Wis. 331.

[90] *Bourland* v. *Kipp,* 55 Ill. 376; *Camp* v. *Small,* 44 Ill. 37; *Olds* v. *Cummings,* 31 Ill. 188.

[91] *Greene* v. *Warnick,* 64 N. Y. 220, reversing 4 Hun (N. Y.) 703; *Trustees of Union College* v. *Wheeler,* 61 N. Y. 88, 99, 104 (opinion *per* Theodore W. Dwight, C., collating and reviewing the authorities at length); affirming 5 Lans.

better title than his assignor possessed;[92] but the rule is limited where the mortgage is given to secure a negotiable note.[93] For these reasons it is often prudent to make the assignor a party defendant.[94] The assignee also takes, and may enforce, all the collateral securities which his assignor holds.[95]

It has been held that a mortgagee who has guaranteed the payment of the bond secured by the mortgage to a purchaser of the bond, and who afterwards, on account of his guarantee, takes up some of the overdue coupons attached to and evidencing the interest to be paid on such bond, is entitled to foreclose the mortgage for such past due coupons; and the owner of the bond and mortgage is not a necessary party to such action.[96] In a case where the plaintiff and defendant bought land, each to pay one half, and the plaintiff paid his half, and joined with the defendant in a mortgage to the grantor for the balance of the amount due by the defendant; and subse-

(N. Y.) 160, 59 Barb. (N. Y.) 585. *Schafer* v. *Reilly,* 50 N. Y. 61; *Ingraham* v. *Disborough,* 47 N. Y. 421. See *Crane* v. *Turner,* 67 N. Y. 437, and *Davis* v. *Bechstein,* 69 N. Y. 440, 442, 25 Am. Rep. 218, *per* Church, Ch. J.

[92] *Kamena* v. *Huelbig,* 23 N. J. Eq. (8 C. E. Gr.) 78; *Rose* v. *Kimball,* 16 N. J. Eq. (1 C. E. Gr.) 185; *Woodruff* v. *Depue,* 14 N. J. Eq. (1 McCart.) 168. This proposition was questioned as to a *bona fide* purchaser for a valuable consideration by Comstock, J., in *McLallen* v. *Jones,* 20 N. Y. 162. See *Bush* v. *Lathrop,* 22 N. Y. 535, 537, 550, *per* Denio, J., who examined and repudiated the supposed distinction between "latent" equities, so called, and those existing between the original parties to the instrument; but this case was overruled in *Moore* v. *Metropolitan Nat. Bank,* 55 N. Y. 41, 49, 14 Am. Rep. 173, opinion per Grover, J.; Allen, J., dissented. See also the later cases cited above. *Lee* v. *Kirkpatrick,* 14 N. J. Eq. (1 McCart.) 264. In *Mott* v. *Clark,* 9 Pa. St. 399, 49 Am. Dec. 566, it was held that the assignee did not take subject to the latent equities of third persons. See *Atwater* v. *Underhill,* 22 N. J. Eq. (7 C. E. Gr.) 599.

[93] *Carpenter* v. *Longan,* 83 U. S. (16 Wall.) 271, 21 L. ed. 313.

[94] See *post,* § 198 *et seq.*

Where an assignee of a mortgage has only the equitable title, the assignor who holds the legal title is a necessary party defendant. *Langley* v. *Andrews, as adm'r, etc.* 132 Ala. 147, 31 So. 469.

[95] *Philips* v. *Bank of Lewistown,* 18 Pa. St. 394.

[96] *Burnett* v. *Hoffman,* 40 Neb. 569, 58 N. W. 1134.

quently the plaintiff paid the debt, and the mortgage and note uncanceled and not assigned were delivered to him; the court held that the plaintiff could not maintain a bill in equity against the defendant, to which the mortgagee was not a party, praying subrogation and foreclosure.[97]

§ 95. Joint mortgagees; any one or more may foreclose.—Where a bond and mortgage have been executed or assigned to two or more persons jointly, or are held by them in any way jointly, they may unite as co-plaintiffs in a foreclosure; or any one or more of them may maintain the action without joining the others as co-plaintiffs.[98] A joint foreclosure has been allowed where the mortgage was joint in form, but given to secure different debts in severalty.[99] It is quite well settled that in such cases all the parties interested in the mortgage must be brought before the court as plaintiffs or defendants;[1] so, in an action to redeem, all the mortgagees are necessary parties.[2] Where a note and mortgage had been executed by thirteen persons to three of their number, the three were allowed to foreclose against the other ten for ten-thirteenths of the debt.[3] But before any person who is jointly interested with others in a mortgage debt can be made a defendant, he must be requested to unite as a co-plaintiff.[4]

In a case where there are several notes or bonds secured by a mortgage made directly to the holders of such notes or

[97] *Lynn* v. *Richardson,* 78 Me. 367, 5 Atl. 877.

[98] *Paton* v. *Murray,* 6 Paige Ch. (N. Y.) 474; *Sanford* v. *Bulkley,* 30 Conn. 344; *Baker* v. *Shephard,* 30 Ga. 706; *Hopkins* v. *Ward,* 12 B. Mon. (Ky.) 185; *Gleises* v. *Maignan,* 3 La. 530, 23 Am. Dec. 466; *Brown* v. *Bates,* 55 Me. 520, 92 Am. Dec. 613.

[99] *Shirkey* v. *Hanna,* 3 Blackf. (Ind.) 403, 26 Am. Dec. 426.

[1] *Hopkins* v. *Ward,* 12 B. Mon. (Ky.) 185; seemingly contra, *Platt* v. *Squire,* 53 Mass. (12 Metc.) 494, 501, holding that where one joint mortgagee begins a foreclosure, it is not necessary to bring the others into the action. See *ante,* § 87.

[2] *Woodward* v. *Wood,* 19 Ala. 213.

[3] *McDowell* v. *Jacobs,* 10 Cal. 387.

[4] See *ante,* § 89; N. Y. Code Civ. Proc. § 448.

bonds, all the holders should be made parties to the foreclosure of the mortgage;[5] but where the mortgage is given to a trustee for the benefit of the holders, such holders need not be made parties to the suit to foreclose.[6] Is the latter case, where the trustee is dead, one or more of the holders of the notes or bonds may file a bill on behalf of himself or themselves and all others secured by the mortgage for the foreclosure thereof.[7]

§ 96. Same rule—Joint mortgagees in representative capacity.—The same rules hold true when the joint mortgagees hold the mortgage in a representative or official capacity. A mortgagee, by his will, appointed his mortgagor and another person his executors; the second executor was entitled to foreclose against his co-executor, the mortgagor, making him a defendant individually and as executor, upon the principle that one co-executor may maintain an action in equity against another co-executor to compel the payment of a debt owing by him to the estate.[8] A mortgagee may also foreclose, though he has with others been made an assignee of the mortgagor for the benefit of creditors.[9] And the fact that a person owns an undivided part of certain premises, and at the same time holds a mortgage on another undivided part, will not prevent his foreclosing.[10]

§ 97. Partners; any one or more may foreclose.—Partners may unite in the foreclosure of a mortgage held by them as a part of their joint capital, or any one of them

[5] *Nashville & D. R. Co.* v. *Orr,* 85 U. S. (18 Wall.) 471, 21 L. ed. 810. See *Willingham & Cone* v. *Huguenin,* 129 Ga. 835, 60 S. E. 186.

[6] *Shaw* v. *Little Rock & Ft. S. R. Co.* 100 U. S. 605, 25 L. ed. 757; *Vose* v. *Bronson,* 73 U. S. (6 Wall.) 452, 18 L. ed. 846.

[7] *Galveston H. & H. R. Co.* v. *Cowdrey,* 78 U. S. (11 Wall.) 459, 20 L. ed. 199. See *post,* § 132.

[8] *McGregor* v. *McGregor,* 35 N. Y. 218; *Lawrence* v. *Lawrence,* 3 Barb. Ch. (N. Y.) 71.

[9] *Paton* v. *Murray,* 6 Paige Ch. (N. Y.) 474.

[10] *Baker* v. *Shephard,* 30 Ga. 706; *Gleises* v. *Maignan,* 3 La. 530, 23 Am. Dec. 466.

may bring the action as sole plaintiff. If any of the partners refuse to join as co-plaintiffs, the courts generally require them to be brought in as defendants; but it must appear in the pleadings, and be a fact, that the co-partners have refused to become co-plaintiffs, before they can be made defendants to the action.[11] Even where a mortgage was executed to one member of a co-partnership to secure a partnership debt, all the partners were deemed necessary parties to an action for foreclosure.[12] It would seem, however, that if a mortgage is held by one of the partners as a trustee for the partnership, he can foreclose without in any way bringing the other partners into the action.[13] In case of the death of a partner pending foreclosure, a bill of revivor against his personal representatives is unnecessary, the survivors taking the entire legal title to the bond and mortgage under the doctrine of survivorship in joint tenancy.[14]

§ 98. **Joint mortgagees, one dying; doctrine of survivorship.**—It seems quite well established that the doctrine of joint tenancy and survivorship, as applied to the tenure of lands, is also applicable to the joint ownership of choses in action, including mortgages. In People v. Keyser,[15] Selden, J., says: "There was never any doubt that the entire legal interest remained in the survivor. The only doubt was, whether the survivor did not take the whole interest, legal and equitable, according to the rule of survivorship applied to a joint tenancy in lands; but it was finally held, the case of Petty v. Styward,[16] being the leading case, that, although the entire legal interest vested in the survivor, he was to be re-

[11] N. Y. Code Civ. Proc. § 448; *Jewell* v. *West Orange,* 36 N. J. Eq. (9 Stew.) 403.

[12] *DeGreiff* v. *Wilson,* 30 N. J. Eq. (3 Stew.) 435; *Noyes* v. *Sawyer,* 3 Vt. 160.

[13] *Shelden* v. *Bennett,* 44 Mich. 634.

[14] *Roberts* v. *Stigleman,* 78 Ill. 120. See post, § 98. *Younts* v. *Starnes,* 42 S. C. 22, 19 S. E. 1011.

[15] 28 N. Y. 226, 236, 84 Am. Dec. 338, citing 1 Chitty on Pleading, 19, 20; 2 Fonbl. Eq. 103, and notes; Rolls v. Yate, Yelv. 177, note 1.

[16] 1 Eq. Cas. Abr. 290.

garded in equity as a trustee for the personal representatives of deceased parties for their equal shares." It is also well settled that upon the death of a partner, the surviving partners take the legal title to the property of the partnership for the purpose of settling its affairs.

The courts have accordingly deduced the rule that upon the death of one of a number of joint owners of a mortgage, the surviving owners can foreclose it without bringing the personal represestatives or heirs of the deceased joint mortgagee into the action.[17] It has been explicitly held, that "a suit upon a mortgage to obtain a foreclosure, may be brought and maintained by the surviving mortgagee." [18] Where a mortgage had been executed to a husband and wife, she was allowed to foreclose upon his death, without bringing his personal representatives into the action.[19] There can be no harm, however, in making the personal representatives of a deceased joint mortgagee parties defendant to the action, for, if a contest as to the ownership of the mortgage should arise, they would then be concluded by the decree of foreclosure;[20] furthermore, they have an equitable interest in the proceeds of the foreclosure, a portion of which must ultimately come into their hands for distribution.

§ 99. **When personal representatives of deceased joint mortgagee necessary parties.**—In New Jersey the per-

[17] *Erwin* v. *Ferguson,* 5 Ala. 158; *Milroy* v. *Stockwell,* 1 Ind. 35; *Lannay* v. *Wilson,* 30 Md. 536; *Blake* v. *Sanborn,* 74 Mass. (8 Gray) 154; *Martin* v. *McReynolds,* 6 Mich. 70; *McAllister* v. *Plant,* 54 Miss. 106; *Hansell* v. *Gregg,* 7 Tex. 225. See *post,* §§ 120, 122. Contra, *Fisher on Mortgages,* § 361; *Vickers* v. *Cowell,* 1 Beav. 529; *Mutual Life Ins. Co.* v. *Sturges,* 32 N. J. Eq. (5 Stew.) 678, 683.

[18] *Williams* v. *Hilton,* 35 Me. 547, 58 Am. Dec. 729. See also *Kinsley* v. *Abbott,* 19 Me. 430, 433, opinion *per* Shipley, J. In *Penn* v. *Butler,* 4 U. S. (4 Dall.) 354, 1 L. ed. 864, the court say that the surviving obligee and mortgagee "was entitled to the possession of the joint securities, and that he might recover their amount."

[19] *Lannay* v. *Wilson,* 30 Md. 536; *McMillan* v. *Mason,* 5 Coldw. (Tenn.) 263, 98 Am. Dec. 401.

[20] *Freeman* v. *Scofield,* 16 N. J. Eq. (1 C. E. Gr.) 28.

sonal representatives of a deceased joint mortgagee are considered indispensable parties to a foreclosure by the survivors;[21] they may be united as co-plaintiffs or made defendants.[22] And where a personal representative commences the action, the joint survivors are necessary parties. Thus, where a mortgage had been executed to a husband and wife, and after the husband's death foreclosure was brought by the assignee of his administrator, the widow was held erroneously omitted.[23] The rules of this section apply also to the joint assignees of a mortgage; and, indeed, to joint owners generally, whatever may have been the source of their title to the mortgage.[24]

§ 100. Mortgagees, owners in severalty; any one or more may foreclose.—Any one or more of a number of owners of a mortgage, each of whom holds a specific interest therein in severalty, may bring an action to foreclose the mortgage, making defendants such other owners as do not consent to become co-plaintiffs;[25] likewise all the owners may unite as co-plaintiffs.[26] Where a mortgage is owned in severalty, it is indispensable that all the interests be represented in an action to foreclose.[27] And even though debts in severalty be secured by a joint mortgage, any creditor may maintain a foreclosure, as in the case of a several mortgage, but the other creditors are absolutely necessary parties as co-plaintiffs or de-

[21] *Mutual Life Ins. Co.* v. *Sturges,* 32 N. J. Eq. (5 Stew.) 678, 683, explaining the reason for the rule, and following Freeman v. Schofield, 16 N. J. Eq. (1 C. E. Gr.) 28.

[22] *Freeman* v. *Scofield,* 16 N. J. Eq. (1 C. E. Gr.) 28.

[23] *Savings Bank* v. *Freese,* 26 N. J. Eq. (11 C. E. Gr.) 453.

[24] *Martin* v. *McReynolds,* 6 Mich. 70.

[25] *Porter* v. *Clements,* 3 Ark. 364, 380, where the question of parity of interest in the action is considered at length; *Brown* v. *Bates,* 55 Me. 520, 92 Am. Dec. 613.

[26] *Stevenson* v. *Mathers,* 67 Ill. 123, where the action was to foreclose a land contract.

[27] *Nashville & D. R. R. Co.* v. *Orr,* 85 U. S. (18 Wall.) 471, 21 L. ed. 810.

fendants;[28] a joint bill for foreclosure is also allowable.[29] Upon the death of any of the owners in severalty, his personal representatives must be brought before the court.[30] The decree for foreclosure should be for the payment to the several owners of the sums respectively due to each.[31] Where mortgagees hold separate, but contemporaneous and equal mortgages, they may unite as co-plaintiffs, or any one may foreclose, making the others defendants, as though there was but one mortgage in which they held their interests in severalty.[32]

§ 101. Owner of one of several notes secured by a mortgage may foreclose.—In most of the Western and in some of the Eastern states, notes with interest coupons, instead of a bond, are given as the instrument of indebtedness. In order to facilitate their negotiability as investments, a number of notes are often given instead of one. In these states numerous decisions[33] have been rendered, fixing the legal status of such notes, and the remedies and procedure of owners for their collection. As the general result it may be stated that an action *at law* may be maintained by the holder of any note as upon an ordinary promissory note. Or, the holder of any

[28] See *Tyler* v. *Yreka Water Co.* 14 Cal. 212; *Ætna Life Ins. Co.* v. *Finch*, 84 Ind. 301; *Moffitt* v. *Roche*, 76 Ind. 75; *Howe* v. *Dibble*, 45 Ind. 120. See *ante*, § 95.

[29] *Shirkey* v. *Hanna*, 3 Blackf. Ind. 403, 26 Am. Dec. 426.

[30] *Burnett* v. *Pratt*, 39 Mass. (29 Pick.) 556; *Vickers* v. *Cowell*, 1 Beav. 529; Fisher, on Mortgages, §§ 349, 361.

[31] *Higgs* v. *Hanson*, 13 Nev. 356.

[32] *Cochran* v. *Goodell*, 131 Mass. 464. See *post*, §§ 116, 204.

[33] *Hartwell* v. *Blocker*, 6 Ala. 581; *Wilson* v. *Hayward*, 2 Fla. 27; *Myers* v. *Wright*, 33 Ill. 284; *Pogue* v. *Clark*, 25 Ill. 351; *Ross* v. *Utter*, 15 Ill. 402; *Goodall* v. *Mopley*, 45 Ind. 355; *Merritt* v. *Wells*, 18 Ind. 171; *Stanley* v. *Beatty*, 4 Ind. 134; *Barrett* v. *Blackmar*, 47 Iowa, 569; *Lyster* v. *Brewer*, 13 Iowa, 461; *Sangster* v. *Love*, 11 Iowa, 580; *Rankin* v. *Major*, 9 Iowa, 297; *Swenson* v. *Moline Plow Co.* 14 Kan. 387; *Jenkins* v. *Smith*, 4 Met. (Ky.) 380; *Bell* v. *Shrock*, 2 B. Mon. (Ky.) 29; *Jordon* v. *Cheney*, 74 Me. 359; *Moore* v. *Ware*, 38 Me. 496; *Johnson* v. *Candage*, 31 Me. 28; *Haynes* v. *Wellington*, 25 Me. 458; *Johnson* v. *Brown*, 31 N. H. 405; *Wiley* v. *Pinson*, 23 Tex. 486; *Pettibone* v. *Edwards*, 15 Wis. 95.

one of a number of the notes may proceed in the first instance by a suit in equity, as in an ordinary foreclosure; but he must bring all the other mortgagees and holders of notes secured by the mortgage into court, before a decree can be made.[34] It is peculiar that two holders of notes cannot join as plaintiffs; each one holds an interest in the mortgage *pro tanto* for his own note. But where one person holds two or more notes, he may foreclose them in the same action;[35] in New Hampshire on the other hand, foreclosure by a writ of entry cannot be maintianed unless all the holders of notes unite as plaintiffs,[36] and then, it would seem, only after all the notes have become due.[37]

§ 102. All owners of notes necessary parties—Payable in order of maturity.—All holders of notes must be brought into the action,[38] so that the amounts and priorities

[34] *King* v. *Merchants' Exchange Co.* 5 N. Y. 547, 556; *Pugh* v. *Holt*, 27 Miss. 461; *Archer* v. *Jones*, 26 Miss. 583. See also the cases cited in the first note to the section. *Willingham & Cone* v. *Huguenin*, 129 Ga. 835, 60 S. E. 186.

In *Van Benthuysen* v. *Central N. E. & W. R. Co.* 17 N. Y. Supp. 709, the court say, that a holder of railroad bonds secured by mortgage may maintain an action to foreclose the mortgage upon default in payment of interest, where the trustees have, upon request, refused so to do. See also: *General Electric Co.* v. *La Grande Edison Electric Co.* 87 Fed. 590, 31 C. C. A. 118. It is thought, however, that a single bondholder has no right to a decree for his exclusive benefit on the foreclosure of a mortgage, but is bound to act for all standing in a similar position, and not only to permit other bondholders to intervene, but also to see that their rights are protected in the final decree. *New Orleans P. R. Co.* v. *Parker*, 143 U. S. 42, 36 L. ed. 66, 12 Sup. Ct. 364.

[35] *Myers* v. *Wright*, 33 Ill. 284. See *ante*, § 100.

[36] *Noyes* v. *Barnet*, 57 N. H. 605.

[37] *Hunt* v. *Stiles*, 10 N. H. 466.

[38] *Myers* v. *Wright*, 33 Ill. 284. See §§ 84 and 86, and cases cited. In *Thayer* v. *Campbell*, 9 Mo. 277, it was held that the holders of other notes were not necessary parties to the action, but that they might come in on their own motion. But see the later cases of *Mitchell* v. *Ladew*, 36 Mo. 526, 88 Am. Dec. 156, approved and followed in *Hurck* v. *Erskine*, 45 Mo. 484; *Thompson* v. *Field*, 38 Mo. 320; *Mason* v. *Barnard*, 36 Mo. 384. See *Guthrie* v. *Treat*, 66 Neb. 415, 92 N. W. 595, 103 Am. St. Rep. 718.

of their several claims may be determined, for it is another peculiarity of these notes in some states, that they are entitled to payment in the order in which they fall due, and their respective priorities as liens on the mortgaged premises follow the same order. This rule obtains in Alabama,[39] Florida,[40] Illinois,[41] Indiana,[42] Iowa,[43] Kansas,[44] Missouri,[45] New Hampshire,[46] Ohio,[47] Virginia, West Virginia and Wisconsin.[48] The principle upon which it proceeds is *potior in tempore, potior in jure.* Justice Walker in Preston v. Hodgen,[49] concisely stated the rule adopted in these states: "The assignment of

[39] *Bank of Mobile* v. *Planters'* and *Merchants' Bank,* 9 Ala. 645; *McVay* v. *Bloodgood,* 9 Port. (Ala.) 547, explained in *Cullum* v. *Erwin,* 4 Ala. 452.

[40] *Cotton* v. *Blocker,* 6 Fla. 1.

[41] *Humphreys* v. *Morton,* 100 Ill. 592; *Koester* v. *Burke,* 81 Ill. 436; *Herrington* v. *McCollum,* 73 Ill. 476; *Flower* v. *Elwood,* 66 Ill. 438; *Preston* v. *Hodgen,* 50 Ill. 56; *Funk* v. *McReynolds,* 33 Ill. 481.

[42] *Gerber* v. *Sharp,* 72 Ind. 553; *Doss* v. *Ditmars,* 70 Ind. 451; *Evansville People's Sav. Bank* v. *Finney,* 63 Ind. 460; *Sample* v. *Rowe,* 24 Ind. 208; *Murdock* v. *Ford,* 17 Ind. 52; *Hough* v. *Osborne,* 7 Ind. 140, followed in *Harris* v. *Harlan,* 14 Ind. 439; *Stanley* v. *Beatty,* 4 Ind. 134; *State Bank* v. *Tweedy,* 8 Blackf. (Ind.) 447, 46 Am. Dec. 486.

[43] *Walker* v. *Schreiber,* 47 Iowa, 529, and the cases cited in the preceding section.

[44] *Richardson* v. *McKim,* 20 Kan. 346.

[45] *Hurck* v. *Erskine,* 45 Mo. 484; *Thompson* v. *Field,* 38 Mo. 320; *Mitchell* v. *Ladew,* 36 Mo. 526, 88 Am. Dec. 156; *Mason* v. *Barnard,* 36 Mo. 384.

[46] *Noyes* v. *Barnet,* 57 N. H. 605; *Johnson* v. *Brown,* 31 N. H. 405; *Hunt* v. *Stiles,* 10 N. H. 466.

[47] *Winters* v. *Bank,* 33 Ohio St. 250; *Bushfield* v. *Meyer,* 10 Ohio St. 334; *Bank of United States* v. *Covert,* 13 Ohio, 240.

[48] *Pierce* v. *Shaw,* 51 Wis. 316; *Marine Bank* v. *International Bank,* 9 Wis. 57; *Wood* v. *Trask,* 7 Wis. 566, 76 Am. Dec. 230.

[49] 50 Ill. 56, 59; *Gerber* v. *Sharp,* 72 Ind. 553, and cases cited; *Murdock* v. *Ford,* 17 Ind. 52. See also *Smith* v. *Stevens,* 49 Conn. 181. In *Sargent* v. *Howe,* 21 Ill. 148, A. executed three notes to B. and conveyed property in trust to C. to secure their payment; B. assigned two of the notes to D. It was held that the assignment carried the security with it as an incident to the debt, and that D., by an equity action, could compel the trustee to sell enough of the property to pay his notes. The assignment in such cases is *pro tanto,* not *pro rata;* the notes must be paid in the order in which they mature, as they have priority as liens in that order. See *Vansant* v. *Allmon,* 23 Ill. 30, 34.

each note operates as an assignment *pro tanto* of the mortgage, and by each assignment it, in effect, becomes so many seperate mortgages to secure the several notes in the order of their maturity." But where all the notes mature at the same time, they are equal liens;[50] and if, by the terms of the notes and mortgage, default in the payment of the first note or of the interest, when due, renders all the notes due and payable, they become equal liens upon default, and are payable *pro rata* instead of *pro tanto* from the proceeds of a sale.[51]

§ 103. Notes payable pro rata in New York and some other states.—But in New York,[52] New Jersey,[53] Pennsylvania,[54] Minnesota,[55] Michigan,[56] Mississippi,[57] Kentucky,[58] and Vermont [59] the rule has been adopted that bonds and notes,

[50] *Humphreys* v. *Morton,* 100 Ill. 592.

[51] *Grattan* v. *Wiggins,* 23 Cal. 16; *Phelan* v. *Olney,* 6 Cal. 478; *Winters* v. *Bank,* 33 Ohio St. 250; *Bushfield* v. *Mayer,* 10 Ohio St. 334, supported in point by *Bank of United States* v. *Covert,* 13 Ohio, 240; *Pierce* v. *Shaw,* 51 Wis. 316. Contra, holding that the notes must be paid in the order of their maturity, *Hurck* v. *Erskine,* 45 Mo. 484; *Mason* v. *Barnard,* 36 Mo. 384.

[52] *Granger* v. *Crouch,* 86 N. Y. 494, 499; *Bridenbecker* v. *Lowell,* 32 Barb. (N. Y.) 9.

[53] *Collerd* v. *Huson,* 34 N. J. Eq. (7 Stew.) 38. See the note to the case, giving a full collation of authorities.

[54] Perry's Appeal, 22 Pa. St. 43, 60 Am. Dec. 63, where four bonds and mortgages, simultaneous in execution and record, but due in successive years, were held to be equal liens and to share *pro rata; cases collated.* The rule was also applied where all the bonds matured at the same time. Hodge's Appeal, 84 Pa. St. 359.

[55] *Wilson* v. *Eigenbrodt,* 30 Minn. 4. See the able and ingenious opinion of Mitchell, J., holding this to be the rule for Minnesota unless a contract to a different effect is expressed in the mortgage.

[56] *Wilcox* v. *Allen,* 36 Mich. 160; *McCurdy* v. *Clark,* 27 Mich. 445.

[57] *Trustees Jefferson College* v. *Prentiss,* 29 Miss. 46; *Bank of England* v. *Tarleton,* 23 Miss. 173; *Henderson* v. *Herrod,* 18 Miss. (10 Smed. & M.) 631; *Dick* v. *Mawry,* 17 Miss. (9 Smed. & M.) 448; *Terry* v. *Woods,* 14 Miss. (6 Smed. & M.) 139, 45 Am. Dec. 274; *Cage* v. *Iler,* 13 Miss. (5 Smed. & M.) 410, 43 Am. Dec. 521; *Parker* v. *Mercer,* 7 Miss. (6 How.) 320, 38 Am. Dec. 438.

[58] *Campbell* v. *Johnston,* 4 Dana (Ky.) 182.

[59] *Belding* v. *Manly,* 21 Vt. 550; *Keyes* v. *Wood,* 21 Vt. 331; *Wright* v. *Parker,* 2 Aik. (Vt.) 212.

maturing at different times and secured by a single mortgage, are equal and concurrent liens and entitled to the security *pro rata*.[60] Whichever rule is adopted, all holders of notes and bonds are indispensable parties to a foreclosure of the mortgage, in order to produce a perfect title at the sale. It may be observed here that questions affecting the rights of holders of bonds given with railroad mortgages are not within the scope of this work, and the reader is referred to text-books treating specially of railway securities and kindred subjects.[61]

§ 104. Owner of mortgage, having pledged the same as collateral security, may foreclose.—Where the owner of a mortgage has pledged it as collateral security for a debt of less amount than the mortgage, he still has such an interest in it as entitles him to bring an action for the foreclosure of the mortgage.[62]

§ 105. Pledgee necessary party—Mortgage collaterally assigned.—But in such an action the pledgee is a necessary party,[63] and may be made a co-plaintiff,[64] or a defendant;

[60] See *post*, § 116.

[61] Jones on Railway Securities.

[62] Vice-chancellor McCoun, held, in *Norton* v. *Warner*, 3 Edw. Ch. (N. Y.) 106, that "the complainant had not divested himself of all interest in or control over the mortgage. The assignment is but a partial one, made to secure to the pledgee the payment of a loan, being less than the amount due on the mortgage. In equity, he is still the owner, subject only to the lien or pledge for the loan. The pledgee might have filed a bill of foreclosure against the original mortgagor and all parties in interest, and in that case the pledgee would have been deemed a trustee for the mortgagee, for the whole mortgage debt after satisfying his claim; and upon the pledgee's refusal to proceed—and which the bill alleges—I see no good reason why the complainant might not proceed, as he has done, to foreclose." *Simson* v. *Satterlee*, 64 N. Y. 657, affirming 6 Hun (N. Y.) 305. In point *Sinking Fund Com'rs* v. *Northern Bank*, 1 Metc. (Ky.) 174; *McKinney* v. *Miller*, 19 Mich. 142; *George* v. *Woodward*, 40 Vt. 672; *Brunette* v. *Schettler*, 21 Wis. 188. See *post*, §§ 106, 201, 202.

[63] *Plowman* v. *Riddle*, 14 Ala. 169, 48 Am. Dec. 92. See *post*, 201, 202.

[64] *Hoyt* v. *Martense*, 16 N. Y. 231.

neither the mortgagor, nor any person other than the assignee himself, can object that he is made a defendant.[65] And if the assignee, or pledgee, refuses to become a co-plaintiff upon the request of the mortgagee, he can not himself object that he is made a defendant to the action;[66] it should be alleged in the complaint, however, that he has refused to join as a co-plaintiff. If an objection is made at all it must be by demurrer or answer, or the alleged defect will be considered waived at the trial.[67] The rule of this section is in accordance with the general principle that all parties interested in the mortgage debt must be before the court, or the decree of foreclosure will not extinguish their interests. Equity courts are not particular as to how parties come before them, so long as all persons interested in the subject-matter of the action are brought within their jurisdiction, so that a complete determination can be made of the rights of all the parties interested. It is indispensable that the pledgee, and all others interested in the mortgage as a collateral security, be made parties to the action.[68] The decree should provide first for the payment to the pledgee of the amount due him, and then for the payment to the mortgagee of the balance.[69]

It is also proper for the mortgagee and the pledgee to join as co-plaintiffs in the action to foreclose, as they are together the owners of the entire bond and mortgage. Neither the mortgagor nor other parties to the action can object to such joinder of plaintiffs, as all parties interested in the mortgage

[65] *Simson* v. *Satterlee*, 64 N. Y. 657, affirming 6 Hun (N. Y.) 305.

[66] *Norton* v. *Warner*, 3 Edw. Ch. (N. Y.) 106 N. Y. Code Civ. Proc. § 448. See *ante*, § 89.

[67] *Carpenter* v. *O'Dougherty*, 67 Barb. (N. Y.) 397, 2 T. & C. (N. Y.) 427, aff'd 58 N. Y. 681. See *O'Dougherty* v. *Remington Paper Co.* 81 N. Y. 496; *Remington Paper Company* v. *O'Dougherty*, 81 N. Y. 474.

[68] *Kittle* v. *VanDyck*, 1 Sandf. Ch. (N. Y.) 76; *Woodruff* v. *Depue*, 14 N. J. Eq. (1 McCart.) 168, 176; *Miller* v. *Henderson*, 10 N. J. Eq. (2 Stockt.) 320. See *post*, §§ 201, 202.

[69] *Overall* v. *Ellis*, 32 Mo. 322; *Brunette* v. *Schettler*, 21 Wis. 188.

debt are thereby brought before the court, so that its decree will become binding and conclusive upon them.[70]

§ 106. Assignee of mortgage as collateral security may foreclose.—In the foregoing section it has been seen that though a mortgagee has pledged his mortgage as a collateral security, he may nevertheless maintain an action to foreclose it; also, that the mortgagee and the pledgee may unite as co-plaintiffs in foreclosing. It has now become well settled, as a further principle, that the pledgee, who holds the mortgage as a collateral security, may also maintain an action for its foreclosure.[71] The pledgee, however, can recover judgment only for the amount of his claim, the payment of which the decree should direct.[72] The amount secured and the interests

[70] *Hoyt* v. *Martense,* 16 N. Y. 231.

[71] *Bard* v. *Poole,* 12 N. Y. 495, 507, *per* Denio, J., stating the reasons for the rule; *Bloomer* v. *Sturges,* 58 N. Y. 168; *Carpenter* v. *O'Dougherty,* 67 Barb. (N. Y.) 397, 2 T. & C. (N. Y.) 427, affirmed in 58 N. Y. 681; *Dalton* v. *Smith,* 86 N. Y. 176; *Bush* v. *Lathrop,* 22 N. Y. 535; *Whitney* v. *M'Kinney,* 7 Johns. Ch. (N. Y.) 144; *Lehman* v. *McQueen,* 65 Ala. 570; *Hunter* v. *Levan,* 11 Cal. 11; *Beers* v. *Hawley,* 3 Conn. 110; *Wilson* v. *Fatout,* 42 Ind. 52; *St. John* v. *Freeman,* 1 Ind. 84. See *Compton* v. *Jones,* 65 Ind. 117, where the debt, for which the bond and mortgage had been assigned as collateral security, had been paid by the assignor, entitling him to a reassignment of the securities, and the assignee unsuccessfully attempted a foreclosure. *Rice* v. *Dillingham,* 73 Me. 59; *Cutts* v. *York Manuf. Co.* 14 Me. 326, 18 Me. 190, *per* Weston, Ch. J., where the assignor was made a defendant; *Brown* v. *Tyler,* 74 Mass. (8 Gray) 135, 69 Am. Dec. 239; *Graydon* v. *Church,* 7 Mich. 36, 50, 68, *per* Christiancy, J., collating and reviewing the authorities, especially in New York; *Selectmen of Natchez* v. *Minor,* 17 Miss. (9 Smed. & M.) 544, 48 Am. Dec. 727; *Paige* v. *Chapman,* 58 N. H. 333; *Chew* v. *Brumagim,* 21 N. J. Eq. (6 C. E. Gr.) 520, 529, *per* VanSyckel, J., a leading case, collating and reviewing the New York cases; reported below in 19 N. J. Eq. 130, and affirmed in *Chew* v. *Brumagen,* 80 U. S. (13 Wall.) 497, 20 L. ed. 663, where the proposition of this section was considered at length; *Wilson* v. *Giddings,* 28 Ohio St. 554.

[72] *Carpenter* v. *O'Dougherty,* 67 Barb. (N. Y.) 397. See the preceding note. *Salmon* v. *Allen,* 11 Hun (N. Y.) 29, a complicated case; McCrum v. Corby, 11 Kan. 464. In *Underhill* v. *Atwater,* 22 N. J. Eq. (7 C. E. Gr.) 16, the assignee became the owner of the entire mortgage pending the foreclosure of his original claim, and a

of all the parties in the mortgage, together with the fact that the assignment is only collateral or conditional, must be specifically stated in the complaint; and it is indispensable that the mortgagee, or owner of the equity of redemption in the mortgage, be made a party to the action in order that his interests also may be foreclosed.[73] It should also appear in the complaint that the mortgagee has refused to become a co-plaintiff with the pledgee; otherwise the complaint will be demurrable. It is believed that a person who holds an assignment of a mortgage to indemnify and protect him against liabilities or obligations of any kind may foreclose as soon as he is damnified.

§ 107. Owner of an equitable interest of any kind in the mortgage may generally foreclose.—According to Mr. Pomeroy, it is a general principle of practice in most of our states that every action must be prosecuted in the name of the real party in interest.[74] Following this universal and equitable principle, the courts have established a rule that whoever holds an equitable or real interest of any kind in a mortgage, may bring an action for its foreclosure;[75] indeed, the rule in such actions is as elastic and liberal as equity jurisprudence could possibly make it. It has become almost axiomatic that an equity court cares little who brings an action, so that he be a real party in interest, nor how it is brought, so long as it acquires complete jurisdiction of all the

supplemental bill was held necessary to cover his new interest in the mortgage. See *Ackerson* v. *Lodi Branch R. R.* 28 N. J. Eq. (1 Stew.) 542; *Van Deventer* v. *Stiger,* 25 N. J. Eq. (10 C. E. Gr.) 224, holding that the decree must be for the amount of the debt and interest only; *Kamena* v. *Huelbig,* 23 N. J. Eq. (8 C. E. Gr.) 78.

[73] See *post,* §§ 201, 202, and cases cited; also *ante,* § 104; Fisher on Mortgages, § 348, and the English cases cited.

[74] Pomeroy's Remedies, § 99. See *ante,* § 89.

[75] *Hill* v. *Meeker,* 23 Conn. 594; *Wooden* v. *Haviland,* 18 Conn. 107. See *Irish* v. *Sharp,* 89 Ill. 261, holding that the action should be brought in the name of the equitable owner of the mortgage, and not in the name of the mortgagee for his use.

parties interested and of the entire subject-matter in issue, so that a complete adjudication can be made upon the whole case. It has been shown that the person who holds the largest interest in the mortgage should commence the action; and it is undoubtedly the best practice to have all parties interested in the mortgage united as plaintiffs, as opposed to all parties interested in the equity of redemption who are best made defendants.[76] But where this is impossible, or parties refuse to join as co-plaintiffs, they can equally well be made defendants, and the decree of the court will be conclusive upon them. It often becomes necessary to make persons who are interested in the mortgage, defendants, as their interests may be antagonistic to the interests of others who also own a part of the mortgage. Furthermore, no one can be made a plaintiff against his will, and a person refusing to become a plaintiff can be brought into an action in no other way than as a defendant.[77]

§ 108. Special cases of equitable interest—Annuitants, legatees, executors.—The cases in which questions have arisen affecting equitable assignments and the conditional and contingent rights of parties in mortgages, are so varied in character that it is almost impossible to induce from them any general rules or principles applicable to the subject of this section.[78] A legatee may foreclose a mortgage upon de-

[76] See *ante*, §§ 104, 106 and notes.

[77] N. Y. Code Civ. Proc. § 448. See *Beebe* v. *Morris*, 56 Ala. 525.

[78] In *Lawrence* v. *Lawrence*, 3 Barb. Ch. (N. Y.) 71, 75, a mortgage had been given by a husband and wife who were executors to their co-executrix to secure the payment of moneys of the estate received by the husband as executor; the wife, after her husband's death, was not allowed to file a bill in her character as executrix against his personal representatives and heirs at law, to foreclose such mortgage, where it did not appear from the bill that she was entitled, in her sole and separate right as a legatee, to a portion of the fund secured by the mortgage. "If in such a case the wife had an interest in the fund, and, the co-executrix to whom the mortgage was given, upon a proper application to her for that purpose, refuses to proceed to foreclose the mortgage, the widow of the mort-

fault where it is bequeathed,—the interest to him and the principal to another,—and the mortgage is to be kept on foot by the terms of the will as a living security for those purposes.[79] So a mortgagee may foreclose a mortgage conditioned for his support and maintenance during life.[80]

§ 109. Special cases of equitable assignment—Purchaser on defective foreclosure—Payment by mistake or fraud.—It may be stated generally that a purchaser at a foreclosure sale becomes an equitable assignee of the mortgage foreclosed, for the purpose of maintaining a second or strict foreclosure to extinguish the liens of junior incumbrancers who were not made parties to the original action, or of perfecting a foreclosure in any way defective;[81] he is entitled to an action *de novo* on the mortgage.[82] But a deed executed by both United States loan commissioners, in pursuance of a sale held by one only, has been held void and not operative

gagee and the other legatees for whose benefit the mortgage was given, may file a bill showing their respective rights in the fund, and claiming to have the benefit of such mortgage and of a foreclosure thereof. But in that case the mortgagee and all the legatees who are interested in the fund, must be made parties to the suit; or the bill must be filed by some of the legatees in behalf of themselves and of all others having an interest in the fund." (The above quotation is abridged from the chancellor's opinion.)

[79] *Hancock* v. *Hancock,* 22 N. Y. 568, *per* Comstock, Ch. J.

[80] *Ferguson* v. *Ferguson,* 2 N. Y. 360.

[81] *Bolles* v. *Duff,* 43 N. Y. 469; *Robinson* v. *Ryan,* 25 N. Y. 320; *Franklyn* v. *Hayward,* 61 How. (N. Y.) Pr. 43; *Stewart* v. *Hutchinson,* 29 How. (N. Y.) Pr. 181; *Taylor* v. *Agricultural & M. Ass.* 68 Ala. 229; *Goodenow* v. *Ewer,* 16 Cal. 461, 76 Am. Dec. 540; *Muir* v. *Berkshire,* 52 Ind. 149; *Shimer* v. *Hammond,* 51 Iowa 401; *Shaw* v. *Heisey,* 48 Iowa, 468; *Johnson* v. *Robertson,* 34 Md. 165; *Wilcoxson* v. *Osburn,* 77 Mo. 621; *Jones* v. *Mack,* 53 Mo. 147; *Bank of Wis.* v. *Abbott,* 20 Wis. 570; *Moore* v. *Cord,* 14 Wis. 213; *Stark* v. *Brown,* 12 Wis. 572, 78 Am. Dec. 762.

[82] *Rogers* v. *Holyoke,* 14 Minn. 220, Gil. 158. In *Robinson* v. *Ryan,* 25 N. Y. 320, the purchaser at a statutory foreclosure sale, defective for want of service of a notice upon the mortgagor, was held to stand as an assignee of the mortgage, and was allowed in this action to foreclose.

as an equitable assignment of the mortgage to the purchaser, so as to give him any rights under it.[83] Where omitted parties or others bring an action to redeem from a foreclosure sale, the purchaser is likewise regarded as an equitable assignee of the mortgage,[84] and a necessary defendant.

A person who advances money for the payment of a mortgage, with the expectation of having another mortgage executed to himself as security, becomes an equitable assignee of the existing mortgage, and upon refusal of the mortgagor to execute a new mortgage, he may maintain an action for the foreclosure of the first one.[85] So also a person who loans money on a mortgage, to be used in part for the payment of a prior mortgage, is equitably subrogated as assignee of the mortgage so paid, and may foreclose it, in case the mortgage executed to him for the loan is declared usurious or void for other reasons.[86] A valid and subsisting obligation is not destroyed because included in a security, or made the subject of a contract, void for usury; although formally satisfied and discharged, it may be revived and enforced in case the new security or contract is invalidated. And where a mortgage, executed to a clerk in chancery, to secure a widow's dower, was subsequently discharged by the clerk without authority of the court, upon the execution to him of a second mortgage for a larger sum, the court decided that if the owners of the fund had not elected to foreclose the second mortgage they might have foreclosed the first one, on the ground that its discharge by the clerk, without authority, was null and void.[87]

[83] *Olmsted* v. *Elder*, 5 N. Y. 144.

[84] *Bolles* v. *Duff*, 43 N. Y. 469; *McSorley* v. *Larissa*, 100 Mass. 270; *Childs* v. *Childs*, 10 Ohio St. 339, 75 Am. Dec. 512.

[85] *Gilbert* v. *Gilbert*, 39 Iowa, 657; *Bank* v. *Campbell*, 2 Rich. (S. C.) Eq. 179.

[86] *Patterson* v. *Birdsall*, 64 N. Y. 294, 298, 21 Am. Rep. 609, affirming 6 Hun (N. Y.) 632. See *Miller* v. *Winchell*, 70 N. Y. 437.

[87] *Farmers' Loan & Trust Co.* v. *Walworth*, 1 N. Y. 433. See *Homeopathic Mut. Life Ins. Co.* v. *Marshall*, 32 N. J. Eq. (5 Stew.) 103.

§ 110. Equitable owner by subrogation may foreclose.—It often occurs that a purchaser of an equity of redemption in mortgaged premises, pays and procures an existing mortgage to be discharged, believing it to be the only incumbrance on the premises. Upon his discovery of liens subsequent to the mortgage discharged, the mortgage may be revived, and he will be held equitable subrogated to all the rights of the mortgagee.[88] A grantor who pays a mortgage which his grantee has assumed, is held subrogated to all the rights of the mortgagee, and in an action to foreclose, may recover a judgment for deficiency against the grantee; and it is questionable whether, where the security is being impaired, he has any remedy to protect himself, except to pay his bond and mortgage and become subrogated to the rights of the mortgagee.[89]

The form in which an assignee acquires his ownership or interest in the mortgage is quite immaterial; it may be by mere delivery or by parol, but to enable the assignee to maintain a foreclosure there must be a distinct intention to give him an interest in the bond and mortgage. Where the intention is to have a written assignment, a mere manual delivery will not pass the title.[90]

§ 111. A surety for the mortgage debt may sometimes foreclose—First, having guaranteed debt.—If a person who stands in the relation of surety to a mortgage debt is compelled to pay it, he is entitled to be subrogated to the rights of the mortgagee, and may foreclose the mortgage in his own name, without a formal assignment either in writ-

[88] *Ayers* v. *Adams,* 82 Ind. 109; *Lovejoy* v. *Vose,* 73 Me. 46; *Cobb* v. *Dyer,* 69 Me. 494; *Youngman* v. *Elmira & W. R. R.* 65 Pa. St. 278.

[89] *Marshall* v. *Davies,* 78 N. Y. 414, 421, reversing 16 Hun (N. Y.) 606. See *Calvo* v. *Davies,* 73 N. Y. 211, 215, 29 Am. Rep. 130. In point, *Wadsworth* v. *Lyon,* 93 N. Y. 201, 45 Am. Rep. 190; *Wood* v. *Smith,* 51 Iowa, 156.

[90] So held by Folger, J., in *Strause* v. *Josephthal,* 77 N. Y. 622. See *Green* v. *Marble,* 37 Iowa, 95; *Andrews* v. *McDaniel,* 68 N. C. 385.

ing or by parol.[91] There are three principal ways in which this relation and its attending rights may arise: First, where the surety has guaranteed the payment of the mortgage debt, in an assignment or a separate instrument, he may take up the bond and mortgage and enforce their payment in his own name;[92] and it has been held that not even an assignment is necessary.[93]

§ 112. Surety may foreclose—Second, grantee having assumed mortgage.—Second, where a grantor is obligated to pay a mortgage debt and conveys the land to a grantee, who assumes the payment thereof, he is entitled, on paying the debt, voluntarily or otherwise, to be subrogated to the rights of the mortgagee, and to enforce the mortgage against the land as the primary fund for payment, and thereafter against all persons liable for a deficiency. The right to foreclose is perfect without an assignment of the bond and mortgage;[94] even in a case where the grantee had not assumed payment of the mortgage, the grantor, on paying the mortgage, was deemed equitably subrogated to the extent that he could maintain a foreclosure.[95] But an assignment can be compelled upon tender of the amount unpaid, and if the mortgagee refuses to assign, an action can be maintained against him for a formal assignment of the bond and mortgage. The theory upon which an assignment will be decreed has been stated as that of equitable subrogation.[96] Upon the rights of a surety in this connection, Judge Morse,[97] of the New York

[91] *Mims* v. *McDowell,* 4 Ga. 182; *Norton* v. *Soule,* 2 Me. (2 Greenl.) 341; *Saylors* v. *Saylors,* 3 Heisk. (Tenn.) 525. See also the cases cited below, and *ante,* §§ 106, 107, and notes.

[92] *Darst* v. *Bates,* 95 Ill. 493; *Gerber* v. *Sharp,* 72 Ind. 553.

[93] *Walker* v. *King,* 44 Vt. 601.

[94] *McLean* v. *Towle,* 3 Sandf. Ch. (N. Y.) 117; *Risk* v. *Hoffman,* 69 Ind. 137; *Hoffman* v. *Risk,* 58 Ind. 113; *Josselyn* v. *Edwards,* 57 Ind. 212; *Wood* v. *Smith,* 51 Iowa, 156; *Hoysradt* v. *Holland,* 50 N. H. 433.

[95] *Baker* v. *Terrell,* 8 Minn. 195, Gil. 165.

[96] *Johnson* v. *Zink,* 51 N. Y. 333, affirming 52 Barb. (N. Y.) 396; *Matteson* v. *Thomas,* 41 Ill. 110.

[97] *Averill* v. *Taylor,* 8 N. Y. 44, 51. See also *Marshall* v. *Davies,* 78

court of appeals, has said: "I understand the law to be as well settled, as the reason and justice of the rule is clear, that any one who holds the actual relation of surety for the mortgage debt, charged upon land in which he has an interest, although his liability as such surety extends no farther than to lose his interest in the land, has a right to redeem, for the protection of such interest. And I suppose it to be equally well settled, that his right as surety in such a case, and upon his redeeming, is, to be subrogated to the rights and to occupy the position of the creditor from whom he redeems." And Chief Commissioner Lott, in a later case [98] in the same court, determined that the "relation of surety between the mortgagor and his grantee does not deprive the obligee of the right of enforcing the bond against the obligor. He is entitled to his debt, and has a right to avail himself of all his securities. Equity, however, requires that the obligor, on the payment of the debt out of his own funds, should be subrogated to the rights of the obligee, so that he can reimburse himself by a recourse to the mortgaged premises for that purpose. This can not prejudice the creditor, and it is clearly equitable as between the debtor and the owner of the land. He clearly has no right or color of right, justice or equity to claim that he, notwithstanding the conveyance of the property subject to the mortgage, and thus entitling him only to its value over and above it, should in fact enjoy and hold it discharged of the incumbrance, without any contribution toward its discharge and satisfaction, from the land. This equitable principle is fully recognized in most of the cases. Indeed, it is so consis-

N. Y. 414, 421, 58 How. (N. Y.) Pr. 231; *Marsh* v. *Pike,* 10 Paige Ch. (N. S.) 595, cited and reviewed in *Calvo* v. *Davies,* 73 N. Y. 211, 215, 29 Am. Rep. 130; *Cherry* v. *Monro,* 2 Barb. Ch. (N. Y.) 618; *Stebbins* v. *Hall,* 29 Barb. (N. Y.) 525; *Cornell* v. *Prescott,* 2 Barb. (N. Y.) 16; *Ferris* v. *Crawford,* 2 Den. (N. Y.) 595; *Tice* v. *Annin,* 2 Johns. Ch. (N. Y.) 125; *Halsey* v. *Reed,* 9 Paige Ch. (N. Y.) 446; *Cox* v. *Wheeler,* 7 Paige Ch. (N. Y.) 248, 258; *Brewer* v. *Staples,* 3 Sandf. Ch. (N. Y.) 579.

[98] *Johnson* v. *Zink,* 51 N. Y. 333, 336.

tent with right and justice as to require no authorities to sustain it." It is to be observed in all cases mentioned in this section, that the land is the primary fund for the payment of the mortgage debt.[99] The surety can not compel the mortgagee to file a bill to foreclose the mortgage and to exhaust his remedy against the principal debtor by a judgment for deficiency; but he may file a bill against the mortgagee [1] and the subsequent grantee, who has assumed the payment of the debt and thereby become the principal debtor, to have the debt paid to the mortgagee by such grantee, or from the proceeds of a sale of the mortgaged premises. "It is well settled that a surety, after the debt has become due, may come into court and compel the principal to pay the debt."[2]

§ 113. Surety may foreclose—Third, junior interest redeeming from senior interest.—Third, where a subsequent incumbrancer, though not holding the actual relation of surety for the mortgage debt, still has such an interest in the land that he may redeem from the mortgage debt by paying the same, and thereby become subrogated to the rights and the position of the mortgagee.[3] Cases under this head are numerous in those states where foreclosure may be made by entry and possession, and the mortgagor and those claiming

[99] *Marsh* v. *Pike,* 10 Paige Ch. (N. Y.) 595, affirming 1 Sandf. Ch. (N. Y.) 210.

[1] *Morse* v. *Larkin,* 46 Vt. 371.

[2] *Marsh* v. *Pike,* 1 Sandf. Ch. (N. Y.) 212, *per* Vice-chancellor Sandford, citing *Warner* v. *Beardsley,* 8 Wend. (N. Y.) 194; 1 Story's Eq. 327; 2 Story's Eq. 35, § 730; 144, § 849. See *Cornell* v. *Prescott,* 2 Barb. (N. Y.) 16; *Norton* v. *Warner,* 3 Edw. Ch. (N. Y.) 108, and note. *Hayes* v. *Ward,* 4 Johns. Ch. (N. Y.) 123, 132, 8 Am. Dec. 554; *McLean* v. *Lafayette Bank,* 3 McL. C. C. 587.

[3] *Ellsworth* v. *Lockwood,* 42 N. Y. 89, 99, is the leading case; relied upon in *Dings* v. *Parshall,* 7 Hun (N. Y.) 522. See *Averill* v. *Taylor,* 8 N. Y. 44; *Cornell* v. *Prescott,* 2 Barb. (N. Y.) 20; *Carpentier* v. *Brenham,* 40 Cal. 221; *Tyrell* v. *Ward,* 102 Ill. 29; *Lowrey* v. *Byers,* 80 Ind. 443; *Benton* v. *Shreeve,* 4 Ind. 66. For an exhaustive discussion of the doctrine of subrogation and substitution, as applied to parties to a mortgage, see *Rardin* v. *Walpole,* 38 Ind. 146, collating the authorities.

under him are obliged to assert their rights by redemption especially in Massachusetts, Maine and Vermont. One of two joint mortgagors, who has been obliged to pay the whole debt, has been held subrogated to the rights of the mortgagee as against the other mortgagor;[4] and if a purchaser of a divided or an undivided part of mortgaged premises pays the entire mortgage to protect his own interest, he will become the equitable assignee of a proportional part of the mortgage, and will be allowed to enforce it against the remaining part of the premises.[5] So a tenant for life, upon paying a prior existing mortgage, in order to protect his own estate, is deemed an equitable assignee of the mortgage.[6] But a surety is never entitled to subrogation and foreclosure until he has paid the debt.[7] The propositions stated in this section are dependent upon the general principles of law which govern the relation of principal and surety, and more especially upon those principles which entitle a surety to be subrogated to the securities of a creditor upon the default of the principal debtor in making payment.[8]

§ 114. Assignee of a mortgage without the bond cannot foreclose.—It is now a well established principle in the law of mortgages that the assignee of a mortgage without the bond, note or indebtedness which the mortgage was given to secure, acquires no title whatever to the mortgage debt, and cannot maintain a foreclosure; the mortgage in his hands is a mere nullity. The assignment of the mortgage alone is scarcely presumptive evidence of an intention to assign the indebtedness which it was given to secure;[9] but an assignment

[4] *Shinn* v. *Shinn*, 91 Ill. 477; *White* v. *Fisher*, 62 Ill. 258.

[5] *Champlin* v. *Williams*, 9 Pa. St. 341.

[6] *Hamilton* v. *Dobbs*, 19 N. J. Eq. (4 C. E. Gr.) 227.

[7] *Conwell* v. *McCowan*, 53 Ill. 363.

[8] Brandt on Suretyship and Guaranty.

[9] *Jackson* v. *Blodget*, 5 Cow. (N. Y.) 206; *Nagle* v. *Macy*, 9 Cal. 426; *Peters* v. *Jamestown Bridge Co.* 5 Cal. 334, 63 Am. Dec. 134; *Hamilton* v. *Lubukee*, 51 Ill. 415, 99 Am. Dec. 562; *Hubbard* v. *Harrison*, 38

of a bond and mortgage, and the moneys due and to grow due thereon, carries, by its terms, a note for which they are held as collateral security.[10] In Merritt v. Bartholick,[11] a leading case in New York, Judge Parker says: "As a mortgage is but an incident to the debt which it is intended to secure, the logical conclusion is, that a transfer of the mortgage without the debt is a nullity, and no interest is acquired by it. The security can not be separated from the debt and exist independently of it. This is the necessary legal conclusion, and is recognized as the rule by a long course of judicial decisions * * * for the legal maxim is, the incident shall pass by the grant of the principal, but not the principal by the grant of the incident." *Accessorium non ducit, sed sequitur principale.* In a later case,[12] a bond and mortgage had been given to secure the performance of a contract; after the contract had been rescinded, the assignee of the bond and mortgage brought an action for foreclosure, but it was dismissed on the ground that the rescission of the contract extinguished the indebtedness and the liability thereunder and destroyed the validity of the bond and mortgage.

Some courts have held that an assignment of the mortgage without the note or bond transfers a naked trust,[13] and that the assignee must hold the mortgage at the will and disposal of the creditor who owns the bond.[14] Where a mortgage is

Ind. 323; *Willis* v. *Vallette,* 4 Met. (Ky.) 195; *Lunt* v. *Lunt,* 71 Me. 377; *Webb* v. *Flanders,* 32 Me. 175. See *Bulkley* v. *Chapman,* 9 Conn. 8 on the question of intent; Powell, 1115, 1116. See *post,* § 115.

[10] *Belden* v. *Meeker,* 2 Lans. (N. Y.) 471, affirmed 47 N. Y. 307.

[11] 36 N. Y. 44, 45, affirming 47 Barb. (N. Y.) 253, and 34 How. (N. Y.) Pr. 129, and citing many cases; *Cooper* v. *Newland,* 17 Abb. (N. Y.) Pr. 342, 344; *Langdon* v. *Buell,* 9 Wend. (N. Y.) 80.

[12] *Wanzer* v. *Cary,* 76 N. Y. 526. In point, *Emery* v. *Keighan,* 94 Ill. 543.

[13] *Johnson* v. *Cornett,* 29 Ind. 59; *Johnson* v. *Walter,* 60 Iowa, 315; *Pope* v. *Jacobus,* 10 Iowa, 262; *Cleveland* v. *Cohrs,* 10 Rich. (S. C.) 224.

[14] *Dudley* v. *Cadwell,* 19 Conn. 228; *Huntington* v. *Smith,* 4 Conn. 237; *Medley* v. *Elliot,* 62 Ill. 532; *Webster* v. *Calden,* 56 Me. 204; *Bailey* v. *Gould,* Walk. Ch. (Mich.) 478.

executed without a bond or other written evidence of the debt secured, and it contains no covenant for the payment of the debt, the assignee acquires a valid claim and lien upon the land, but nothing more.[15]

§ 115. Assignee of the note, bond or debt may foreclose, though the mortgage is not assigned.—As has been seen in the preceding section, the mortgage debt is the essential fact, while the mortgage is merely an incident. Consequently the assignee of the debt may foreclose, as he is the equitable assignee of the mortgage, though he holds neither a written nor a parol assignment of it.[16] He is the real party in interest and can give a full quittance of the debt, though he

[15] *Severance* v. *Griffith*, 2 Lans. (N. Y.) 38.

[16] For the New York cases see the preceding section. *Center* v. *Planters' & Mechanics' Bank*, 22 Ala. 743; *Doe* v. *McLoskey*, 1 Ala. 708; *Willis* v. *Farley*, 24 Cal. 490; *Bennett* v. *Solomon*, 6 Cal. 134; *Ord* v. *McKee*, 5 Cal. 515; *Quinebaug Bank* v. *French*, 17 Conn. 134; *Huntington* v. *Smith*, 4 Conn. 237; *Austin* v. *Burbank*, 2 Day (Conn.) 474, 2 Am. Dec. 119; *Hamilton* v. *Lubukee*, 51 Ill. 415, 99 Am. Dec. 562; *Olds* v. *Cummings*, 31 Ill. 188; *Herring* v. *Woodhull*, 29 Ill. 92, 81 Am. Dec. 296; *Ryan* v. *Dunlap*, 17 Ill. 40, 63 Am. Dec. 334; *Holdrige* v. *Sweet*, 23 Ind. 118; *Gower* v. *Howe*, 20 Ind. 396; *Garrett* v. *Puckett*, 15 Ind. 485; *Walker* v. *Schreiber*, 47 Iowa, 529; *Preston* v. *Morris*, 42 Iowa, 549; *Bremer Co. Bank* v. *Eastman*, 34 Iowa, 392, 394; *Bank of Indiana* v. *Anderson*, 14 Iowa, 544, 83 Am. Dec. 390; *Sangster* v. *Love*, 11 Iowa, 580; *Blair* v. *Marsh*, 8 Iowa, 144; *Crow* v. *Vance*, 4 Clarke (Iowa) 434, and the cases cited at pages 440, 441; *Kurtz* v. *Sponable*, 6 Kan. 395; *Burdette* v. *Clay*, 8 B. Mon. (Ky.) 295; *Vimont* v. *Stitt*, 6 B. Mon. (Ky.) 478; *Bank of United States* v. *Huth*, 4 B. Mon. (Ky.) 450; *Warren* v. *Homestead*, 33 Me. 256; *Byles* v. *Tome*, 39 Md. 461; *Ohio Life Ins. & Trust Co.* v. *Winn*, 4 Md. Ch. Dec. 253; *Briggs* v. *Hannowald*, 35 Mich. 474; *Martin* v. *McReynolds*, 6 Mich. 70; *Holmes* v. *McGinty*, 44 Miss. 94; *Laberge* v. *Chauvin*, 2 Mo. 145; *Richards* v. *Kountze*, 4 Neb. 208; *Kyger* v. *Ryley*, 2 Neb. 20, 28; *Wheeler* v. *Emerson*, 45 N. H. 527; *Whittemore* v. *Gibbs*, 24 N. H. 484; *Lane* v. *Sleeper*, 18 N. H. 209; *Rigney* v. *Lovejoy*, 13 N. H. 253; *Southerin* v. *Mendum*, 5 N. H. 420, 432; *Hyman* v. *Devereux*, 63 N. C. 624; *Perkins* v. *Sterne*, 23 Tex. 561, 76 Am. Dec. 72; *Keyes* v. *Wood*, 21 Vt. 331; *Pratt* v. *Bank of Bennington*, 10 Vt. 293, 33 Am. Dec. 201; *Body* v. *Jewsen*, 33 Wis. 402; *Martineau* v. *McCollum*, 3 Pin. (Wis.) 455; *Carpenter* v. *Longan*, 83 U. S. (16

is not in a position to execute a legal discharge of the mortgage.[17] The rule of this section holds good even after the debt has been put into a judgment.[18]

While in a foreclosure it may not be indispensable to join the assignor as a party plaintiff or defendant, it would certainly be advisable to do so, in order to extinguish any possible interest which he might continue to have or claim. The assignor has sometimes been held a necessary party, on the ground that an assignment of the note alone carries only the equitable, and not the legal title to the security.[19] *Vice versa,* if the assignor should commence a foreclosure of his mortgage after having assigned the bond or debt, his assignee would certainly be a necessary party. According to the cases, however, the assignor could hardly maintain an action to foreclose. The assignee and the assignor may unite as co-plaintiffs;[20] and it has been held that the assignee can prosecute the action in the name of the assignor.[21]

Wall.) 271, 21 L. ed. 313. Under a parol assignment see *O'Neal* v. *Seixas,* 85 Ala. 80, 4 So. 745.

The New Hampshire supreme court, in the case of *Gove* v. *Gove,* 64 N. H. 503, 15 Atl. 121, say that the holder of a negotiable note secured by mortgage in New Hampshire, deriving his title from an executor or administrator in another state, may sue in his own name upon the mortgage in New Hampshire. And it was recently held by the supreme court of Missouri that the purchaser for value before maturity of a note secured by a deed of trust, cannot be defeated of his right to enforce his security against the land, notwithstanding his knowledge of special circumstances under which the note was obtained, unless he has actual knowledge of a fraud on the part of a payee. *Jennings* v. *Todd,* 118 Mo. 296, 40 Am. St. Rep. 373, 24 S. W. 148.

On impeaching assignment of mortgage see: *Johnson* v. *Beard,* 93 Ala. 96, 9 So. 535.

[17] *Wayman* v. *Cochrane,* 35 Ill. 152.

[18] *Wayman* v. *Cochrane,* 35 Ill. 152; *Swartz* v. *Leist,* 13 Ohio St. 419; *Moore* v. *Cornell,* 68 Pa. St. 320.

[19] *Bibb* v. *Hawley,* 59 Ala. 403; *Denby* v. *Mellgrew,* 58 Ala. 147; *Prout* v. *Hoge,* 57 Ala. 28; *Graham* v. *Newman,* 21 Ala. 497; *Burton* v. *Baxter,* 7 Blackf. (Ind.) 297; *Stone* v. *Locke,* 46 Me. 445; *Moore* v. *Ware,* 38 Me. 496. See *ante,* § 114.

[20] *Holdridge* v. *Sweet,* 23 Ind. 118.

[21] *Calhoun* v. *Tullass,* 35 Ga. 119; *English* v. *Register,* 7 Ga. 387

§ 116. Mortgagees owning contemporaneous mortgages, being equal liens, any one or more may foreclose.—Where two or more bonds and mortgages have been simultaneously executed and recorded to secure independent debts, or parts of the same debt, and are equal liens upon the premises, the mortgagees may unite as co-plaintiffs to foreclose their mortgages, or any one or more may foreclose upon refusal of the others to unite as co-plaintiffs.[22] One of the mortgagees can not ignore the rights of the others, and foreclose without making them parties; if they are omitted, the decree and sale will be defective,[23] and they can redeem, or maintain a separate foreclosure.[24] The courts seem to regard such mortgages the same as though they constituted a single mortgage given to secure to the mortgagees in severalty the amounts of their respective claims.[25]

§ 117. Owner of two mortgages cannot foreclose both at same time in separate actions.—A person who owns two or more mortgages upon the same premises, cannot maintain separate actions at the same time for their foreclosure.[26] In a case[27] where this proposition was squarely

[22] *Potter* v. *Crandall,* Clarke Ch. (N. Y.) 119, 123. See *Greene* v. *Warnick,* 64 N. Y. 220, reversing 4 Hun (N. Y.) 703, where the respective rights of simultaneous mortgagees came before the court in a contest for surplus moneys; *Decker* v. *Boice,* 83 N. Y. 215; *Cochran* v. *Goodell,* 131 Mass. 464. See also *Perry's Appeal,* 22 Pa. St. 43, 60 Am. Dec. 63, collating and reviewing the Pennsylvania cases, *per* Woodward, J. See *post,* § 204.

[23] But in *Dungan* v. *American Life Ins. Co.* 52 Pa. St. 253, one mortgagee foreclosed, ignoring the other, and the decree was held to divest both.

[24] *Cain* v. *Hanna,* 63 Ind. 408.

[25] See *ante,* §§ 100, 101. See *Granger* v. *Crouch,* 86 N. Y. 494, 499.

[26] *Fitzhugh* v. *McPherson,* 3 Gill (Md.) 408. In *Demarest* v. *Berry,* 16 N. J. Eq. (1 C. E. Gr.) 481, after an action had been commenced on a first mortgage, it was discovered that a second mortgage covered the same premises described in the first mortgage and other lands also, and an action was then commenced on the second mortgage; but the second foreclosure was allowed to continue only on the discontinuance of the first one. See *ante,* § 116.

[27] *Roosevelt* v. *Ellithorp,* 10 Paige Ch. (N. Y.) 415, 419.

before the court, Chancellor Walworth held that "the complainant not only unnecessarily, but contrary to the settled practice of the court, which is for the complainant to state all of his junior incumbrances upon the mortgaged premises in his bill to foreclose his prior mortgage, commenced two separate and distinct foreclosure suits upon these two mortgages, on one piece of land, given by the same mortgagors to the same mortgagee, and which mortgages, at the time of filing these bills, belonged to the same person." The best practice is to foreclose all the mortgages in one action,[28] or to foreclose the senior mortgage, setting forth in the complaint the claims upon the junior incumbrances. It matters not that the mortgages are of different dates, and given to different persons to secure different debts; it is essential only that they be owned by the same person at the time of foreclosure, and that they cover the same premises. If the junior mortgage covers other premises also, the fact should be set forth in the complaint. If the junior mortgage alone is foreclosed, the senior mortgage may remain as a valid and subsisting lien.[29]

§ 118. Assignee in bankruptcy or by general assignment, or receiver of a corporation, may foreclose.—An assignee in bankruptcy or by general assignment may foreclose a bond and mortgage which belonged to the estate of the assignor, as he succeeds to the entire legal title to the assets; he acquires no better title, however, than the assignor possessed.[30] Likewise, he may assign the mortgage, and the assignee can maintain a foreclosure.[31] The assignor is not a necessary party plaintiff or defendant; if deemed best, however, he may very properly be made a defendant, so as to

[28] *McGowen* v. *Branch Bank at Mobile,* 7 Ala. 823; *Hawkins* v. *Hill,* 15 Cal. 499, 76 Am. Dec. 499; *Phelps* v. *Ellsworth,* 3 Day (Conn.) 397.

[29] *Clements* v. *Griswold,* 46 Hun (N. Y.) 377.

[30] *Upton* v. *National Bank of Reading,* 120 Mass. 153.

[31] *Ward* v. *Price,* 12 N. J. Eq. (1 Beas.) 543.

extinguish any possible equities that he may claim. The assignee may decline to collect the mortgage or to prosecute a foreclosure if he believes that nothing can be realized. In such a case the bankrupt or assignor is at liberty to commence the suit in his own name, but the assignee should be brought into the action, or at least be notified of its pendency, and requested to prosecute it. The general rule is that, if an assignee abandons any property or choses in action belonging to the bankrupt's estate, or if he declines to appear as prosecutor when summoned in a suit pending in favor of the bankrupt, the right remains in or reverts to the bankrupt; he is still the legal and equitable owner of his estate as against every one but his assignee.[32]

The receiver of an insolvent corporation may also foreclose a mortgage,[33] and his successor in office likewise succeeds to the same right.[34] "It is the settled doctrine that the receiver of an insolvent corporation represents not only the corporation, but also creditors and stockholders, and that, in his character as trustee for the latter, he may disaffirm and maintain an action as receiver * * * to recover its funds or securities invested or misapplied." [35]

§ 119. Assignee pendente lite may continue a foreclosure.—A person who purchases a bond and mortgage pending its foreclosure may be substituted as plaintiff and continue the action in his own name, or the action may be continued in the name of the assignor, if no one objects and the matter is not brought to the attention of the court. But objection can be made by answer if the assignment is executed before the answer is pleaded.[36] If the assignment is recorded,

[32] *Towle* v. *Rowe,* 58 N. H. 394.

[33] *Robinson* v. *Williams,* 22 N. Y. 380, was an action by a receiver against a receiver; *Iglehart* v. *Bierce,* 36 Ill. 133.

[34] *Iglehart* v. *Bierce,* 36 Ill. 133.

[35] See *Attorney-General* v. *Guardian Mutual Life Ins. Co.* 77 N. Y. 272, 275, *per* Andrews, J.

[36] *Mills* v. *Hoag,* 7 Paige Ch. (N. Y.) 18, 31 Am. Dec. 271; *Field* v. *Maghee,* 5 Paige Ch. (N. Y.) 539;

or the fact of the transfer is brought to the knowledge of the court, it would seem that the action can be continued only in the name of the true owner and real party in interest,[37] who should bring himself forward in the suit by petition or a supplemental bill.[38]

§ 120. Owner of mortgage dying—Personal representatives may foreclose.—The legal title to a bond and mortgage passes, upon the death of its owner, to his personal representatives, who are in equity trustees for the benefit of the decedent's heirs or legatees. When, at an earlier day, it was held that the mortgagee had a vested interest in the title to the lands under his mortgage, his heirs, instead of his personal representatives, were held to succeed to that interest upon his death. But at present it is the uniform law of America that a bond and mortgage are only securities, and pass as personal property to the control and disposition of a decedent's personal representatives;[39] and the absence of a personal obligation by bond, note or covenant for the debt, does not affect the right of the personal representatives to the possession of the mortgage.

A personal representative upon coming into due possession and control of a bond and mortgage may maintain an action for its foreclosure; indeed, he is the only person who can foreclose the mortgage, as he holds the entire legal title to it.[40] The administrator of a mortgagee to whom the mort-

Wallace v. *Dunning,* Walk. Ch. (Mich.) 416. See *Smith* v. *Bartholomew,* 42 Vt. 356.

[37] *Bigelow* v. *Booth,* 39 Mich. 622. See *Ellis* v. *Sisson,* 96 Ill. 105. See *post,* §§ 150–153.

[38] *Foster* v. *Deacon,* 6 Madd. 59; *Coles* v. *Forrest,* 10 Beav. 552; Fisher on Mortgages, §§ 385–388.

[39] *Kinna* v. *Smith,* 3 N. J. Eq. (2 H. W. Gr.) 14; *Grace* v. *Hunt,* 1 Cooke (Tenn.) 344; *Thornborough* v. *Baker,* 3 Swan. 628; *Tabor* v. *Tabor,* 3 Swan. 636. See the cases cited below.

[40] *People* v. *Keyser,* 28 N. Y. 226, 84 Am. Dec. 338; *Newton* v. *Stanley,* 28 N. Y. 61; *Peck* v. *Mallams,* 10 N. Y. 509; *Renaud* v. *Conselyea,* 7 Abb. (N. Y.) Pr. 105, reversing 4 Abb. (N. Y.) Pr. 280 and 5 Abb. (N. Y.) Pr. 346; *Routh* v. *Smith,* 5 Conn. 135, 139; *Buck* v. *Fischer,* 2 Colo. 182; *Dixon* v. *Cuyler,* 27 Ga

gage was given to secure an annuity, may foreclose, if the condition was broken during the decedent's life-time, and recover the unpaid annuity.[41] If two or more executors or administrators have qualified, all should unite as plaintiffs;[42] but if any who have qualified refuse to join as co-plaintiffs, they may be made defendants to the action; they must be brought before the court in some capacity.[43] In most states it is not neces-

248. In *Hunsucker* v. *Smith,* 49 Ind. 114, an administrator held personally a mortgage on the lands of the decedent. *Merrin* v. *Lewis,* 90 Ill. 505; *Nolte* v. *Libbert,* 34 Ind 163; *Cryst* v. *Cryst,* Smith (Ind.) 370; *Talbot* v. *Dennis,* Smith (Ind.) 357; *White* v. *Rittemeyer,* 30 Iowa 272 citing may cases; *Grimmel* v. *Warner,* 21 Iowa, 13; *Burton* v. *Hintrager,* 18 Iowa, 348, 351. So by statute in Missouri, *Riley's Adm'r* v. *McCord's Adm'r,* 24 Mo. 265 (R. C. 1845, p. 749); also in Michigan, *Albright* v. *Cobb,* 30 Mich. 355. See *Webster* v. *Calden,* 56 Me. 204, 211; *Fay* v. *Cheney,* 31 Mass. 399; *Dewey* v. *VanDeusen,* 21 Mass. (4 Pick.) 19; *Smith* v. *Dyer,* 16 Mass. 18; *Scott* v. *McFarland,* 13 Mass. 309; *Baldwin* v. *Allison,* 4 Minn. 25; *Griffin* v. *Lovell,* 42 Miss. 402; *Mutual Life Ins. Co.* v. *Sturges,* 32 N. J. Eq. (5 Stew.) 678, 33 N. J. Eq. (6 Stew.) 328; *Gibson* v. *Bailey,* 9 N. H. 168; *Trimmier* v. *Thomson,* 10 Rich. (S. C.) 164; *Collamer* v. *Langdon,* 29 Vt. 32; *Pierce* v. *Brown,* 24 Vt. 165; *Weir* v. *Mosher,* 19 Wis. 311. For the English cases see *Cave* v. *Cork,* 2 Y. & C. C. C. 130; *Wilton* v. *Jones,* 2 Y. & C. C. C. 244; *Hobart* v. *Abbott,* 2 P. Wms. 643; *Meeker* v. *Tanton,* 2 Ch. Cas. 29; *Gobe* v. *Carlisle,* 2 Vern. 67, cited in *Clerkson* v. *Bowyer,* 2 Vern. 67; Fisher on Mortgages, §§ 359, 360. See *O'Neal* v. *Seixas,* 85 Ala. 80, 4 So. 745; *Plummer* v. *Dougherty,* 78 Me. 341, 5 Atl. 526, *Holcomb* v. *Richards,* 38 Minn. 38, 35 N. W. 714; *Robinson* v. *Brower,* 10 N. Y. Supp. 854, 32 N. Y. S. R. 42; *Dial* v. *Gary,* 24 S. C. 572; *Anderson* v. *Watt,* 138 U. S. 694, 34 L. ed. 1078, 11 Sup. Ct. Rep. 449.

And it is held by the supreme court of South Carolina, in the case of *Dial* v. *Gary,* 24 S. C. 572, that where the mortgagee dies in another state, only his administrator in South Carolina can maintain suit to foreclose a mortgage on lands lying in that state. But on the other hand, it has been held in Minnesota that where a mortgage of lands in that state given to secure a debt due to the mortgagee in another state, contains a power to the mortgagee, his executors, administrators or assigns, in case of default to sell and convey the premises, it may be exercised by the administrator appointed at the mortgagee's domicile. *Holcombe* v. *Richards,* 38 Minn. 38, 35 N. W. 714.

[41] *Marsh* v. *Austin,* 83 Mass. (1 Allen) 235; *Pike* v. *Collins,* 33 Me. 38.

[42] *Anderson* v. *Watt,* 138 U. S. 694, 34 L. ed. 1078, 11 Sup. Ct. Rep. 449.

[43] *Rathbone* v. *Lyman,* 8 R. I.

sary to bring the heirs of the mortgagee into the action,[44] while in a few they are held indispensable parties.[45]

Where a testator dies pending his foreclosure, his executor after qualifying may properly revive the action;[46] and he may do this, though his co-executor be the owner of the equity of redemption. In such a case it was held advisable in reviving the action to make the co-executor a defendant personally, as he was the owner of the equity of redemption, and a defendant also in his representative capacity; and the action was sustained upon the principle that one co-executor may maintain an action in equity against another co-executor to compel the payment of a debt owing by him to the estate.[47] The executor of a trustee has been allowed to foreclose a mortgage held in trust by the decedent, where the trust was

155. But see *Alexander* v. *Rice,* 52 Mich. 451.

[44] *Dayton* v. *Dayton,* 7 Ill. App. 136; *Griffin* v. *Lovell,* 42 Miss. 402. This is the rule in New York.

See *Kraemer* v. *Adelsberger,* 122 N. Y. 467, 25 N. E. 859, 34 N. Y. S. R. 24, reversing 23 Jones & S. (55 Super. Ct. Rep.) 245; *Citizens' Nat. Bank* v. *Dayton,* 116 Ill. 257, 4 N. E. 492.

[45] *Huggins* v. *Hall,* 10 Ala. 283; *McIver* v. *Cherry,* 8 Humph. (Tenn.) 713; *Atchison* v. *Surguine,* 1 Yerg. (Tenn.) 400. They were necessary parties in Illinois until the statute of 1874, Ch. 95, § 9, dispensed with the old rule. *Dayton* v. *Dayton,* 7 Ill. App. 136. In *Etheridge* v. *Vernoy,* 71 N. C. 184, the heirs were held not necessary where the mortgagee had assigned the bond and mortgage absolutely and died insolvent without the state, but ordinarily the heirs of the mortgagee are held necessary parties. For the English cases see Fisher on Mortgages, § 359; *Scott* v. *Nicoll,* 3 Russ. 476; *Ellis* v. *Guavas,* 2 Ch. Cas. 50; *Freak* v. *Hearsey,* 1 Ch. Cas. 51.

[46] In those cases where the legal title is in the mortgagee, and he dies pending foreclosure, the case cannot be proceeded with until his executor is made a party and the defendant given notice; even in those cases where the foreclosure was proceeding in the name of the mortgagee for the use of another. *Meeks* v. *Johnson,* 75 Ga. 629.

[47] *McGregor* v. *McGregor,* 35 N. Y. 218, 222, Wright and Smith, JJ., writing the opinions, and relying largely upon *Smith* v. *Lawrence,* 11 Paige Ch. (N. Y.) 206. In *Miller* v. *Donaldson,* 17 Ohio, 264, an administrator *de bonis non* foreclosed a mortgage belonging to the estate of a testator whose executor was his mortgage debtor; the fact that he was made executor was held not to extinguish the debt.

well defined and did not rest in the discretion of the trustee;[48] but the general rule is for the successor of the trutsee to foreclose.[49]

§ 121. Vendor under land contract dying—Personal representatives may foreclose.—In the foreclosure of a land contract, the rule as stated above is somewhat limited. The personal representatives of a deceased vendor may foreclose a land contract, but they must either show that they have tendered and are able and ready to give a deed with a good title, or else they must make the heirs or devisees of the deceased vendor, inheriting his legal title, parties to the action, so that they may be bound by the decree. Upon this subject Judge Earl has said that "by the contract of sale, the land conveyed became real estate in the purchasers, and would descend as such to their heirs or devisees. The vendor held the legal title as trustee for the purchasers. The purchase money due upon the contract was, as to him, personal estate, and upon his death passed to his personal representatives, as part of his personal estate; and the legal title to the real estate passed to his heirs or devisees in trust for the purchasers."[50]

[48] *Bunn* v. *Vaughan,* 1 Abb. App. Dec. (N. Y.) 253.

[49] See *post,* §§ 127–133.

[50] *Thomson* v. *Smith,* 63 N. Y. 301, 303, citing Dart on Purchasers and Vendors, 121; *Moyer* v. *Hinman,* 13 N. Y. 180; *Lewis* v. *Smith,* 9 N. Y. 502, 510, 61 Am. Dec. 706; *Moore* v. *Burrows,* 34 Barb. (N. Y.) 173; *Adams* v. *Green,* 34 Barb. (N. Y.) 176; *Champion* v. *Brown,* 6 Johns. Ch. (N. Y.) 398, 10 Am. Dec. 343. In *Schroeppel* v. *Hopper,* 40 Barb. (N. Y.) 425, the heirs at law of a decedent executed to his administrator a deed of their title to the premises to enable her to transfer it to the purchaser in fulfillment of a land contract, and the court held, in an action to foreclose the land contract, that the heirs were not necessary parties. In *Leaper* v. *Lyon,* 68 Mo. 216, on the other hand, the heirs were held necessary parties, even though a deed executed by them had been tendered to the vendee by the personal representatives. See *Anshutz' Appeal,* 34 Pa. St. 375.

§ 122. **Owner of mortgage dying—Heirs, devisees and legatees generally cannot foreclose.**—As has been shown in the preceding section, the heirs of a deceased mortgagee receive no title whatever to the bond and mortgage; consequently, having no interest in the security, they can not maintain an action for its foreclosure.[51] In a case where no personal representative had been appointed, an heir was allowed to foreclose on filing an indemnifying security to protect the mortgagor from being subsequently called upon for payment.[52] Neither can an heir make such an assignment of a mortgage as will entitle an assignee to maintain a foreclosure.[53] Where a mortgagee died pending a foreclosure, his heirs were allowed to revive the action; and after administration had been closed upon the affairs of a decedent, his distributees were allowed to foreclose a mortgage belonging to his estate.[55] In an action to redeem from a mortgage, the heirs and personal representatives of the mortgagee have both been held necessary parties.[56]

Where, however, a mortgage is specifically bequeathed to a legatee, the entire title passes to him and he may foreclose the mortgage.[57] But even in such a case it has been held that the personal representatives should be made defendants.[58]

[51] *Anthony* v. *Peay*, 18 Ark. 24; *Roath* v. *Smith*, 5 Conn. 135, 139; *Kinna* v. *Smith*, 3 N. J. Eq. (2 H. W. Gr.) 14. Contra, English authorities: *Gobe* v. *Carlisle*, cited in 2 Vern. 67; *Clerkson* v. *Bowyer*, 2 Vern. 67; Fisher on Mortgages, § 364. See *ante*, § 120, and the cases cited.

[52] *Babbitt* v. *Bowen*, 32 Vt. 437.

[53] *Douglass* v. *Durin*, 51 Me. 121.

[54] *McIver* v. *Cherry*, 8 Humph. (Tenn.) 713; *Atchison* v. *Surguine*, 1 Yerg. (Tenn.) 400.

[55] *Hill* v. *Boyland*, 40 Miss. 618.

[56] *Hilton* v. *Lothrop*, 46 Me. 297; *Haskins* v. *Hawkes*, 108 Mass. 379.

[57] *White* v. *Secor*, 58 Iowa, 533, 536; *Grimmell* v. *Warner*, 21 Iowa, 13; *Trenton Banking Co.* v. *Woodruff*, 2 N. J. Eq. (1 H. W. Gr.) 117. For the English authorities, see Fisher on Mortgages, § 355; *Wood* v. *Williams*, 4 Madd. 186; *Wetherell* v. *Collins*, 3 Madd. 255; *Hichens* v. *Kelly*, 2 Sm. & G. 264. The heir is not a necessary party; Fisher on Mortgages, § 359; *How* v. *Vigures*, 1 Rep. in Ch. 32; *Skipp* v. *Wyatt*, 1 Cox Ch. 353.

[58] *Gibbes* v. *Holmes*, 10 Rich. (S. C.) Eq. 484, 493.

Where the legacy is made a general bequest to be paid out of the mortgage, the action may properly be brought by the executor, making the legatee a defendant;[59] and an executor has been allowed to foreclose, even where the mortgage has been specifically bequeathed.[60] It is believed that such a foreclosure will always be allowed, if there should be a deficiency of assets to pay the decedent's debts.

And in a case where the administrators, having paid all creditors and all the expenses of administration, handed the complainants, who were sole heirs and distributees, certain mortgages which were deemed of little value and not brought to the notice of the probate court, and the heirs afterwards brought suit to foreclose the mortgages, and a demurrer to the complaint was interposed on the ground that the suit could only be brought by the personal representatives of the mortgagee, the court held that the demurrer could not be sustained.[61]

§ 123. An executor or administrator to whom a mortgage is executed may foreclose.—Whenever a bond and mortgage are executed or assigned[62] to the personal representative of a decedent, to secure assets belonging to his estate, the personal representative may bring an action in his official capacity for foreclosure. The same principle is true where a personal representative holds funds in the capacity of a trustee; and the fact that the investment of trust funds in bonds and mortgages is so highly favored by courts, renders this principle very important in the administration of estates. The persons beneficially interested need not be brought into the action.[63] The character of the personal representative should clearly appear in the bond and mort-

[59] *Newton* v. *Stanley,* 28 N. Y. 61. See *Buck* v. *Fischer,* 2 Colo. 182.

[60] *Cryst* v. *Cryst,* Smith (Ind.) 370.

[61] *Stanley* v. *Mather,* 31 Fed. 860.

[62] *Flagg* v. *Johnston,* 39 Ga. 26.

[63] For the English cases, see *Wood* v. *Harman,* 5 Madd. 368; *Locke* v. *Lomas,* 5 DeG. & S. 326, 16 Jur. 814.

gage, and must be specifically alleged in the pleadings to foreclose.[64]

In a leading New York case [65] the mortgagee was described as "T. B., executor of the estate of T. T., deceased;" *prima facie,* the mortgage was held to be the private property of T. B. After the death of T. B., an administrator of T. T., with the will annexed, filed a bill for the foreclosure of the mortgage. The court held that the personal representatives of T. B. were necessary parties, and that the plaintiff should show by proper allegations that the mortgage was a part of the assets of the estate of T. T. In a similar case,[66] a mortgage was executed to "P., acting executor of the estate of D." Upon the death of P., it was held that the mortgage belonged *prima facie* to his estate, and could be foreclosed by his personal representatives, but later the court decided that evidence was admissible showing the real ownership of the mortgage; and it then appearing that it actually belonged to D., the personal representatives of P. were not allowed to maintain the action. And where an executor invests estate funds in his individual name and capacity, his personal representative alone, and not his successor, can foreclose the mortgage.[67]

[64] *Flagg* v. *Johnston,* 39 Ga. 26.

[65] *Peck* v. *Mallams,* 10 N. Y. 509, 537, 546, opinions by Willard, Johnson and Mason, JJ. In *People* v. *Keyser,* 28 N. Y. 226, 84 Am. Dec. 338 (reported below in 39 Barb. 587; 17 Abb. (N. Y.) Pr. 215), a mortgage was made to "M. & W., executors of E.;" after the death of M., the question arose as to whether W., the surviving executor, could execute a sufficient discharge of the mortgage, and whether the executors of M. ought not to unite with him in executing the discharge. It was held that the discharge by W. was sufficient. *Quære,* as to whether the surviving mortgagee could not have maintained an action for the foreclosure of the mortgage, if he had sufficient authority to execute a discharge of the debt. See *ante,* § 98, on the doctrine of survivorship among joint mortgagees

[66] *Renaud* v. *Conselyea,* 4 Abb. (N. Y.) Pr. 280, 5 Abb. (N. Y.) Pr. 346. On re-argument, Strong, J., revised his opinion, writing the decision in 7 Abb. (N. Y.) Pr. 105.

[67] *Caulkins* v. *Bolton,* 98 N. Y. 511.

§ 124. The successor in office of an executor or administrator may foreclose.—When a mortgage is made to A., *as* executor or administrator, his successor in office receives the legal title to the mortgage, and may foreclose it. The personal representatives of A. have nothing whatever to do with the bond and mortgage, which legally and equitably belong to the assets of the deceased person whom he represented.[68] Thus, a mortgage had been executed to an administrator to secure a widow's dower; upon his death his successor and not his personal representative was allowed to foreclose.[69]

§ 125. Foreign executors and administrators—When they may foreclose.—For more than a half century it has been well established as a principle of inter-state law, that an executor or administrator, appointed in a foreign political jurisdiction, cannot maintain a suit in the courts of other states; and the word "foreign" is used in each state to designate all jurisdictions and laws without itself. While foreign laws are recognized in all the courts under the principle of *lex loci contractus,* the machinery used for the enforcement of such laws in their native jurisdictions is never recognized or allowed in any other jurisdiction. "The right which an individual may claim to personal property in one country, under title from a person domiciled in another, can only be asserted by the legal instrumentalities which the institutions of the country where the claim is made have provided. The foreign law furnishes the rule of decision as to the validity of the title to the thing claimed; but in respect to the legal assertion of that title it has no extra-territorial force. As a result of this doctrine it is now generally held everywhere, and it is well settled in this state, that an executor or administrator appointed in another state has not, as such, any authority beyond the sovereignty by virtue of whose laws he

[68] *Renaud* v. *Conselyea,* 4 Abb. (N. Y.) Pr. 280. See *post,* § 133.

[69] *Brooks* v. *Smyser,* 48 Pa. St. 86, 86 Am. Dec. 569.

was appointed." [70] Accordingly a foreign executor or administrator can not foreclose a mortgage by an equitable action in New York.[71]

If a foreign personal representative desires to foreclose a mortgage in New York, or in any state outside of the political jurisdiction in which he was appointed, it is necessary for him to take out letters testamentary or of administration in some probate court within the state where the mortgaged premises are situated; otherwise he can not obtain such a standing in a court of equity as will enable him to maintain an action for foreclosure.[72] "It is not because the executor or administrator has no right to the assets of the deceased, existing in another country, that he is refused a standing in the courts of such country, for his title to such assets, though conferred by the law of the domicile of the deceased, is recognized everywhere. Reasons of form, and a solicitude to protect the rights of creditors and others, resident in the jurisdiction in which the assets are found, have led to the disability of foreign executors and administrators, which disability, however inconsistent with principle, is very firmly established.[73]

[70] *Parsons* v. *Lyman*, 20 N. Y. 103, *per* Denio, J., citing *Morrell* v. *Dickey*, 1 Johns. Ch. (N. Y.) 153; *Doolittle* v. *Lewis*, 7 Johns. Ch. (N. Y.) 45, 11 Am. Dec. 389; *Vroom* v. *VanHorne*, 10 Paige Ch. (N. Y.) 549, 42 Am. Dec. 94.

[71] *Peterson* v. *Chemical Bank*, 32 N. Y. 21, 40, 88 Am. Dec. 298, affirming 29 How. (N. Y.) Pr. 240; *Parsons* v. *Lyman*, 20 N. Y. 112; *Brown* v. *Brown*, 1 Barb. Ch. (N. Y.) 189; *Vermilya* v. *Beatty*, 6 Barb. (N. Y.) 429; *Lawrence* v. *Elmendorf*, 5 Barb. (N. Y.) 73; *Smith* v. *Webb*, 1 Barb. (N. Y.) 232; *Williams* v. *Storrs*, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340; *Stone* v. *Scripture*, 4 Lans. (N. Y.) 186. See the cases cited above.

[72] See the cases cited in the preceding notes to this section. *Alexander* v. *Rice*, 52 Mich. 451; *Woodruff* v. *Mutchler*, 34 N. J. Eq. (7 Stew.) 33, and note; *Porter* v. *Trall*, 30 N. J. Eq. (3 Stew.) 105; *Trecothick* v. *Austin*, 4 Mason C. C. 16. Contra, *Heywood* v. *Hartshorn*, 55 N. H. 476.

[73] *Peterson* v. *Chemical Bank*, 32 N. Y. 43, 88 Am. Dec. 298. Hiram Denio, Ch. J., has written the opinions in the leading cases of *Parsons* v. *Lyman*, 20 N. Y. 103, and *Peterson* v. *Chemical Bank* (*supra*), with so much learning and

§ 126. Methods of avoiding rule requiring domestic administrator for plaintiff.—The rule, requiring a foreign personal representative to take out letters testamentary or of administration, may, however, be avoided by his making an assignment of the bond and mortgage to some person residing in the state where the premises are situated; and the assignee may maintain an action for their foreclosure.

It seems that the disability of a foreign executor or administrator to sue in other states does not attach to the *subject-matter of the action,* but to the *person of the plaintiff.*[74] So a foreign specific legatee of a bond and mortgage may foreclose, on the ground that he is legally and equitable the absolute owner of them.[75] But such a foreclosure by a specific legatee or an assignee will not produce a perfect record title, inasmuch as no evidence of the authority of the personal representative to act in the place of the deceased mortgagee, and to execute a proper assignment of the mortgage, is to be found in the state.[76] Where a voluntary payment of the mortgage debt is made by the mortgagor to a foreign executor or administrator of the mortgagee, such payment will discharge the debt and cancel the lien. The result of the cases seems to be that a foreign executor or administrator, appointed by the proper tribunal of the decedent's domicile, is authorized to take charge of the property in New York and to receive debts due to the decedent, where there was no conflicting grant of letters there, and where it could be done without suit.[77]

with such clearness, after an exhaustive review of all the cases which in any way affect the principles stated in this section, that they are worthy of the careful study of any one who has occasion to examine the law affecting the extra-territorial rights of foreign executors and administrators. Attention is also called to the elaborate briefs printed with the opinion in *Peterson* v. *Chemical Bank.*

[74] *Peterson* v. *Chemical Bank,* 32 N. Y. 43, 88 Am. Dec. 298; *Smith* v. *Webb,* 1 Barb. (N. Y.) 232; *Smith* v. *Tiffany,* 16 Hun (N. Y.) 552, *per* Hardin, J., collating and reviewing the cases upon this point.

[75] *Smith* v. *Webb,* 1 Barb. (N. Y.) 232.

[76] *Smith* v. *Tiffany,* 16 Hun (N. Y.) 552.

[77] *Vroom* v. *VanHorne,* 10 Paige Ch. (N. Y.) 549, 42 Am. Dec. 94,

But in a recent case in New York, where an administrator had been appointed upon the estate of a deceased non-resident, and the mortgagor nevertheless paid his mortgage debt to a foreign administrator who was subsequently appointed at the intestate's place of residence, the domestic administrator in New York was allowed to foreclose the bond and mortgage, and the court determined that, under the circumstances, payment to the foreign administrator was no defense to the action.[78] In foreclosures, as in other actions, an objection that the plaintiff is a foreign executor or administrator, and therefore legally disqualified from suing, must be taken by demurrer or answer, or it will be considered waived.[79]

It is stated by Mr. Thomas,[80] that the foreclosure of a mortgage by advertisement under a power of sale, and pursuant to statute, is a matter of contract and not of jurisdiction, and that a foreign executor or administrator may therefore adopt that method of foreclosure without seeking the authority of our courts of probate.

per Chancellor Walworth, cited with approval and quoted by Denio, J., in *Parsons* v. *Lyman,* 20 N. Y. 115. The same principle is stated as good law by Judge Story, in *Trecothick* v. *Austin,* 4 Mason C. C. 33.

[78] *Stone* v. *Scripture,* 4 Lans. (N. Y.) 186.

[79] *McBride* v. *Farmers' Bank of Salem,* 26 N. Y. 457; *Zabriskie* v. *Smith,* 13 N. Y. 322, 326, 64 Am. Dec. 551; *Robbins* v. *Wells,* 26 How. (N. Y.) Pr. 15.

[80] *Thomas on Mortgages,* p. 476, citing as authority, *Doolittle* v. *Lewis,* 7 Johns. Ch. (N. Y.) 45, 11 Am. Dec. 389; *Averill* v. *Taylor,* 5 How. (N. Y.) Pr. 476; but it is very doubtful whether this proposition would be approved at the present day. The former case was decided by Chancellor Kent in 1823, under a statute which made provision for the foreclosure of mortgages containing a power, and the mortgage in that case contained a special power which led the Chancellor to say that the foreclosure was a matter of private contract and not of court jurisdiction. He cited a colony statute as old as 1774. The court, in *Averill* v. *Taylor,* seemed to be in much doubt as to whether this proposition was good law, and with some hesitation relied upon *Chancellor Kent's opinion.* See *Demarest* v. *Wynkoop,* 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467. The proposition, however, is supported by the late case of *Hayes* v. *Frey,* 54 Wis. 503, 518, which relies upon *Doolittle* v. *Lewis,* 7 Johns. Ch. (N. Y.) 45, 11 Am. Dec. 389.

§ 127. Trustees may foreclose.—It may be stated as a general rule that a person who is in any manner appointed the trustee of a person owning a mortgage or an interest therein, may maintain an action in his own name, as trustee, for its foreclosure.[81] So, also, a trustee, like a personal representative, to whom a mortgage is executed to secure funds of the trust estate, may foreclose in his own name as such trustee.[82] When the trust is merely nominal, it is usual for the trustee to join the *cestui que trust* with him as co-plaintiffs; indeed, some courts have held that the beneficiaries are necessary parties plaintiff.[83] It is believed, however, that if a beneficiary refuses to become a co-plaintiff, he can be made

[81] *Fisher on Mortgages,* §§ 355, 358, 365. For the English cases, see *Osbourn* v. *Fallows, Russ & M.* 741; *Adams* v. *Paynter,* 1 Coll. 530; *Smith* v. *Chichester,* 2 Dru. & War. 404; *Browne* v. *Lockhart,* 10 Sim. 426; *Wilton* v. *Jones,* 2 Y. & C. C. C. 244; *Allen* v. *Knight,* 5 Hare, 280; *Barkley* v. *Reay,* 2 Hare, 306.

[82] *Hays* v. *Dorsey,* 5 Md. 99, act of 1833, chap. 181; *Hackensack Water Co.* v. *DeKay,* 36 N. J. Eq. (9 Stew.) 548. In *Hays* v. *Galion G. L. & C. Co.* 29 Ohio St. 330, the trustee owned in his own right no part of the mortgage debt, and the relation of trustee did not appear on the face of the notes or mortgage. *Holmes* v. *Boyd,* 90 Ind. 332, where a note and collateral mortgage were held in the name of a cashier for his bank. See *ante,* § 123, N. Y. Code Civ. Proc. § 449.

[83] *Hitchcock's Heirs* v. *United States Bank of Penn.* 7 Ala. 386; *Freeman* v. *Schofield,* 16 N. J. Eq. (1 C. E. Gr.) 28; *Large* v. *Van Doren,* 14 N. J. Eq. (1 McCart.) 208; *Woodruff* v. *Depue,* 14 N. J. Eq. (1 McCart.) 168, 176; *Stillwell* v. *McNeely,* 2 N. J. Eq. (1 H. W. Gr.) 305; *Davis* v. *Hemingway,* 29 Vt. 438; *Fleming* v. *Holt,* 12 W. Va. 143; *Butler* v. *Farry,* 68 N. J. Eq. 760, 63 A. 240. In *Cassidy* v. *Bigelow,* 25 N. J. Eq. (10 C. E. Gr.) 112, the trustee and *cestui que trust* united as plaintiffs. In *Wright* v. *Bundy,* 11 Ind. 398, it was held that the beneficiaries were not necessary parties, but that they might properly be united as co-plaintiffs. This case was thoroughly argued twice by able counsel.

See also *Milwaukee Trust Co., as guardian, etc.* v. *Van Valkenburgh,* 132 Wis. 638, 112 N. W. 1083; *Abrams* v. *Taintor,* 76 Neb. 109, 107 N. W. 225; *Breed as ex'r, etc.* v. *Baird,* 139 Ill. App. 15.

In *Kentucky* under the code (Civ. Code Proc. § 21) the *cestui que trust* need not be made a party to a foreclosure action by the trustee. *Vance* v. *Lane's Trustee,* 26 Ky. Law Rep. 619, 82 S. W. 297; *Union Trust Co.* v. *Broshears,* 19 Ky. Law Rep. 37, 39 S. W. 44.

Bondholders secured by deed of trust may intervene in an action by

a defendant;[84] it is best, at least, when possible, to bring all parties interested in the trust within the jurisdiction of the court.

Where the number of beneficiaries is so large that great inconvenience and expense would be incurred by making them parties to the bill of foreclosure, the courts may, in their discretion, dispense with a strict adherence to the rule.[85] Thus, in one case a mortgage was executed to a person as "the agent and trustee of the several subscribers to the loan," which was of large amount; the mortgagee was allowed to file a bill for foreclosure in his own name, without bringing the beneficiaries into the action.[86] The complaint in such a case should state that the foreclosure is for the benefit of the bondholders, and that they are too numerous to be made parties.[87]

The general rule is that a trustee in a mortgage is the

the trustee to foreclose. *Parsons* v. *Little*, 28 App. D. C. 218.

The administrator of a deceased trust creditor is a necessary party to foreclosure by the trustee. *Bryan as trustee, etc.* v. *McCann*, 55 W. Va. 372, 47 S. E. 143.

For the English authorities, see Fisher on Mortgages, § 367; *Goldsmid* v. *Stonehewer*, 9 Hare Appx. 39, 17 Jur. 199, holding that the beneficiaries are unnecessary parties. See *Wood* v. *Harman*, 5 Madd. 368; *Locke* v. *Lomas*, 5 DeG. & S. 326, 16 Jur. 814. But where the trustee had died, it was deemed best to make the *cestuis que trust* parties, *Stansfield* v. *Hobson*, 16 Beav. 189.

[84] *Large* v. *VanDoren*, 14 N. J. Eq. (1 McCart.) 208; *Davis* v. Heminway, 29 Vt. 438. See Fisher on Mortgages, § 373, for English cases; *Minn* v. *Stant*, 12 Beav. 190, 15 Beav. 49; *Browne* v. *Lockhart*, 10 Sim. 426.

[85] See *post*, §§ 132, 207, for English and other authorities; Fisher on Mortgages, § 374. In point, *Swift* v. *Stebbins*, 4 Stew. & P. (Ala.) 447. In *Carpenter* v. *Canal Co.* 35 Ohio St. 307, the lienholders were so numerous that it was impracticable to bring them all before the court, and one, as trustee, prosecuted for all. See *Bardstown & Louisville R. R. Co.* v. *Metcalfe*, 4 Met. (Ky.) 199, 81 Am. Dec. 541; *Camden Safe Deposit & Trust Co.* v. *Dialogue*, 72 Atl. 358, 75 N. J. Eq. 358; *Butler* v. *Farry*, 68 N. J. Eq. 760, 63 A. 240.

[86] *Willink* v. *Morris Canal Banking Co.* 4 N. J. Eq. (3 H. W. Gr.) 377.

[87] *Carpenter* v. *Blackhawk Gold Mining Co.* 65 N. Y. 43; *King* v. *The Merchants' Exchange Co.* 5 N. Y. 547.

proper person to foreclose it,[88] whether he holds the legal title to any of the notes secured thereby or not,[89] and if he does not appear, his absence must be accounted for by refusal or neglect on his part, or by his default or misconduct;[90] and in such actions the representatives of the deceased joint mortgagees are not necessary parties to a suit to foreclose a mortgage by the survivor of three trustees who had no beneficial interest.[91] But in cases of the trustee's unreasonable neglect or refusal to discharge his duty,[92] any holder of a note or a bond may bring an action to enforce the security for the

[88] *White* v. *Allatt,* 87 Cal. 245, 25 Pac. 420; *Lambert* v. *Hyers,* 22 Ill. App. 616; *Seibert* v. *Minneapolis & St. L. R. R. Co.* 52 Minn. 148, 246, 53 N. W. 1134, 20 L.R.A. 535, 38 Am. St. Rep. 530; *Mallory* v. *West Shore & H. R. R. Co.* 3 Jones & S. (N. Y.) 174; *Thompson* v. *Huron Lumber Co.* 4 Wash. 600, 30 Pac. 741; *Smith* v. *Lowther,* 35 W. Va. 300, 13 S. E. 999; *Knapp* v. *Troy & B. R. Co.* 87 U. S. (20 Wall.) 117, 22 L. ed. 328; *Susquehanna & W. V. R. & Coal Co.* v. *Blatchford,* 78 U. S. (11 Wall.) 172, 20 L. ed. 179; *Central Trust Co.* v. *Charlotte, C. & A. R. Co.* 65 Fed. 264.

Statute gives the trustee power to foreclose in some states. See *Gates* v. *Boston & N. Y. A. L. R. Co.* 53 Conn. 346, 5 Atl. 695.

In the absence of peculiar circumstances justifying a bondholder cannot sue to foreclose a mortgage or trust deed, by which his note or bond is secured. 2 L.R.A. 535 note.

There are cases, however, where bondholders have been permitted to maintain actions to foreclose without any apparent question as to the propriety of the action in that particular form. See *Canadian Southern R. Co.* v. *Gebhard,* 109 U. S. 527, 534, 27 L. ed. 1020, 1023; *Howwell* v. *McAden,* 94 U. S. 463, 24 L. ed. 254; *Chicago, R. I. & P. R. Co.* v. *Howard,* 74 U. S. (7 Wall.) 392, 19 L. ed. 117; *Wilmer* v. *Atlantic & R. A. L. R. Co.* 2 Woods C. C. 447, Fed. Cas. No. 17,776.

In Rhode Island the trustees under a will probated in a foreign state may bring a foreclosure action, although the will has not been recorded in the latter state, where the mortgage was not the subject of the trust when created, but was acquired by the trustees under their power to invest the funds, as the legal title is in the trustees. *Bradford* v. *King,* 18 R. I. 743, 31 Atl. 166.

[89] *Thompson* v. *Huron Lumber Co.* 4 Wash. 600, 30 Pac. 741.

[90] *Central Trust Co.* v. *Charlotte, C. & A. R. Co.* 65 Fed. 264.

[91] *Landale* v. *McLaren,* 8 Manit. Rep. 322.

[92] On refusal of trustee to foreclose holder of note or bond (See *ante,* § 101) beneficiaries or *cestui que trust* (See *post,* § 132) may bring action to foreclose the mortgage.

common benefit.[93] So may they where the trustee in the mortgage accepts the position of assignee in a general assignment by the mortgagor, and thereby assumes a position antagonistic to the interest of the noteholders or bondholders, which deprives him of his preferential right to bring suit for foreclosure, since as a trustee it is his duty to assert the preference of the bonds, while, as assignee it is his duty to prevent it so far as possible.[94] But where the same person is trutsee in two mortgages, a foreclosure of the first by him is not inconsistent with his position as trustee in the second mortgage.[95]

In all those cases where the security is simply a mortgage with a provision that on default the holder of the bonds, or any one or more of them, may take possession of the mortgagee's property for the common and joint benefit of all holders of the bonds, one bondholder may maintain a suit in his own name, for the benefit of all, to enforce payment by foreclosure.[96] And the holder of a note or bond may also file a bill to foreclose where the trust deed or mortgage provides that the trustee may, in his own name or otherwise, file a bill to foreclose.[97]

It is not necessary that the trustee shall have possession of the land mortgaged as a condition precedent to the exercise of a power of sale in a trust deed, where the trustee is authorized, but not required, to take possession before making a sale thereunder.[98]

[93] *Seibert* v. *Minneapolis & St. L. R. Co.* 52 Minn. 148, 206, 53 N. W. 1134, 20 L.R.A. 535, 38 Am. St. Rep. 530.

See *General Electric Co.* v. *La Grande Edison Electric Co.* 87 Fed. 590, 31 C. C. A. 118.

[94] *American Tube & I. Co.* v. *Kentucky Southern Oil & G. Co.* 51 Fed. 826.

[95] *Robinson* v. *Iron R. Co.* 135 U. S. 522, 34 L. ed. 276, 10 Sup. Ct. Rep. 907.

[96] *Mason* v. *York & C. R. Co.* 52 Me. 82.

[97] *Cheltenham Improvement Co.* v. *Whitehead,* 128 Ill. 279, 21 N. E. 569; *Frink* v. *Neal,* 37 Ill. App. 621; *Boley* v. *Lake Street Elevated R. Co.* 64 Ill. App. 305.

[98] *Jones* v. *Hagler,* 95 Ala. 529, 10 So. 345.

Under the California code,[99] a person who takes notes and a mortgage securing them, in his own name, for the benefit of the estate of a decedent, is the trustee of an express trust, and may maintain a foreclosure suit without joining with him the persons for whose benefit the action is prosecuted.[1]

Where mortgages and debts are assigned to be collected and the proceeds to be held in trust, the legal title thereto vests in the assignees who may foreclose in their individual capacity and need not sue as trustees.[2]

§ 128. Same—Delegation and substitution of power.—The rule is that a power of sale in a trust deed operating as a mortgage cannot be delegated by the trustee, but he must be personally present and supervise the sale, unless such deed expressly provides for the delegation.[3] And under a deed of trust providing that upon refusal of the trustee to make the sale the beneficiaries may appoint a substitute, a substitute so appointed by all the beneficiaries except one, who indorses his approval, but states that all his interest in the subject-matter has been settled, is in effect a substitution made by all the beneficiaries.[4] Although the power of sale in a trustee cannot be delegated, yet an action to foreclose a mortgage given by a corporation to secure its bonds may be maintained by one of three trustees, where one of the others is dead and the third is interested in the property and assets of another company which has purchased the property mortgaged, and is interested in such purchase.[5]

§ 129. Same—Request to foreclose.—All provisions in trust deed or mortgages restrictive of the trustee's power to

[99] Cal. Code Civ. Proc. § 369.

[1] *White* v. *Allatt,* 87 Cal. 245, 25 Pac. 420.

[2] *Cartleyou* v. *Jones,* 132 Cal. 131, 64 P. 119.

[3] *Smith* v. *Lowther,* 35 W. Va. 300, 13 S. E. 999.

[4] *Cates* v. *Mayes* (Tex.) 12 S. W. 51.

[5] *Robinson* v. *Alabama & G. Mfg. Co.* 48 Fed. 12.

act, such as providing that in case of default he shall not act except upon a written demand of the holders of a specified amount of the outstanding indebtedness,—will be strictly construed. Thus under such a restriction a sufficient request for the foreclosure of the mortgage is made to the trustee in a mortgage securing several claims, with a condition that default in one shall render all due, by a written request by the holders of some claims that the deed be foreclosed, and that they believe that a sufficient default has been made to render the entire mortgage due, and that their action is for the benefit of everybody concerned in the deed.[6]

A provision of a trust deed, that it shall be the duty of the trustee upon a request in writing signed by the holders of not less than a quarter in amount of the bonds outstanding, to proceed to enforce the rights of the bondholders by the exercise of power given, in case of default in the payment of semi-annual interest remaining unpaid for six months, by entering and operating the property or selling it, does not require such written request, where the trustee acts upon his own motion,[7] and does not preclude the trustee from foreclosing immediately by suit upon default in payment of interest.[8] And it is said that a provision of a mortgage given by a railway company, that if default be made in payment of interest when due and demanded, and default shall continue for the space of six months; or if default be made in the payment of principal when due; it shall be the duty of the trustee to take appropriate proceedings at law or in equity to enforce the rights of the bondholders, upon a request signed by the holders

[6] *Heffron* v. *Gage,* 44 Ill. App. 147.

[7] *Farmers' Loan & T. Co.* v. *New York & N. R. Co.* 78 Hun (N. Y.) 213, 28 N. Y. Supp. 933, 60 N. Y. S. R. 217.

[8] *Farmers' Loan & T. Co.* v. *Chicago & N. P. R. Co.* 61 Fed. 543.

A sale made under a trust deed at the request of only one of the beneficiaries is valid where the deed, which is to secure both or either of the beneficiaries, contains no provisions that one or both of them shall request the trustee to execute the power of sale. *Jones* v. *Hagler,* 95 Ala. 529, 10 So. 345.

of one-third in amount,—does not limit the right of the trustee to foreclose for interest not six months overdue.[9]

§ 130. Same—Same—Requiring stipulated percentage.—A provision in a mortgage or trust deed that no proceedings at law or in equity shall be taken by the holder of any note or bond secured thereby, to foreclose the equity of redemption independently of the trustee, until after the refusal of the trustee to comply with a requisition first made upon him by the holders of a certain percentage of the notes or bonds secured by such mortgage or deed of trust, is valid. While such provisions are to be deemed *stricti juris,* they are to be reasonably construed in view of the nature of the security, and the interest of the holders of the notes or bonds as a class. It is not the purpose or effect of such a stipulation to divest the holders of the notes or bonds of their right to judicial remedies, or to oust the courts of their jurisdiction, but it is merely the imposition of certain conditions upon themselves in respect to the exercise of that right.[10] It has been said that such stipulations are agreements which the bondholders are at liberty to make, and there is nothing in them illegal or contrary to public policy.[11] In such a case each bondholder enters into contractual relations with each and all of his co-bondholders. His right to appropriate the security in satisfaction of his bond in such lawful manner as he may choose is modified not only by the express provisions of the mortgage, but by the peculiar nature of the security.[12] It is said in the case of Seibert v. Minneapolis and St. Louis

[9] *Mercantile Trust Co.* v. *Chicago, P. & St. L. R. Co.* 61 Fed. 372.

[10] *Seibert* v. *Minneapolis & St. L. R. Co.* 52 Minn. 148, 246, 53 N. W. 1134, 20 L.R.A. 535, 38 Am. St. Rep. 530.

[11] *Chicago, D. & V. R. Co.* v. *Fosdick,* 106 U. S. 47, 27 L. ed. 47, 1 Sup. Ct. Rep. 60.

[12] *Seibert* v. *Minneapolis & St. L. R. Co.* 52 Minn. 148, 206, 53 N. W. 1134, 20 L.R.A. 535, 38 Am. St. Rep. 530. See *Gates* v. *Boston & N. Y. A. L. R. Co.* 53 Conn. 346, 5 Atl. 695; *Guilford* v. *Minneapolis, S. Ste. M. & A. R. Co.* 48 Minn. 560, 31 Am. St. Rep. 694, 51 N. W. 658; *Canada Southern R. Co.* v. *Geb-*

Railroad Company,[13] that the legislature would have had an undoubted right to have incorporated in the enabling statute authorizing the execution of the mortgage and the issuance of the bonds secured thereby, a provision requiring the mortgage to contain similar stipulations.[14] It is clear then that it would be competent for the bondholders themselves to agree to them. They are to be treated as *stricti juris,* but nevertheless are to be reasonably construed in view of the nature of the mortgage, which is the common security of all the bondholders, and the purposes to be subserved in making them. There is no doubt that the parties could lawfully provide in the same instrument for a reasonable extension of the time for the commencement of foreclosure proceedings, to be determined at the option of a majority of the bondholders.[15]

§ 131. Beneficiaries—When not necessary parties.—In the foreclosure of railroad mortgages this limitation has become so well established as to be a separate rule; the bondholders are never necessary or proper parties plaintiff or defendant, but there may be circumstances which would authorize the court to admit any of them as defendants on their own application.[16] Another limitation to the general rule is made in cases where a trustee is appointed to receive and administer a fund for the benefit of creditors; he may foreclose without bringing the creditors before the court.[17] In some cases the creditors are so numerous that it would be simply

hard, 109 U. S. 527, 534, 537, 27 L. ed. 1020, 1023, 1024, 3 Sup. Ct. Rep. 363; *Shaw* v. *Little Rock & Ft. S. R. Co.* 100 U. S. 605, 612, 25 L. ed. 757, 759.

[13] 52 Minn. 148, 206, 53 N. W. 1134, 20 L.R.A. 535, 38 Am. St. Rep. 530.

[14] *Howell* v. *McAden,* 94 U. S. 463, 466, 24 L. ed. 254, 256.

[15] *Nute* v. *Hamilton Mut. L. Ins. Co.* 72 Mass. (6 Gray) 174.

[16] See *Jones on Railroad Securities,* §§ 431, 437.

[17] *Christie* v. *Herrick,* 1 Barb. Ch. (N. Y.) 254.

The supreme court of Minnesota, in the case of *Moulton* v. *Haskell,* 50 Minn. 367, 52 N. W. 960, say that a real estate mortgage in trust

impossible to make all of them parties to the action; furthermore, creditors are often described as a class, and not by their individual names.

§ 132. Beneficiaries, cestuis que trust, may sometimes foreclose.—It is stated by Justice Story, on the authority of English cases, that a beneficiary, or *cestui que trust,* may maintain an action for the foreclosure of a mortgage belonging to his trust estate, or in which he has an interest.[18] So one or two beneficiaries may bring a foreclosure for themselves and other beneficiaries,[19] especially if the trustee is, for any reason, disqualified from acting.[20] But in such cases it is also necessary to make the trustee a party plaintiff or defendant to the action, as the legal title to the mortgage,

to pay debts due from or assumed by the mortgagor upon sufficient consideration, may be enforced by the trustees in their own names without joining the *cestui que trust.*

[18] *Ala. Life Ins. & Trust Co.* v. *Pettway,* 24 Ala. 544; *Carradine* v. *O'Connor,* 21 Ala. 573; *Marriott* v. *Givens,* 8 Ala. 694; *McGowan* v. *Branch Bank of Mobile,* 7 Ala. 823; *Somes* v. *Skinner,* 16 Mass. 348; *Martin* v. *McReynolds,* 6 Mich. 70; *Hackensack Water Co.* v. *DeKay,* 36 N. J. Eq. (9 Stew.) 548; *Mitchell* v. *McKinney,* 6 Heisk. (Tenn.) 83; *Wood* v. *Williams,* 4 Madd. 186; *Hichens* v. *Kelly,* 2 Sm. & G. 264, Story Eq. Pl. §§ 201, 209. See N. Y. Code Civ. Proc. § 449.

It has been held that the holders of the debt secured by a mortgage or trust deed providing that the trustee may, on default, file a bill to foreclose in his own name, "or otherwise," may maintain an action to foreclose. *Frink* v. *Neal,* 37 Ill. App. 621.

Dorin v. *Colt,* 180 Ill. 397, 54 N. E. 167; *Town* v. *Alexander,* 185 Ill. 254, 56 N. E. 1111; *Surine* v. *Winterbotham,* 96 Ill. App. 123.

[19] *Berry* v. *Bacon,* 28 Miss. 318.

[20] See *Ashhurst* v. *Montour Iron Co.* 35 Pa. St. 30, where the *cestuis que trust* were numerous bondholders, and the trustee was for some reason disqualified from acting; also *Davis* v. *N. Y. Concert Co.* 41 Hun (N. Y.) 492, where the trustee for numerous bondholders refused to foreclose at their request. *Winton's Appeal,* 87 Pa. St. 77. In *Bank of Commerce* v. *Lanahan,* 45 Md. 396, a deed, intended as a mortgage, was executed to one of a number of creditors to secure his own claim and the claims of others; it was held that the *cestuis que trust* could not maintain an action for foreclosure, although the grantee in the deed was a trustee, and the other creditors were beneficiaries. But in *Dorsey* v. *Thompson,* 37 Md. 25, the *cestuis que trust* foreclosed

if not the equitable title, is vested in him.[21] The best practice is for the trustee and the beneficiary to unite as co-plaintiffs.[22]

In all those cases where there is a good reason why the trustee cannot foreclose, or sufficient reason to believe he will not act, the beneficiaries, or *cestui que trust,* may maintain an action of foreclosure.[23] Thus, it has been said that one of two bondholders protected by a trust mortgage may bring an action for the foreclosure in his own name, where the trustee is absent in a foreign country, and the bondholder has sufficient reason to believe that he has become insane.[24] And it is held that a provision in a trust deed that on application of the lawful holder of the notes secured thereby, it shall be lawful for the trustee to file a bill for the foreclosure thereof, does not apply where the bill is brought by the *cestui que trust* himself jointly with the trustee.[25]

a mortgage, making the trustee a defendant. *Johnes* v. *Outwater,* 55 N. J. Eq. 398, 36 A. 483.

[21] In *Hays* v. *Lewis,* 21 Wis. 663, the trustee was held an indispensable party, and it was questioned whether the *cestuis que trust* alone could maintain an action for foreclosure.

First National Bank v. *Radford Trust Co.* 80 Fed. 569, 26 C. C. A. 1.

Where a mortgage is assigned to the cashier of a bank as collateral security for a debt due the bank, the bank may foreclose without making the cashier a defendant. *Michigan State Bank of Eaton Rapids* v. *Trowbridge,* 92 Mich. 217, 52 N. W. 632.

In *Sidney Stevens Implement Co.* v. *South Ogden Land, Building & Improvement Co.* 20 Utah, 267, 58 P. 843, it is held that the trustees in a deed of trust are not necessary or indispensable parties as under the statute (§ 3517 R. S. 1898) they are not vested with any title.

Where the beneficiary and trustee are the same person it is not necessary that the complainant be joined as trustee also. *Dearlove* v. *Hatterman,* 102 Ill. App. 329.

[22] See *ante,* §§ 127, 131, and notes.

[23] *General Electric Co.* v. *La Grande Edison Electric Co.* 79 Fed. 25, 87 Fed. 590, 31 C. C. A. 118; *First National Bank* v. *Radford Trust Co.* 80 Fed. 569, 26 C. C. A. 1.

[24] *Ettlinger* v. *Persian Rug & Carpet Co.* 142 N. Y. 189, 40 Am. St. Rep. 587, 58 N. Y. S. R. 303, 31 Abb. (N. Y.) N. C. 301, 36 N. E. 1055.

[25] *Brown* v. *McKay,* 151 Ill. 315, 37 N. E. 1037, aff'g. 51 Ill. App. 295.

The supreme court of Louisiana say that the holder of a majority of the bonds issued by a New Jersey corporation, secured by mortgaging upon lands in Louisiana giving the trustee the right of entry, possession and sale, and to enforce the rights of the bondholders by suit in equity, but providing that such right of entry and sale are cumulative remedies, which shall not deprive the trustee or the beneficiaries of any legal or equitable remedy by judicial proceedings consistent with the true intent and meaning of the mortgage, may maintain a suit in Louisiana for the foreclosure of the mortgage for the benefit of himself and all similarly situated, where there is no trustee, without going to New Jersey and having a new trustee appointed.[26] But the New Jersey court of chancery hold that powers of sequestration and sale given to a trustee in a mortgage cannot be exercised by a holder of bonds secured thereby, in a suit for its foreclosure upon refusal of the trustee to act upon a default in payment of interest.[27]

§ 133. Mortgages to persons in official capacity; they or their successors may foreclose.—A person to whom a bond and mortgage are executed in an official capacity may foreclose the same in his own name as such officer, as he holds the entire legal title; the real party, who equitably owns the fund, is not held a necessary party to the action. So also a successor in office may foreclose in his own name as such officer, as the courts hold him to be the equitable assignee of the security.[28] His predecessor, in whose name the mortgage was taken, need not be brought into the action, and upon his death his personal representatives are not neces-

[26] *Wheelwright* v. *St. Louis, N. O. & O. Canal Transp. Co.* 56 Fed. 164.

[27] *McFadden* v. *Mays Landing & E. H. C. R. Co.* 49 N. J. Eq. (4 Dick.) 176, 22 Atl. 932.

[28] *Iglehart* v. *Bierce,* 36 Ill. 133; *Hiatt* v. *The State-Kitselman,* 110 Ind. 472; *Vanarsdall* v. *The State,* 65 Ind. 176. See *Norton* v. *Ohrns,* 67 Mich. 612, 35 N. W. 175; *Wall* v. *McMillan,* 44 S. C. 402, 22 S. E. 422.

sary parties. The rule of this section is in harmony with the principles stated in §§ 124 and 127, as to executors, administrators and trustees. Thus the successor of a receiver of an insolvent corporation is allowed to sue in his own name as such receiver.[29] Illustrations may be taken from the reported cases, where mortgages have been given to guardians of infants[30] and lunatics,[31] to the sheriff,[32] to the comptroller of a state,[33] to the state superintendent of insurance,[34] to United States loan commissioners,[35] and to personal representatives[36] and trustees.[37] It is not necessary for a general guardian, to whom, as such, a mortgage has been assigned, to join his ward as a party in an action for foreclosure.[38]

[29] *Leavitt* v. *Pell,* 27 Barb. (N. Y.) 322; affirmed 25 N. Y. 474; *Iglehart* v. *Bierce,* 36 Ill. 133.

[30] *Lyon* v. *Lyon,* 67 N. Y. 250; *Cleveland* v. *Cohrs,* 10 Rich. (S. C.) 224. In *Walter* v. *Wala,* 10 Neb. 123, a note and mortgage were turned over by an administrator to a guardian as a part of his ward's distributive share. In *Commonwealth* v. *Watmough,* 12 Pa. St. 316, a mortgage was executed to a guardian; the wards, on becoming of age, assigned their interests, and the assignee was held to have the full legal title and allowed to foreclose. See *Caulkins* v. *Bolton,* 98 N. Y. 511; *Miller* v. *Clark,* 56 Mich. 337; *Norton* v. *Ohrns,* 67 Mich. 612, 35 N. W. 175.

[31] See *Peabody* v. *Peabody,* 59 Ind. 556, for an action brought by a guardian or committee of a lunatic to foreclose a mortgage executed to the lunatic while sane.

[32] *Wall* v. *McMillan,* 44 S. C. 402, 22 S. E. 424.

[33] *Flagg* v. *Munger,* 9 N. Y. 483, holding that the comptroller of New York had power to foreclose a mortgage assigned to him by a bank to secure the redemption of its notes; so to the treasurer of the state of New Jersey, *Townsend* v. *Smith,* 12 N. J. Eq. (1 Beas.) 350, 72 Am. Dec. 403; *Supervisors of Iowa Co.* v. *Mineral Point R. R.* 24 Wis. 93. See *Delaplaine* v. *Lewis, Governor, etc.* 19 Wis. 476.

[34] *Smith* v. *Lombardo,* 15 Hun (N. Y.) 415, where the action was in the name of the deputy.

[35] *Thompson* v. *Comm'rs,* 79 N. Y. 54; *York* v. *Allen,* 30 N. Y. 104; *Pell* v. *Ulmar,* 18 N. Y. 139; *Olmstead* v. *Elder,* 5 N. Y. 144; *Powell* v. *Tuttle,* 3 N. Y. 396; *Wood* v. *Terry,* 4 Lans. (N. Y.) 80. The foreclosure of United States loan mortgages is strictly statutory, and is governed by the laws of the United States; Laws of 1837, Ch. 150.

[36] See *ante,* § 123.

[37] See *ante,* § 127.

[38] *Bayer* v. *Phillips,* 17 Abb. (N. Y.) N. C. 425, with foot note. N. Y. Code Civ. Proc. § 1686.

§ 134. A married woman owning a mortgage may foreclose.—It is now a universal principle of law in England and in America that a married woman can own and control a separate estate in real and personal property, and that she is entitled to all the rights and remedies pertaining to property which a *feme sole* possesses, and may enforce them as fully in the courts. She can own and foreclose a bond and mortgage in her own name, and it is not necessary for her to make her husband a party to the action, as he can have no interest in it.[39] Where a bond and mortgage were executed to a husband and wife, the wife was held entitled to foreclose in her own name on the death of the husband, upon the ground of survivorship in joint ownership;[40] and it appearing that the money was actually loaned by the wife, that fact was held as another circumstance which entitled her to foreclose in her own name. And so a discharge by a husband of a mortgage executed to him and his wife, but really belonging to her, will not prevent her foreclosing.[41] The marriage of a mortgagee, a *feme sole,* to a mortgagor will not extinguish the mortgage; the mortgage remains unaffected and may be foreclosed.[42] A husband can execute a valid mortgage on his lands to his wife, who can foreclose against him.[43] She can also foreclose a mortgage assigned to her on her husband's lands. The assignment does not operate as a discharge of the mortgage.[44]

[39] *Bartlett* v. *Boyd,* 34 Vt. 256. So she can assign her mortgage. *Kamena* v. *Huelbig,* 23 N. J. Eq. (8 C. E. Gr.) 78.

[40] *Shockley* v. *Shockley,* 20 Ind. 108.

[41] *McKinney* v. *Hamilton,* 51 Pa. St. 63.

[42] This has been the law in New York since the act of 1848. *Power* v. *Lester,* 17 How. (N. Y.) Pr. 413, aff'd 23 N. Y. 527, a leading case.

[43] *Mix* v. *Andes Ins. Co.* 9 Hun (N. Y.) 397; *Wochoska* v. *Wochoska,* 45 Wis. 423; *Putnam* v. *Bicknell,* 18 Wis. 333. Such a mortgage was held void in *Terry* v. *Wilson,* 63 Mo. 493.

[44] *Bean* v. *Boothby,* 57 Me. 295; *Trenton Banking Co.* v. *Woodruff,* 2 N. J. Eq. (1 H. W. Gr.) 117.

CHAPTER VI.

PARTIES DEFENDANT—NECESSARY TO PERFECT THE TITLE —OWNERS OF THE FEE TITLE.

§ 135. Introductory.
§ 136. General principles.
§ 137. Mortgagor, still owning the equity of redemption, necessary.
§ 138. Mortgagor, no longer owning the equity of redemption, not necessary.
§ 139. Mortgagor always a desirable defendant.
§ 140. Mortgagor, still owning only a divided or undivided part of the premises, or being a tenant in common by descent or grant, a necessary party.
§ 141. Mortgagor, being a tenant in common or by the entirety, a necessary defendant.
§ 142. Joint mortgagors—Survivorship.
§ 143. Mortgagor, still holding any kind of an equitable, contingent or latent interest, generally necessary—Sheriff's execution sale.
§ 144. Vendor and vendee under land contract necessary.
§ 145. Parties to deeds for security, in escrow or in fraud, necessary.
§ 146. Purchaser and owner of the equity of redemption by grant or otherwise from the mortgagor necessary.
§ 147. Owner of mortgaged premises omitted as defendant—Effect.
§ 148. Remedies of omitted owner of mortgaged premises.
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§ 150. Purchaser *pendente lite* not necessary.
§ 151. Common law doctrine of *lis pendens.*
§ 152. New York statutory provisions for *lis pendens;* other states.
§ 153. Effect on parties of omitted or defective *lis pendens.*
§ 154. Mortgagor a married woman, having a separate estate, necessary.
§ 155. Wife of mortgagor or owner of the equity of redemption necessary.
§ 156. Wife not executing mortgage—Her remedies if omitted as defendant.
§ 157. Wife of mortgagor; service of summons or process under early practice.
§ 158. Wife of mortgagor; service of summons under present practice.
§ 159. Wife of mortgagor or owner of equity of redemption, not necessary in those states where the common law doctrine of dower has been changed.

§ 160. The husband of a mortgagor who is a married woman, having a separate estate, generally not necessary.
§ 161. Heirs of mortgagor or owner of the equity of redemption necessary.
§ 162. Heirs of mortgagor or owner—When not necessary.
§ 163. Devisees of mortgaged premises necessary.
§ 164. Legatees and annuitants necessary.
§ 165. Executors and administrators generally not necessary.
§ 166. Trustees, holding an interest of whatever kind in mortgaged premises for beneficiaries, necessary.
§ 167. *Cestuis que trust* and beneficiaries—When necessary.
§ 168. *Cestuis que trust*—When not necessary.
§ 169. Statutes making *cestuis que trust* necessary.
§ 170. Remaindermen and reversioners necessary.
§ 171. A defendant *in esse* necessary.
§ 172. Assignee in bankruptcy or by voluntary general assignment, and receiver, necessary.
§ 173. Assignee in bankruptcy *pendente lite* not necessary.
§ 174. Infants, lunatics, idiots and habitual drunkards necessary parties.
§ 175. Mortgage executed by administrator or executor to pay decedent's debts; heirs and devisees of the decedent necessary.
§ 176. Corporations necessary parties by corporate name.
§ 177. Tenants and occupants necessary.

§ 135. Introductory.—Most text-book writers have considered the subject of parties defendant to mortgage foreclosures under the sub-divisions of necessary parties and proper parties. Mr. Jones [45] has defined a necessary party as "one whose presence before the court is indispensable to the rendering of a judgment which shall have any effect on the property; without whom the court might properly refuse to proceed, because its decree would be practically nugatory." This definition, however, can not be considered logical, nor in accordance with the decisions of the courts; for at present no one can be said to be a necessary party in order to maintain the action, nor necessary in the sense that this omission would defeat the action or render the decree absolutely void.

The words "necessary" and "proper" are used with much looseness, inaccuracy and uncertainty of definition in the courts of our various states,—apparently in disregard of the facts

[45] Jones on Mortgages, § 1394.

that the words are relative in signification, and that they should be used as descriptive of parties, only with reference to the purposes for which the parties are made defendants to the foreclosure. Under the above definition neither an owner of a part or of the whole of an equity of redemption, nor a subsequent lienor, nor any other person interested in the subject-matter of the action, can be called a necessary party.

To make a logical analysis of the subject of parties defendant to foreclosure, it will be necessary to divide the subject *according to the purposes* for which the parties are brought into the action. This chapter will be given to the consideration of parties who are necessary defendants for the purpose of extinguishing or of cutting off the entire equity of redemption, and the interests of all persons who claim under the owner of the equity by subsequent mortgages, judgments or otherwise,—that is, of parties who are necessary in order to exhaust every remedy against the land for the collection of the mortgage debt, and in order to produce a perfect title at the sale, or such a title as the courts will compel a bidder to accept. The word "necessary" will be used throughout the work in this sense alone; the word "proper" can not enter into the analysis, for it is too uncertain in meaning, and conveys the idea that there may be an option on the part of the plaintiff as to whether he will bring a party into the action or not.

For convenience of treatment and to make a logical division of this part of the work, parties defendant will be considered in this and the following chapter under the heads of *Owners of the Fee Title,* and *Subsequent Mortgagees and Lienors.* In this chapter exclusive attention will be given to parties who own the equity of redemption in the mortgaged premises, or who have any interest in the quality or the quantity of the title. In the following chapter, attention will be given to parties holding liens and incumbrances upon the mortgaged premises which accrued subsequent to the execution and delivery of the mortgage under foreclosure

§ 136. **General principles.**—Many states have now codified the general equitable principle, that any person may be made a defendant to an action who has or claims to have an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein.[46] Applying this principle to foreclosures, it may be said that any person who is interested in any way in the mortgaged premises, or who has an interest in the mortgage debt adverse to that of the plaintiff, may be made a defendant in the action.[47] Thus the owner of any quantity or quality of estate in the premises, even in the remotest degree or of the most trifling value, becomes as necessary a party defendant to perfect the title as the sole owner of the entire equity of redemption. The holder of a lien by mortgage, judgment or any contingent equity, is also generally a necessary defendant. But one who holds a tax deed is not a necessary party since a tax lien is always superior to the mortgage.[48]

In those cases where the owner of land who disclaims interest therein at the time a mortgage is executed thereon by another as his own, or his vendee, is not a necessary party to an action to foreclose the mortgage.[49] And a purchaser with knowledge of an agreement by his vendor to give a purchase-

[46] N. Y. Code Civ. Proc. § 447; *Pomeroy's Remedies,* § 271. See *ante,* §§ 87, 88.

[47] *Winter Loeb & Co.* v. *Montgomery Cooperage Co.* 169 Ala. 628, 53 So. 905.

[48] *Williams* v. *Cooper,* 124 Cal. 666, 57 Pac. 577. See *post,* § 196.

[49] *Lyon* v. *Morgan,* 143 N. Y. 505, 38 N. E. 960, 62 N. Y. S. R. 806.

Doctrine of estoppel, when invoked to change title to land, is to be applied with great caution. It permits verbal statements or admissions to be substituted in place of written evidence of transfer, which the Statute of Frauds and the general rules of law require in such cases, and hence should not be applied unless the grounds upon which it rests are clearly and satisfactorily established, and not then except in support of a clear equity or to prevent fraud. *Lyon* v. *Morgan,* 143 N. Y. 505, 509, 38 N. E. 960; *Thompson* v. *Simpson,* 128 N. Y. 270, 28 N. E. 627; *Trenton Banking Co.* v. *Duncan,* 86 N. Y. 221, 230.

In the case cited in the text, the plaintiff, so far as the recorded title showed, was a purchaser in good faith and for a valuable considera-

money mortgage is a proper party in a suit to foreclose the mortgage.[50]

As to whether a person claiming title adverse and paramount to the mortgagor is a necessary party, there is a conflict in the decisions, the supreme court of California[51] holding that they are not, while under the liberal statutes of Indiana they are.[52] The supreme court of the United States have said that in a suit to establish a mortgage, and for a sale thereunder, it is competent to unite as defendants both the mortgagor and the party claiming the property adversely to the lien of the mortgage by virtue of proceedings for a sale for taxes had subsequently to its execution.[53] And it is held in New York that a decree foreclosing a mortgage is not invalid because unknown persons who may claim under the mortgagor—as a sailor who has not been heard from for years—are made parties under a general designation, without evidence that they are in fact unknown or absentees, or that the mortgagor died without heirs or next of kin.[54]

In some cases, parties claiming liens on the title of a mortgagor's grantor, which are superior to the mortgage, may be made parties and their interests litigated in foreclosure proceedings.[55] The general rule, however, is that mere general creditors without liens have no right to question the

tion, relying upon a recorded title, not affected by anything, so far as appeared, unless it was the admission which the owner made when his father assumed to mortgage it, and of those admissions he had no notice. It does not appear that there was any actual possession of the land when he purchased and took his conveyance that would operate as constructive notice, and, therefore, he was protected by the preceding act against an undisclosed equity in favor of the holder of the mortgage. *Lyon* v. *Morgan,* 143 N. Y. 505, 509, 38 N. E. 960; *Holland* v. *Brown,* 140 N. Y. 344, 35 N. E. 577.

[50] *Harman* v. *Blackstone,* 61 Mo. App. 254.

[51] *McComb* v. *Spangler,* 71 Cal. 418, 12 Pac. 347.

[52] *Bundy* v. *Cunningham,* 107 Ind. 360, 8 N. E. 174.

[53] *Mendenhall* v. *Hall,* 134 U. S. 559, 33 L. ed. 1012, 10 Sup. Ct. Rep. 616.

[54] *Moran* v. *Conoma,* 36 N. Y. S. R. 680, 13 N. Y. Supp. 625.

[55] *Converse* v. *Michigan Dairy Co.* 45 Fed. 18.

construction placed upon a mortgage of their debtor's property in a foreclosure suit between the parties interested in the mortgaged property.[56] And general creditors who connect themselves with the title to mortgaged property only by a levy made subsequent to the mortgage, may be compelled to litigate their claims in a foreclosure suit.[57] Creditors, however, who, in an action for the foreclosure of a mortgage in which a mortgagor has made default, have filed answers asking for a sale to satisfy their own claims, but have not served them on the mortgagor, cannot, where no foreclosure is decreed and the mortgagor is not insolvent, have a decree for a sale to satisfy their claims.[58]

The heirs of a grantee are necessary parties defendant, and where they were not made parties to a foreclosure suit instituted after the conveyance, no title will vest in the purchaser at the sale against them.[59]

It has even been said, by the supreme court of New York, that the indorsers of a note are proper parties defendant to an action to foreclose a mortgage securing it, where they are liable to the mortgagees for the payment of the debt or some part of it.[60] But the United States circuit court of appeals has held that a land company which has guaranteed the principal and interest of mortgage bonds of a railroad company, under authority of the charter of the latter, is not an indispensable or even a proper party to a suit to foreclose the mortgage because it has paid notes given to raise money to pay interest coupons attached to the mortgage bonds, as it would be a proper party only when entitled to subrogation to the mortgage lien because of the payment, and payment of the whole debt is essential to subrogation.[61]

[56] *Omaha & St. L. R. Co.* v. *O'Neill,* 81 Iowa, 463, 46 N. W. 1100.

[57] *Converse* v. *Michigan Dairy Co.* 45 Fed. 18.

[58] *Hairston* v. *Hairston,* 35 S. C. 298, 14 S. E. 634.

[59] *Daugherty* v. *Deardorf,* 107 Ind. 527, 8 N. E. 296.

[60] *Patton* v. *Townsend,* 47 N. Y. S. R. 490, 19 N. Y. Supp. 946.

[61] *Columbia Finance & Trust Co.* v. *Kentucky U. R. Co.* 60 Fed. 794.

There is thought to be no question but that one in possession at the time of the commencement of the action is a proper party defendant to an action to foreclose a mortgage, in the absence of facts showing that he is in possession under some right or title superior and adverse to the mortgagor.[62] In South Dakota, however, it has been held that the owner of the equity of redemption is the only necessary party defendant to an action in equity to foreclose a real estate mortgage.[63]

A purchaser upon a foreclosure sale becomes a party to the suit to determine priority and validity of liens, without further citation, by tacitly agreeing to become the stakeholder instead of the sheriff, who is directed to retain the proceeds of sale and has acknowledged service.[64] And it is said that where the remainderman of mortgaged land acquiesces in a sale thereof under the mortgage, at which the title was acquired by the life tenant for much less than the real value of the property, a contract between the life tenant and a third person, by which the former was enabled to secure the property so cheaply because of the latter's agreement not to bid at the sale, in consideration of the execution to him of a mortgage on the property after it should be secured, cannot be assailed by the remainderman in a suit to foreclose the latter mortgage; the remedy is by application to set aside the first foreclosure sale.[65]

In a case where a wife joined with her husband in the execution of a mortgage, and her husband died, and after his death the mortgage debt matured, she was properly made a party defendant to the suit for foreclosure; and the result of such suit would ordinarily be to cut off her equity of redemption as effectually as if she had been discovert at the

[62] *Ruyter* v. *Reid,* 121 N. Y. 498, 31 N. Y. S. R. 387, 24 N. E. 791.

[63] *Carpenter* v. *Ingalls,* 3 S. D. 49, 44 Am. St. Rep. 753, 51 N. W. 948.

[64] *Bourgeois* v. *Jacobs,* 45 La. An. 1310, 14 So. 68.

[65] *Hopkins* v. *Ensign,* 122 N. Y. 144, 25 N. E. 306, 33 N. Y. S. R. 299, 9 L.R.A. 731.

time the note was executed; but she could not be made personally responsible for the debt.[66] And the supreme court of Georgia say that a wife and son who have joined in a petition to the chancellor to authorize the husband and father, who is the trustee, to mortgage the trust estate, having an interest in the property, are proper although not necessary parties to the foreclosure.[67]

In North Carolina it is held that the administrator is not a necessary party in an action by a mortgagee to foreclose a mortgage after the death of the mortgagor.[68] And in New York, that the purchaser of growing nursery trees at a constable's execution sale is not a necessary party to an action to foreclose a mortgage on the land.[69]

In a case where one of two mortgagees, who has surrendered the notes held by him, which represent half the mortgage debt, and has received in payment a deed for an undivided one-half of the premises, has no other or further interest in the premises beyond what he acquired by his deed, and is not a proper party defendant on a foreclosure by the party owning the other half of the mortgage debt.[70] And in a case where a misdescription in a mortgage is discovered after the mortgage has been assigned, whereupon the mortgagee, with his wife, executes a further deed correcting the description, and an agreement is made between the mortgagor and mortgagee, correcting and confirming the mortgage, the mortgagee has no further interest in its enforcement, and is, consequently, not a necessary or proper party to an action to foreclose.[71]

But the general rule is that one who sets up a claim to the

[66] *Hagerman* v. *Sutton,* 91 Mo. 519, 4 S. W. 73.

[67] *Bolles* v. *Munnerlyn,* 83 Ga. 727, 10 S. E. 365.

[68] *Fraser* v. *Bean,* 96 N. C. 327, 2 S. E. 159.

[69] *Batterman* v. *Albright,* 122 N. Y. 484, 25 N. E. 856, 34 N. Y. S. R. 131, 11 L.R.A. 800, 19 Am. St. Rep. 510.

[70] *Sowles' Trustee* v. *Buck,* 62 Vt. 203, 20 Atl. 146.

[71] *Haaren* v. *Lyons,* 30 N. Y. S. R. 416, 9 N. Y. Supp. 211.

land, adverse and paramount to that of the mortgagor, cannot be joined as a codefendant in foreclosure.[72]

The supreme court of New York say that in a suit to foreclose a mortgage, and in case the mortgagor be held not to have been the owner of the fee, to enforce in plaintiff's behalf prior liens paid off with the money borrowed upon the mortgage, the former owners of the liens paid off are not necessary parties, since all of their rights are as effectually vested in the plaintiff as though the liens had been formally assigned.[73] And the supreme court of Arkansas say that it is not proper, in an action to foreclose a mortgage, to make a prior vendee of the land a party, to avoid his title as fraudulent; but if made a party it is a misjoinder of parties and causes of action, and can be corrected only by motion; and the objection is waived unless made.[74]

§ 137. **Mortgagor, still owning the equity of redemption, necessary.**—If the mortgagor continues to own the equity of redemption, he is for all purposes a necessary party to an action to foreclose a mortgage;[75] if he has not incum-

[72] *McComb* v. *Spangler,* 71 Cal. 418, 12 Pac. 347.

In Indiana a different rule prevails, however. In a recent case in the supreme court of that state it is said: "The purpose of our liberal statute upon the subject of parties defendants is to settle all conflicting titles and to determine the whole controversy in one suit; and when some of the defendants in a foreclosure suit claim to own the property included in the mortgage, and deny the title of the mortgagors, they must assert their title. *Bundy* v. *Cunningham,* 107 Ind. 360, 8 N. E. 174; *Joslin* v. *Williams,* 61 Neb. 859, 86 N. W. 473; *Wolfe* v. *Harris,* 20 Tex. Civ. App. 99, 48 S. W. 529.

[73] *Connecticut Mut. L. Ins. Co.* v. *Cornwell,* 72 Hun (N. Y.) 199, 55 N. Y. S. R. 480, 25 N. Y. Supp. 348.

[74] *Adams* v. *Edgerton,* 48 Ark. 419, 3 S. W. 628.

[75] *Raynor* v. *Selmes,* 52 N. Y. 579, reversing 7 Lans. (N. Y.) 440; *Kay* v. *Whittaker,* 44 N. Y. 565, 572; *Griswold* v. *Fowler,* 6 Abb. (N. Y.) Pr. 113; *Reed* v. *Marble,* 10 Paige Ch. (N. Y.) 409; *Lane* v. *Erskine,* 13 Ill. 501, 503, authorities collated by Treat, Ch. J.; followed in *Harvey's Adm's* v. *Thornton,* 14 Ill. 217; *Hughes* v. *Patterson,* 23 La. An. 679. For the English authorities, see Fisher on Mortgages, § 298; *Fell* v. *Brown,* 2 Bro. Ch. 276; *Palk* v. *Clinton,* 12 Ves. 48;

bered the property, he is the sole necessary defendant, and the simplest possible case of foreclosure exists. "There is no doubt that the owner of the equity of redemption is a necessary party to a suit for the foreclosure of a mortgage. The mere statement of this proposition is sufficient to show its correctness, without the citation of any authorities in its support. The action is brought for the express purpose of foreclosing the equitable estate and right to redeem remaining against the mortgage, and of transferring to the purchaser at a sale by virtue of the decree, a complete legal title to the mortgaged premises. The very object of the proceeding would, therefore, be completely defeated if the owner of the equity of redemption were not a party. No title could be made that would not be defeasible by the person in whom this equity of redeeming the mortgage remained, not barred or destroyed." [76] If there are two or more mortgagors, all are necessary defendants; one can not represent the others.[77] If

Thomson and Baskerville Case, 3 Rep. in Ch. 215. For a mortgage of a life estate, see *Hunter* v. *Macklew,* 5 Hare, 238. See post, §§ 146–148, and notes.

[76] *Hall* v. *Nelson,* 23 Barb. (N. Y.) 90, 14 How. (N. Y.) Pr. 32, *per* Emott, J.; *Watson* v. *Spence,* 20 Wend. (N. Y.) 260, *per* Cowen, J.; *Buckner* v. *Sessions,* 27 Ark. 219; *Cox* v. *Vickers,* 35 Ind. 27; *Lenox* v. *Reed,* 12 Kan. 223, 228; *Champlin* v. *Foster,* 7 B. Mon. (Ky.) 105. In Louisiana a *curator* will be appointed by the court to represent the mortgagor, if he is a non-resident or hides himself; *Lasere* v. *Rochereau,* 21 La. An. 205. See *Dickinson* v. *Duckworth,* 74 Ark. 138, 85 S. W. 82.

The mortgagor or person owning the equity of redemption being a necessary party defendant to an action to foreclose a mortgage, a sale under a decree in a foreclosure suit to which the owner of the equity of redemption is not a party conveys no title; the purchaser, however, becomes subrogated to the rights of the mortgagee in the premises, as well as in the mortgage debt. *Jordan* v. *Sayer,* 29 Fla. 558, 10 So. 823. See *post,* § 683. And the rights of a grantor in an absolute deed which was in fact a mortgage are not affected by foreclosure of a mortgage made by the grantee, when he is not made a party to the suit, although he is estopped to contest the validity of the mortgage by silence when it was made. *Turman* v. *Bell,* 54 Ark. 273, 26 Am. St. Rep. 35, 15 S. W. 886.

[77] *Stucker* v. *Stucker,* 3 J. J. Marsh. (Ky.) 301, *per* Robertson, Ch. J. See *post,* § 142, on joint mortgagors.

the title is held by a husband and wife as tenants by the entirety, both will be necessary defendants.[78] And if community lands, held by tenants in common, are mortgaged, all of the owners will be necessary defendants.[79] A person who has signed a note or bond, for which another person executes a mortgage as collateral security, is not a necessary party to a foreclosure, as he has no interest in the land;[80] he can be made a defendant, however, if a judgment for deficiency is sought against him.

If the mortgagor has conveyed the premises by an instrument which remains unrecorded, he is still a necessary party, as the record continues to show the title in him;[81] it would be unsafe at least to omit such a mortgagor. It is believed that the safest and securest practice is, always to make the mortgagor a party, if he can be easily served with the summons.[82] If the mortgagor has contracted to sell and convey the premises, he remains a necessary party in order to cut off the entire equity of redemption, even though the contract be under seal and recorded.[83]

In strict foreclosures,[84] and also in foreclosures by advertisement under statute, the mortgagor, or those succeeding to his interests, are necessary parties defendant;[85] the statute must be strictly followed in the service of the required notice upon the necessary parties.[86]

[78] *Curtis* v. *Gooding*, 99 Ind. 45.

[79] *Johnson* v. *San Francisco Sav. Union*, 63 Cal. 554.

[80] *Deland* v. *Mershon*, 7 Clarke (Iowa), 70; *O'Conner* v. *Nadel*, 117 Ala. 595, 23 So. 532.

[81] *Hall* v. *Nelson*, 23 Barb. (N. Y.) 88; *Kipp* v. *Brandt*, 49 How. (N. Y.) Pr. 358; *Ostrom* v. *McCann*, 21 How. (N. Y.) Pr. 431; *Boice* v. *Mich. Mut. Life Ins. Co.* 114 Ind. 480, 15 N. E. 825. See N. Y. Code Civ. Proc. §§ 1670, 1671, and *post*, § 152.

[82] See *post*, § 149, on intermediate purchasers.

[83] *Crooke* v. *O'Higgins*, 14 How. (N. Y.) Pr. 154. See *post*, §§ 140, 141.

[84] *Hornby* v. *Cramer*, 12 How. (N. Y.) Pr. 490.

[85] *Robinson* v. *Ryan*, 25 N. Y. 320; *Cole* v. *Moffitt*, 20 Barb. (N. Y.) 18; *Stanton* v. *Kline*, 16 Barb. (N. Y.) 9; *VanSlyke* v. *Sheldon*, 9 Barb. (N. Y.) 278.

[86] *Mowry* v. *Sanborn*, 65 N. Y. 581.

§ 138. Mortgagor, no longer owning the equity of redemption, not necessary.—A mortgagor who has made an absolute conveyance of all his interest in mortgaged premises is not a necessary party to a foreclosure for the purposes of perfecting the title and of exhausting all remedies against the land for the collection of the debt;[87] neither are the

[87] *Daly* v. *Burchell*, 13 Abb. (N. Y.) Pr. N. S. 264, 268; *Griswold* v. *Fowler*, 6 Abb. (N. Y.) Pr. 113; *VanNest* v. *Latson*, 19 Barb. (N. Y.) 604, 608; *Cherry* v. *Monro*, 2 Barb. Ch. (N. Y.) 627; *Rhodes* v. *Evans*, Clarke Ch. (N. Y.) 168; *Trustees* v. *Yates*, 1 Hoff. Ch. (N. Y.) 142; *Drury* v. *Clark*, 16 How. (N. Y.) Pr. 428; *Crooke* v. *O'Higgins*, 14 How. (N. Y.) Pr. 154; *Bram* v. *Bram*, 34 Hun (N. Y.) 487, 491; *Root* v. *Wright*, 21 Hun (N. Y.) 344, 348, reversed in part, but not as to this point, in 84 N. Y. 72, 38 Am. Rep. 495; *Whitney* v. *McKinney*, 7 Johns. Ch. (N. Y.) 144; *Bigclow* v. *Bush*, 6 Paige Ch. (N. Y.) 343; *Horn* v. *Jones*, 28 Cal. 194; *Boggs* v. *Fowler*, 16 Cal. 559, 76 Am. Dec. 561; *Swift* v. *Edson*, 5 Conn. 534; *Bennett* v. *Mattingly*, 110 Ind. 197; *Stevens* v. *Campbell*, 21 Ind. 471; *Burkham* v. *Beaver*, 17 Ind. 367; *Shaw* v. *Hoadley*, 8 Blackf. (Ind.) 165; *Johnson* v. *Monell*, 13 Iowa, 300, 303; *Jones* v. *Lapham*, 15 Kan. 540; *Bailey* v. *Myrick*, 36 Me. 50; *True* v. *Haley*, 24 Me. 297; *Osborne* v. *Crump*, 57 Miss. 622; *Andrews* v. *Stelle*, 22 N. J. Eq. (7 C. E. Gr.) 478. In *Crenshaw* v. *Thackston*, 14 S. C. 437, such a mortgagor was held a necessary party. *Wright* v. *Eaves*, 10 Rich. (S. C.) Eq. 582; *Buchanan* v. *Monroe*, 22 Tex. 537; *Miner* v. *Smith*, 53 Vt. 551; *Delaplaine* v. *Lewis*, 19 Wis. 476; *Brown* v. *Stead*, 5 Sim. 535; Fisher on Mortgages, § 305. *Boutwell* v. *Steiner*, 84 Ala. 307, 4 So. 184, 5 Am. St. Rep. 375; *West* v. *Miller*, 125 Ind. 70, 25 N. E. 143; *Hammons* v. *Bigelow*, 115 Ind. 363, 17 N. E. 192; *Bennett* v. *Mattingly*, 110 Ind. 197, 11 N. E. 792; *Johnson* v. *Foster*, 68 Iowa, 140, 26, N. W. 39; *Watts* v. *Creighton*, 85 Iowa 154, 52 N. W. 12; *Stevens* v. *Ferry*, 48 Fed. 7; *Hunsicker* v. *Richardson*, 13 Pa. Co. Ct. 524, 3 Pa. Dist. Rep. 178; *Ashmore* v. *McDonnell*, 139 Kan. 669, 18 Pac. 821; *Heidgerd* v. *Cunningham*, 135 App. Div. 414, 119 N. Y. Supp. 921; *McCauley* v. *Brady*, 123 Mo. App. 558, 100 S. W. 541; *Brockway* v. *McClun*, 243 Ill. 196, 90 N. E. 374; *Grove* v. *Grove*, 93 Fed. 865; *Bernard* v. *Shemwell*, 139 N. C. 446, 52 S. E. 64; *Munger* v. *Beard*, 87 Neb. 527, 127 N. W. 872. See *California Title Ins. & Trust Co. as ex'r. etc.* v. *Muller*, 3 Cal. App. 54, 84 Pac. 453.

Yet it is held by the supreme court of Indiana, in the case of *Insurance Company of North America* v. *Martin*, 139 Ind. 317, 37 N. E. 394, that a mortgagor who has conveyed the mortgaged lands to one who assumes the mortgage debt is a necessary party to an action to be subrogated to the mortgagee's rights and to foreclose the mortgage for the amount of a policy, brought by an insurance company,

assignees in bankruptcy, nor the heirs, nor the personal representatives [88] of such a mortgagor necessary parties.[89] But a mortgagor who has sold his equity of redemption by a warranty deed, may be made a party defendant on his own application; so also if he has any other interest in the foreclosure, but if he fails to show a real interest in the action when admitted, the court will subsequently dismiss him from it.[90]

The decisions are clear and uniform in sustaining these propositions, and it is only in exceptional cases and for special reasons that a court will require a mortgagor, who has parted with his entire interest in the property, to be brought in if the plaintiff has omitted him.[91] The mortgaged premises are always the primary fund for the payment of the debt, and a grantee has no right to object if the mortgagor is not made a party to the bill of forclosure.[92] Neither will the objection of any other defendant be considered, unless he shows that his interests will be prejudiced by the omission of the mortgagor.[93] It is only when the party against whom the mortgagee asks a personal judgment for deficiency is a

which has paid the policy on a building on the mortgaged premises and taken an assignment from the mortgagee of his rights under the mortgage to the extent of the policy, in which it is necessary to a full determination of the right to enforce the claim to decide whether the insurance money is payable to the mortgagee only in case of the inadequacy of the mortgage security.

[88] *Rickards* v. *Hutchinson,* 18 Nev. 215.

[89] *Bryce* v. *Bowers,* 11 Rich. (S. C.) Eq. 41. For the English cases, see *Rochfort* v. *Battersby,* 14 Jur. 229; *Lloyd* v. *Lander,* 5 Madd. 282; *Collins* v. *Shirley,* 1 R. & M. 638; *Kerrick* v. *Saffery,* 7 Sim. 317; Fisher on Mortgages, § 306.

[90] *Huston* v. *Stringham,* 21 Iowa, 36; *Gifford* v. *Workman,* 15 Iowa, 34.

[91] *Mims* v. *Mims,* 35 Ala. 23; *Swift* v. *Edson,* 5 Conn. 534; *Lane* v. *Erskine,* 13 Ill. 501; *Shaw* v. *Hoadley,* 8 Blackf. (Ind.) 165; *Murray* v. *Catlett,* 4 G. Greene (Iowa) 108; *Vreeland* v. *Loubat,* 2 N. J. Eq. (1 H. W. Gr.) 104, 105; *McGuffey* v. *Finley,* 20 Ohio, 474, 1 Powell on Mortgages, 405, and note 2.

[92] *Bigelow* v. *Bush,* 6 Paige Ch. (N. Y.) 343, 346.

[93] *Williams* v. *Meeker,* 29 Iowa, 292, 294.

mere surety of the mortgagor, that he can insist that the latter be made a defendant and that the plaintiff's remedy against him for the deficiency in the property be exhausted before resorting to the surety.[94] If there are equities or disputes between the grantee and the mortgagor, they must be settled in another suit.[95]

§ 139. Mortgagor always a desirable defendant.—It is nearly always desirable, however, to make the mortgagor a party defendant, even if he does not continue to hold the equity of redemption; it is against him especially that a judgment for deficiency is sought on his bond or note which the mortgage accompanies.[96] There may be, moreover, latent or secret interests to be cut off, which he continues to hold in the property; creditors may attack his conveyance as fraudulent; or his conveyance, absolute on its face, may be intended only as a collateral security.[97] Thus, in an action to

[94] *Drury,* v. *Clark,* 16 How. (N. Y.) Pr. 424, 431; *Bigelow* v. *Bush,* 6 Paige Ch. (N. Y.) 343.

[95] *VanNest* v. *Latson,* 19 Barb. (N. Y.) 604; *Bennett* v. *Mattingly,* 110 Ind. 197, 11 N. E. 792.

In Washington it is held that one whose lands have been sold and his rights thereto extinguished in an action to foreclose a mortgage cannot recover the same because the sale was not made subject to redemption, or because a valid deed has not been given to the purchaser by the sheriff, since the provisions of the Washington statutes relating to sales under execution do not apply to mortgage foreclosures. *Stevens* v. *Ferry,* 48 Fed. 7.

And a mortgagor who has parted with his title to the mortgaged premises, and is relieved from all personal liability on the bond, cannot defend a suit to foreclose the mortgage, although he has a claim against the plaintiff for consequential damages, since a judgment on the mortgage will not conclude such a claim, and he can bring an independent action to recover therefor. *Hunsicker* v. *Richardson,* 3 Pa. Dist. Rep. 178, 13 Pa. Co. Ct. 524.

[96] *Root* v. *Wright,* 21 Hun (N. Y.) 344, 348; aff'd 84 N. Y. 72, 38 Am. Rep. 495; *Petry* v. *Ambrosher,* 100 Ind. 511; *Stevens* v. *Campbell,* 21 Ind. 471; *Miller* v. *Thompson,* 34 Mich. 10. See *post,* chap. x. *Ætna Life Ins. Co.* v. *Stryker,* 38 Ind. App. 312, 78 N. E. 245.

[97] *Lloyd* v. *Lander,* 5 Madd. 282; *King* v. *Martin,* 2 Ves. Jr. 641. This point is well illustrated by the litigation in *Griswold* v. *Fowler,* 6 Abb. (N. Y.) Pr. 113; *Crooke* v. *O'Higgins,* 14 How. (N. Y.) Pr. 154.

foreclose a mortgage and to correct the description of the premises, both the mortgagor and his grantee have been deemed necessary defendants;[98] and the grantor of a trust deed has been held a necessary defendant for similar reasons.[99] When the plaintiff has no knowledge or suspicion of such equities, or fraudulent conveyance or collateral security deeds, he will generally be bound only by what appears on record.

§ 140. Mortgagor, still owning only a divided or undivided part of the premises, or being a tenant in common by descent or grant, a necessary party.—As long as a mortgagor continues to own any part of the title which he mortgages, he is just as necessary a party to a foreclosure as he would be if he continued to own the whole title.[1] A mortgagee's joining with his mortgagor in a deed of an undivided part of the mortgaged premises, for the purpose of releasing his mortgage debt on that part, has been held inoperative as a release. The mortgage still continued a lien on the entire premises.[2] A mortgage executed by a tenant in common upon his undivided interest in real property will not affect the rights of his co-tenants.[3] Such a mortgage cannot be enforced against the mortgagor's divided part of the premises, until commissioners in partition have made an actual division of the lands, and a decree has been entered adjudging the mortgage a lien upon his part alone.[4] After a mortgage has been adjudged by a decree in partition to be a lien upon a divided instead of an undivided part of the premises, the mortgagee will be confined for his remedy

[98] *Sickmon* v. *Wood*, 69 Ill. 329.

[99] *Marsh* v. *Green*, 79 Ill. 385.

[1] See *ante*, § 137; *Taylor* v. *Porter*, 7 Mass. 355; *Spiller* v. *Spiller*, 1 Hayw. (N. C.) L. 482.

[2] *Torrey* v. *Cook*, 116 Mass. 163, *per* Gray, Ch. J.

[3] *Marks* v. *Sewall*, 120 Mass. 174.

[4] *Reid* v. *Gardner*, 65 N. Y. 578; *Hatch* v. *Kimball*, 14 Me. 9; *Rich* v. *Lord*, 35 Mass. (18 Pick.) 322; *Colton* v. *Smith*, 28 Mass. (11 Pick.) 311, 22 Am. Dec. 375; *Stewart* v. *Allegheny National Bank*, 101 Pa. St. 342.

exclusively to the share set off to his mortgagor.[5] Thus, in an action to foreclose a land contract or "title bond" of an undivided half of certain premises, the vendee of the remaining undivided half was allowed to file a cross bill for partition, and to have a decree entered that the divided half set apart to him be held free and clear of the lien of the title bond.[6]

It has been intimated in some cases,[7] that a purchaser of an undivided interest in mortgaged premises would not be an absolute necessary party; but it is nowhere questioned that a mortgagor still owning the remaining undivided interest is always a necessary defendant. The above intimation is not to be relied upon in New York or in those states where foreclosure is generally accomplished by an equitable action.

§ 141. Mortgagor, being a tenant in common or by the entirety, a necessary defendant.—The owner of an undivided interest in lands, prior to the execution of a mortgage by his co-tenant, is not a necessary party to a foreclosure.[8] If he is made a defendant, he can have the bill dismissed as to himself; even if the action proceeds to a decree and sale, the judgment will not be binding upon him.

One of four joint tenants executed a mortgage purporting to convey the whole estate; on foreclosure the remaining three were held not necessary parties; and even if they had

[5] *Kline* v. *McGuckin*, 24 N. J. Eq. (9 C. E. Gr.) 411.

[6] *Hammond* v. *Perry*, 38 Iowa, 217; *Cornell* v. *Prescott*, 2 Barb. (N. Y.) 16. See also *Loomis* v. *Riley*, 24 Ill. 307; *Williams* v. *Perry*, 20 Ind. 437, 83 Am. Dec. 327.

[7] *Frost* v. *Frost*, 3 Sandf. Ch. (N. Y.) 188; *Mims* v. *Mims*, 35 Ala. 23; *Douglas* v. *Bishop*, 27 Iowa, 214, 216; *Hull* v. *Lyon*, 27 Mo. 570; *Crenshaw* v. *Thackston*, 14 S. C. 437; *Cholmondeley* v. *Clinton*, 2 Jac. & W. 134; *Palk* v. *Clinton*, 12 Ves. 48, 59; Jones on Mortgages, § 1405.

[8] Hence a surviving partner is not a necessary, although he is a proper, party to an action to foreclose a mortgage given by a deceased partner to secure a partnership indebtedness, without binding himself personally to pay the debt. *London, Paris & American Bank* v. *Smith*, 101 Cal. 415, 35 Pac. 1027.

been made parties, their rights would not have been concluded by the decree.[9] Where tenants in common jointly, or jointly and severally, mortgage property, a foreclosure can not be maintained against one of them separately to collect a moiety of the debt; the action must be against both and those claiming under them. Neither can either of them compel the mortgagee to receive half of the debt, and thereby relieve him, and to proceed against his co-tenant for the collection of the other half. The interests of tenants in common in such cases must always be sold together, no matter how numerous the owners may be.[10] If the mortgaged premises have been divided and conveyed in separate parcels, as frequently happens, all the owners of the several parcels must be made defendants to the foreclosure in order to produce a perfect title.[11]

§ 142. Joint mortgagors—Survivorship.—It has been held that neither the heirs nor the personal representatives of a deceased joint mortgagor, or owner of the equity of redemption, are necessary parties to a foreclosure. This rule is undoubtedly based upon the common-law doctrine of survivorship in cases of joint tenancy. But as it is frequently an open question whether a title is held by persons as joint tenants or as tenants in common, it is the safest practice to make the heirs of the deceased owner parties to the foreclosure. In New York the law was settled in Bertles v. Nunan,[12] that under a conveyance to a husband and wife jointly, they take as tenants by the entirety, and upon the death of either, the survivor takes the whole estate; in such a case it would not be necessary to bring the heirs of the deceased joint owner into the action.

[9] *Stephen* v. *Beall,* 89 U. S. (22 Wall.) 329, 22 L. ed. 786.

[10] *Frost* v. *Frost,* 3 Sandf. Ch. (N. Y.) 188.

[11] *Wiley* v. *Pinson,* 23 Tex. 486; *Peto* v. *Hammond,* 29 Beav 91; *Ireson* v. *Denn,* 2 Cox, 425; *Palk* v. *Clinton,* 12 Ves. 48, 59.

[12] 92 N. Y. 152, 44 Am. Rep. 361, *per* Earl, J., reviewing *Meeker* v. *Wright,* 76 N. Y. 262, and in substance overruling it.

§ 143. Mortgagor, still holding any kind of an equitable, contingent or latent interest, generally necessary—Sheriff's execution sale.—It may be generally stated that, as long as the mortgagor continues to own or hold any interest of an equitable nature in the mortgaged premises, he is a necessary defendant to a foreclosure; for the entire equity of redemption can not be cut off or foreclosed as long as such interest is outstanding and unaffected by the action.[13] Such interests may be as various and different as the cases in which questions affecting them arise. It is only from an examination of numerous special cases that the proposition of this section is advanced as a general rule.

The sale of a mortgagor's interest under an execution may do away with the necessity of making the mortgagor a party to a foreclosure, after the delivery of the sheriff's deed and the expiration of the time limited for redemption, as such a sheriff's sale passes the entire equity of redemtpion remaining in the mortgagor to the purchaser as effectually as a deed would. But during the period of redemption the mortgagor is an indispensable party for the purposes stated in this chapter.[14] It has been said by Chancellor Kent [15] that "he has an existing right of which he could not be divested within the year by the sheriff's sale, and could only be in the foreclosure action by making him a party."

It seems that a purchaser at a sheriff's sale under an execution is also a necessary party from the time of his purchase.[16] But where the execution sale is held pending a fore-

[13] *Morgan* v. *Magoffin,* 2 Bibb (Ky.) 395.

[14] N. Y. Code Civ. Proc. § 1440; *Mims* v. *Mims,* 35 Ala. 23. See *post,* § 182.

[15] *Hallock* v. *Smith,* 4 Johns Ch. (N. Y.) 649. The quotation is modified from the original to read with the text.

[16] N. Y. Code Civ. Proc. §§ 1440, 1441, 1448; *Smith* v. *Moore,* 73 Ind. 388; *Byington* v. *Walsh,* 11 Iowa, 27. See *post,* § 146. See also *Bisbee* v. *Carey,* 17 Wash. 224, 49 Pac. 220. The supreme court of Indiana, in the case of *Jewett* v. *Tomlinson,* 137 Ind. 326, 36 N. E. 1106, say that a purchaser of lands at an execution sale under a junior judgment lien is, before the expiration of the year allowed for redemption, merely a holder of a lien on the land which

closure, the plaintiff is not bound to bring the purchaser into the action by a supplemental bill; the purchaser must intervene on his own application if he wishes to be heard.[17]

It has been held that "a sale by a sheriff gives the purchaser, under the certificate, an inchoate right to the land, if not an interest in the land itself; and it is such a right as will ripen into a title, unless the property be redeemed from him. In this case the sale and purchase were anterior to the filing of the bill of foreclosure, and though the purchaser did not obtain a deed from the sheriff until after the bill in this case and a notice of *lis pendens* were filed, yet he is considered something more than a purchaser *pendente lite*. He was a purchaser before, though his title did not become consummated until afterward; and by his purchase he acquired such a right and interest in the land as entitled him to be made a party to the foreclosure suit,—and not having been made a party, he is not foreclosed of his equity of redemption. The purchaser at the foreclosure sale does not get an absolute title, as against the purchaser at the execution sale." [18] At the time of this decision, too, there was no law requiring a sheriff's certificate to be recorded in the county clerk's office, and the plaintiff could have no notice of such certificate, as he now can, without examining the books in the sheriff's office.

From these two cases, which are unquestioned as good law, it appears that both the owner of the equity of redemption

is subsequent and junior to a prior mortgage thereon, and is not a necessary party to an action to foreclose such mortgage. The only effect of not making him a party is that his right of redemption is extended and is not barred or foreclosed by the foreclosure proceeding. But under the South Carolina code (§ 139) one who claims land under a judgment against an executor for the recovery of the testator's debt is properly made a party to a suit for the foreclosure of a mortgage upon the same property, given by the testator's heirs. *Sale* v. *Meggett*, 25 S. C. 72.

[17] *Bennett* v. *Calhoun Association*, 9 *Rich.* (S. C.) Eq. 163. See *post*, § 150, on purchasers *pendente lite*.

[18] *Insurance Co.* v. *Bailey*, 3 Edw. Ch. (N. Y.) 416, strongly in point to the contrary. *Woods* v. *Love*, 27 Mich. 308. See *Smith* v. *Moore*, 73 Ind. 388.

and the purchaser [19] at an execution sale are absolutely necessary parties during the period of redemption following an execution sale, and one or the other of them will continue necessary, according as the property is redeemed or not.[20]

§ 144. **Vendor and vendee under land contract necessary.**—The mortgagor or owner of the equity of redemption also continues a necessary party, even though he may have entered into a land contract or an agreement in any form to convey the property. In such a case a mortgagor holds the equitable relation of mortgagee to the party agreeing to purchase, and can foreclose his land contract. He certainly has such an equitable interest in the property, that the title produced by foreclosure would not be perfect if he were omitted as a party defendant in the action.[21] It is believed that the person agreeing to purchase under a land contract is also a necessary defendant,[22] although Crooke v. O'Hig-

[19] Seemingly contra, *Woods* v. *Love,* 27 Mich. 308, holding that the purchaser at an execution sale is not a necessary defendant, even though he may have filed his sheriff's certificate in the register's office.

[20] For redeeming creditors, see N. Y. Code Civ. Proc. §§ 1447, 1449, 1451, 1452, 1453 *et seq.*

[21] *Crooke* v. *O'Higgins,* 14 How. (N. Y.) Pr. 154. In *Roddy* v. *Elam,* 12, 13 Rich. (S. C.) L. & Eq. 343 the plaintiff was allowed to amend his bill so as to bring in the original vendor.

[22] The *Equitable Life Ass. Soc.* v. *Bostwick,* 22 N. Y. Wk. Dig. 360; *Martin* v. *Morris,* 62 Wis. 418; *Titcomb* v. *Fonda, J. & G. R. Co.* 38 Misc. 630, 78 N. Y. Supp. 226.

It is said that under the New York code (Code Civ. Proc. § 452) a grantee of mortgaged premises, assuming the mortgage by deed not recorded at the commencement of the foreclosure action, is entitled to be made a party defendant. *Johnson* v. *Donvan,* 106 N. Y. 269, 12 N. E. 594, because it is well settled that the true owner of real property does not forfeit his right to be made a party to a foreclosure suit because he has omitted to record his deed, provided his application is made in due time. *Johnson* v. *Donvan,* 106 N. Y. 269, 12 N. E. 594.

In a case where a vendor who has turned over to the purchaser to secure him against a mortgage subsequently satisfied notes which the latter collects, may intervene in an action to foreclose a purchase money mortgage on the property given to such purchaser on a subsequent sale, and be subrogated to the lien of the mortgage to the amount

gins [23] would seem to indicate that the omission to make him a party would not prevent the rendition of a valid judgment of foreclosure.[24]

§ 145. Parties to deeds for security, in escrow or in fraud, necessary.—The mortgagor may also retain an equitable interest in the premises, and thereby remain a necessary party, where he has made a conveyance, absolute on its face, but intended only as a collateral security; or where he has delivered a deed in escrow; or where the deed has been executed, but remains unrecorded for secret purposes, and the plaintiff has no knowledge or suspicion of the same; [25]

of the notes, if it will not injure third persons. *McGuffey* v. *McLain*, 130 Ind. 327, 30 N. E. 296.

And it is said that in a suit to establish and foreclose the lien of a mortgage and a judgment of foreclosure as against persons whose interests are inferior to the mortgage, but who were not made parties to the first suit, neither the mortgagor, nor the holder of the mortgage at the time of the first foreclosure, who bought the land at the foreclosure sale, but who has since assigned the mortgage and judgment to the plaintiff and sold all the land, are not necessary parties, but the grantee of such purchaser of a part of the land is a necessary party. *Byers* v. *Brannon* (Tex.) 19 S. W. 1091.

But conditional vendees of personal property situated on the mortgaged land are not proper parties to an action for foreclosure. *Condit* v. *Goodwin*, 107 App. Div. 616, 95 N. Y. Supp. 1122.

[23] 14 How. (N. Y.) Pr. 154; *Greither* v. *Alexander*, 15 Iowa, 470. In *Blair* v. *Marsh*, 8 Iowa, 144, the owner of a land contract, holding it as a "title bond," assigned it as a collateral security; on foreclosure, both the assignor and the assignee were made parties.

[24] A curious case is reported in *Weed* v. *Stevenson*, Clarke Ch. (N. Y.) 166; *Griswold* v. *Fowler*, 6 Abb. (N. Y.) Pr. 113, where it appeared that an absolute deed was executed to a grantee who executed a defeasance to a person other than the grantor, and both were recorded as a mortgage; in an action to foreclose, the grantor was omitted as a party. Objection was raised by demurrer that he was a necessary defendant. The court ruled that the grantor was a proper, though not a necessary, party; that he might safely have been omitted, but that if the plaintiff had any doubt about the validity of his conveyance, he had a perfect right to make the grantor a defendant to set such doubt at rest.

[25] Many of these difficulties may now be obviated by filing the statutory *lis pendens*. *Kipp* v. *Brandt*, 49 How. (N. Y.) Pr. 358; *Ostrom*

or where the mortgagor conveys his equity of redemption in fraud of creditors, and his conveyance is attacked or threatened. It is thus seen that the instances in which the mortgagor may still hold an equitable interest in the title, after he has apparently parted with his entire ownership, are innumerable and extremely various in character.

§ 146. Purchaser and owner of the equity of redemption, by grant or otherwise from the mortgagor, necessary.—An owner or holder of the equity of redemption by purchase from the mortgagor or a mesne purchaser, is as necessary a defendant to a foreclosure as a mortgagor still owning the mortgaged premises,[26] and if not made a party to

v. *McCann*, 21 How. (N. Y.) Pr. 431, N. Y. Code Civ. Proc. §§ 1670, 1671. See *post*, §§ 151, 152, on *lis pendens*. On fraudulent transfers, see *Adams* v. *Bradley*, 12 Mich. 346.

[26] *Raynor* v. *Selmes*, 52 N. Y. 579; *Miner* v. *Beekman*, 50 N. Y. 337, 344; *Winslow* v. *Clark*, 47 N. Y. 261; *Robinson* v. *Ryan*, 25 N. Y. 320; *St. John* v. *Bumpstead*, 17 Barb. (N. Y.) 100; *VanSlyke* v. *Shelden*, 9 Barb. (N. Y.) 278; *Hall* v. *Nelson*, 14 How. (N. Y.) Pr. 32, 23 Barb. (N. Y.) 88; *Burnham* v. *DeBevorse*, 8 How. (N. Y.) Pr. 159; *Reed* v. *Marble*, 10 Paige Ch. (N. Y.) 409; *Williamson* v. *Field*, 2 Sandf. Ch. (N. Y.) 533; *Watson* v. *Spence*, 20 Wend. (N. Y.) 260. In *Mickles* v. *Dillaye*, 15 Hun (N. Y.) 296, the foreclosure was by advertisement. *Merritt* v. *Phenix*, 48 Ala. 87; *Hall* v. *Huggins*, 19 Ala. 200; *Porter* v. *Muller*, 65 Cal. 512; *Bludworth* v. *Lake*, 33 Cal. 265; *Skinner* v. *Buck*, 29 Cal. 253; *Horn* v. *Jones*, 28 Cal. 194; *Carpentier* v. *Williamson*, 25 Cal. 154; *Heyman* v. *Lowell*, 23 Cal. 106; *Boggs* v. *Fowler*, 16 Cal. 559, 76 Am. Dec. 561; *Goodenow* v. *Ewer*, 16 Cal. 461, 76 Am. Dec. 540; *DeLeon* v. *Higuera*, 15 Cal. 483; *Luning* v. *Brady*, 10 Cal. 265; *Coker* v. *Smith*, 63 Ga. 517; *Jeneson* v. *Jeneson*, 66 Ill. 260; *Ohling* v. *Luitjens*, 32 Ill. 23; *Daugherty* v. *Deardorf*, 107 Ind. 527, citing many Indiana cases; *Petry* v. *Ambrosher*, 100 Ind. 510; *Searle* v. *Whipperman*, 79 Ind. 424; *Mark* v. *Murphy*, 76 Ind. 534; *Lenox* v. *Reed*, 12 Kan. 223, 228; *Roney* v. Bell, 9 Dana (Ky.) 4; *Cooper* v. *Martin*, 1 Dana (Ky.) 25; *Bailey* v. *Myrick*, 36 Me. 50; *Learned* v. *Foster*, 117 Mass. 365; *Roche* v. *Farnsworth*, 106 Mass. 509; *Campbell* v. *Bemis*, 81 Mass. (16 Gray) 485; *Putnam* v. *Putnam*, 21 Mass. (4 Pick.) 139; *Thayer* v. *Smith*, 17 Mass. 429; *Nichols* v. *Randall*, 5 Minn. 304, 308; *Wolf* v. *Banning*, 3 Minn. 202, 204; *Brundred* v. *Walker*, 12 N. J. Eq. (1 Beas.) 140; *Durand* v. *Isaacks*, 4 McC. (S. C.) L. 54; *Rodgers* v. *Jones*, 1 McC. (S. C.) Eq. 221; *Meng* v. *Houser*, 13 Rich. (S. C.)

a suit to foreclose the mortgage, the decree is void as to him.[27] So, also, is a purchaser of a divided [28] or of an undivided [29]

Eq. 210, 220; *Manufacturing Co.* v. *Price,* 4 S. C. 338, 345; *Norton* v. *Lewis,* 3 S. C. 25; *Morrow* v. *Morgan,* 48 Tex. 304; *Buchanan* v. *Monroe,* 22 Tex. 537; *Cord* v. *Hirsch,* 17 Wis. 403; *Green* v. *Dixon,* 9 Wis. 532; *Hodgson* v. *Treat,* 7 Wis. 263; *Peto* v. *Hammond,* 29 Beav. 91; *Maule* v. *Beaufort,* 1 Russ. 349; *Brown* v. *Stead,* 5 Sim. 535; Fisher on Mortgages, §§ 299, 305. Contrary to the above authorities, see *Sumner* v. *Coleman,* 20 Ind. 486; *Cline* v. *Inlow,* 14 Ind 419, and *Semple* v. *Lee,* 13 Iowa, 304, holding that the owner of the equity is not a necessary, but only a proper, party; but these cases have been overruled by later decisions in the same courts. A fraudulent grantee was held a necessary party in *Adams* v. *Bradley,* 12 Mich. 346. The mere nominal holder of the title, who has no real interest therein, is a necessary defendant, *McDonald* v. *McDonald,* 45 Mich. 44; *Merriman* v. *Hyde,* 9 Neb. 113. Likewise the real owner of the property, though not holding the title, is a proper party and on his application to become a defendant, must be brought in by the plaintiff, *Johnston* v. *Donvan,* 106 N. Y. 269, 12 N. Y. Civ. Proc. Rep. 315.

It has been held that the purchaser at an invalid sale under a trust deed, who has made repairs and paid insurance and taxes and given another trust deed on the premises, and the trustees under the both deeds, are proper parties plaintiff to a petition in equity to foreclose the original trust deed. *Wolff* v. *Ward,* 104 Mo. 127, 16 S. W. 161.

Wilson v. *Dahler,* 9 Cal. App. 500, 99 P. 723: *San Diego Realty Co.* v. *McGinn,* 7 Cal. App. 264, 94 Pac. 374; *San Diego Realty Co.* v. *Bergman,* 94 Pac. 376 (Cal.); *Field* v. *Thistle,* 60 N. J. Eq. 444, 46 A. 1099; *McCauley* v. *Brady,* 123 Mo. App. 558, 100 S. W. 541; *Opperman* v. *McGown,* 50 S. W. 1078 (Tex. Civ. App.); *Johnson* v. *White,* 60 Or. 611, 119 Pac. 769; *Armstrong* v. *Hufty,* 156 Ind. 606, 55 N. E. 443, 60 N. E. 1080. See *Gillett* v. *Romig,* 17 Okl. 324, 87 P. 325; *Gulf C. & S. F. Ry. Co.* v. *Blount,* 136 S. W. 566 (Tex. Civ. App.) See also *Haines* v. *Perkins* (Kent Circuit Judge), 155 Mich. 417, 119 N. W. 439.

[27] *Watts* v. *Julian,* 122 Ind. 124, 23 N. E. 698; *Opperman* v. *McGown,* 50 S. W. 1078 (Tex. Civ. App.).

[28] *Spiller* v. *Spiller,* 1 Hayw. (N. C.) L. 482; *Stancill* v. *Spain,* 133 N. C. 76, 45 S. E. 466.

Where the mortgagor makes an agreement with an adjoining owner as to their boundary line and releases to him all the land on the adjoining owners side of the agreed boundary, such adjoining owner is a proper party defendant in an action to foreclose. *Fleischman, as ex'r. etc.* v. *Tilt,* 10 App. Div. 271, 42 N. Y. Supp. 506.

[29] *Jefferson* v. *Coleman,* 110 Ind. 515, 11 N. E. 465. See *Day* v. *Patterson,* 18 Ind. 114, where there were a number of purchasers and

part of the mortgaged premises a necessary defendant; and if not made a party, he will have the right to redeem his part by paying a proportional part of the mortgage debt.[30] The purchaser of an equity of redemption from an assignee in bankruptcy is a necessary defendant, instead of the assignee of the bankrupt.[31] In the foreclosure of a mortgage containing a power of sale, the owner of the equity is entitled to due service of a notice, and a bare compliance with the terms of the power is not sufficient.[32] But where the foreclosure is conducted by *scire facias,* as it may be in Illinois and in some other states, the mortgagor or his personal representatives are the only necessary parties; the purchaser is not even a proper party.[33]

In some states the courts have held the owner of the equity a proper, but not a necessary, party; but these courts evidently mean that the owner is not a necessary defendant for the maintenance of the action, as they are agreed that his rights will remain unaffected unless he is brought into the action. Under the meaning given to the word in this chapter they are indispensable defendants, and the decisions of these courts in fact support the proposition of this section.[34]

The owner of the equity of redemption by virtue of an unrecorded deed, of which the mortgagee has no notice, not

all were held necessary parties. See also Sumner v. Coleman, 20 Ind. 486; *Bates* v. *Ruddick,* 2 Clarke (Iowa) 423, 65 Am. Dec. 774.

[30] *Bates* v. *Ruddick,* 2 Clarke (Iowa), 423, 65 Am. Dec. 774; *Curtis* v. *Gooding,* 99 Ind. 45; *Logan* v. *Smith,* 70 Ind. 598; *Williams* v. *Beard,* 1 S. C. L. 309.

[31] *Felder* v. *Murphy,* 2 Rich. (S. C.) Eq. 58.

[32] *Drinan* v. *Nichols,* 115 Mass. 353.

[33] *Chickering* v. *Failes,* 26 Ill. 507.

[34] See *ante,* § 135; *Sumner* v. *Coleman,* 20 Ind. 486; *Cline* v. *Inlow,* 14 Ind. 419; *Semple* v. *Lee,* 13 Iowa, 304. In *Rose* v. *Swann,* 56 Ill. 37, the foreclosure of a land contract was sought; subsequent purchasers of the rights of the vendee were held *proper,* but not *necessary,* parties. In *Williams* v. *Terrell,* 54 Ga. 462, an owner was held necessary to the extent that he was unaffected by the decree if omitted, and might redeem; Georgia cases collated and reviewed. See *Knowles* v. *Lawton,* 18 Ga. 476, 63 Am. Dec. 290, holding the purchaser unnecessary where the mortgagor

being in possession or exercising any acts of ownership over the property, cannot complain that he was not made a party defendant in an action to foreclose the mortgage,[35] or impeach the decree of foreclosure because he was not named a party.[38]

It has been said that the holders of debentures which are a charge on mortgaged property, as they have an interest in the equity of redemption, are necessary parties to a foreclosure action.[37] And in the case of a joint mortgage given to secure two several notes, one of the mortgagees, who purchases of the mortgagor the equity of redemption, becomes the holder of the legal title, and is properly made a defendant on foreclosure.[38]

But a different rule obtains where there is a stipulation in the mortgage against alienation. Thus it is said that a subsequent purchaser of mortgaged property is not a necessary party defendant in an action to foreclose the mortgage where it contains the *pact de non alienando*,[39] even where he has personally assumed its payment.[40] And this right of mortgagees under the clause *de non alienando* to enforce the mortgage without notice to a purchaser from the mortgagors is not waived or impaired by proceedings by ordinary action,

was made a party; and *May* v. *Rawson,* 21 Ga. 461, holding that where the mortgagor has died, it is sufficient to make the purchaser a party. See *Mevey's Appeal,* 4 Pa. St. 80, holding a purchaser not indispensable under the acts of 1705 and 1822, but unaffected by the action if omitted, and citing the earlier Pennsylvania cases.

[35] *Connely* v. *Rue,* 148 Ill. 207, 35 N. E. 824; *Oakford* v. *Robinson,* 48 Ill. App. 270; *Hatfield* v. *Malcolm,* 71 Hun (N. Y.) 51, 24 N. Y. Supp. 596, 53 N. Y. S. R. 863, 23 Civ. Proc. Rep. 197; *Abraham* v. *Mayer,* 7 Misc. (N. Y.) 250, 27 N. Y. Supp. 264; 58 N. Y. S. R. 29; *Hibernia Savings & Loan Soc.* v. *Cochran,* 141 Cal. 653, 75 P. 315; *Harding* v. *Harker,* 17 Idaho, 341, 134 Am. St. Rep. 259, 105 P. 788. See also *Hager* v. *Astorg,* 145 Cal. 548, 79 P. 68, 104 Am. St. Rep. 68.

[36] *Connely* v. *Rue,* 148 Ill. 207, 35 N. E. 824.

[37] *Griffith* v. *Pound,* L. R. 45 Ch. Div. 553.

[38] *Johnston* v. *McDuffee,* 83 Cal. 30, 23 Pac. 214.

[39] *Fleitas* v. *Meraux,* 47 La. An. 232, 16 So. 848; *Truxillo* v. *Delaune,* 47 La. An. 10, 16 So. 642.

[40] *Truxillo* v. *Delaune,* 47 La. An. 10, 16 So. 642.

instead of by executory process.[41] Neither does the death of the mortgagor impair or affect this right.[42]

§ 147. Owner of mortgaged premises omitted as defendant—Effect.—The cases are uniform in holding that a purchaser at a foreclosure sale acquires no title whatever to the mortgaged premises, unless the owner of the equity of redemption is made a party, although the mortgagor and subsequent incumbrancers may have been made defendants. Such a purchaser remains a stranger to the title to the land, and the sale operates only as an equitable assignment of the mortgage to him.[43] It has sometimes been intimated that such a sale is void,[44] but the current of authorities agree that it is binding upon the parties who have been brought into the action. No suit can be instituted against the mortgagor for the payment of the mortgage debt without making the grantee of the equity of redemption a party defendant.[45]

The owner of the equity of redemption is not affected at all by a decree rendered in an action to which he is not made a party, as the court acquires no jurisdiction of him;[46] the

[41] *Truxillo* v. *Delaune,* 47 La. An. 10, 16 So. 642.

[42] *Truxillo* v. *Delaune,* 47 La. An. 10, 16 So. 642.

[43] *Miner* v. *Beekman,* 50 N. Y. 337, 344; *Winslow* v. *Clark,* 47 N. Y. 261; *Robinson* v. *Ryan,* 25 N. Y. 320; *Kelgour* v. *Wood,* 64 Ill. 345; *Cutter* v. *Jones,* 52 Ill. 84; *Barrett* v. *Blackmar,* 47 Iowa, 565, 571, *per* Day, Ch. J.; *Douglass* v. *Bishop,* 27 Iowa, 214, 216. In point, *Curtis* v. *Gooding,* 99 Ind. 45; *Moore* v. *Cord,* 14 Wis. 213.

[44] In point, *Skinner* v. *Buck,* 29 Cal. 253. See *Boggs* v. *Fowler,* 16 Cal. 559, 76 Am. Dec. 561, holding that such a sale is void, and that no title passes; *Nat. Fire Ins. Co.* v. *McKay,* 1 Sheld. (N. Y.) 138. See *Reed* v. *Marble,* 10 Paige Ch. (N. Y.) 409, 414; *Watson* v. *Spence,* 20 Wend. (N. Y.) 260. In *Mickles* v. *Dillaye,* 15 Hun (N. Y.) 296, it is queried whether a foreclosure by advertisement, in which no notice is served on the owner of the equity of redemption, is not a mere nullity as to *all* parties to the proceeding.

Griffin v. *Hodshire,* 119 Ind. 235, 21 N. E. 741. See *Thompson* v. *Smith,* 96 Mich. 258, 55 N. W. 886; *Ballard* v. *Carter,* 71 Tex. 161, 9 S. W. 92; *Armstrong* v. *Hufty,* 156 Ind. 606, 55 N. E. 443, 60 N. E. 1080.

[45] *Reed* v. *Marble,* 10 Paige Ch. (N. Y.) 409, 414.

[46] *Kelgour* v. *Wood,* 64 Ill. 345; *Cutter* v. *Jones,* 52 Ill. 84; *Dun-*

decree is a nullity as to him, and he has a right to redeem, or to enforce such other remedies as the courts of the different states may allow.[47]

The principles stated in this and the preceding section are equally true, whether the owner acquires his title by grant, or through a sheriff's sale under an execution, receiving a deed in due time,[48] or from an assignee in bankruptcy,[49] or by descent or devise,[50] or otherwise,[51] or is a mere occupant under a land contract to purchase.[52]

The purchaser of an easement from a mortgagor is also a

lap v. *Wilson,* 32 Ill. 517; *Hurd* v. *Case,* 32 Ill. 45, 83 Am. Dec. 249; *Ohling* v. *Luitjens,* 32 Ill. 23; *Chickering* v. *Failes,* 26 Ill. 517; *Bradley* v. *Snyder,* 14 Ill. 263, 58 Am. Dec. 564; *Porter* v. *Kilgore,* 32 Iowa, 380; *Street* v. *Beal,* 16 Iowa, 68, 85 Am. Dec. 504; *Veach* v. Schaup, 3 Clarke (Iowa), 194; *Childs* v. *Childs,* 10 Ohio St. 339, 75 Am. Dec. 512. In point, *Miner* v. *Beekman,* 50 N. Y. 337. For other New York cases see the first note to § 146, *ante.*

Ballard v. *Carter,* 71 Tex. 161, 9 S. W. 92.

The owner of the equity of redemption and the lessee in possession of mortgaged premises are properly made parties to a bill to foreclose a railroad mortgage. *Beekman* v. *Hudson River West Shore Co.* 35 Fed. 3.

Thompson v. *Smith,* 96 Mich. 258, 55 N. W. 886.

See *Livingston* v. *New England Mortgage Security Co.* 77 Ark. 379, 91 S. W. 752.

[47] *Barrett* v. *Blackmar,* 47 Iowa, 565, 571, opinion *per* Day, Ch. J.; *Douglass* v. *Bishop,* 27 Iowa, 214, 216. See the cases in the preceding note *Alsup* v. *Stewart,* 194 Ill. 595, 88 Am. St. Rep. 169, 62 N. E. 795.

[48] *Coster* v. *Clark,* 3 Edw. Ch. (N. Y.) 440; *New York Life Ins. & Trust Co.* v. *Bailey,* 3 Edw. Ch. (N. Y.) 416; *Hallock* v. *Smith,* 4 Johns. Ch. (N. Y.) 649; *Kepley* v. *Jansen,* 107 Ill. 79; *Smith* v. *Moore,* 73 Ind. 388; *Brooks* v. *Keister,* 45 Iowa, 303; *Buck* v. *Sanders,* 1 Dana (Ky.) 189; *Bollinger* v. *Chateau,* 20 Mo. 89; *Hemphill* v. *Ross,* 66 N. C. 477; *Thorpe* v. *Ricks,* 1 Dev. & B. (N. C.) Eq. 619; *Davis* v. *Evans,* 5 Ired. (N. C.) L. 525.

[49] *Winslow* v. *Clark,* 47 N. Y. 261; *Burnham* v. *DeBevorse,* 8 How. (N. Y.) Pr. 159.

[50] See *post,* §§ 161–163, on heirs and devisees. The purchaser of a devisee is a necessary defendant. *Ohling* v. *Luitjens,* 32 Ill. 23.

[51] In *Hall* v. *Huggins,* 19 Ala. 200, the owner purchased the equity at a sale held pursuant to an order of the Orphans' Court. Where a mortgage is foreclosed pending proceedings to condemn lands for public uses, the parties prosecuting the proceeding should be made defendants; *Colehour* v. *State Savings Institution,* 90 Ill. 152.

[52] *Martin* v. *Morris,* 62 Wis. 418.

necessary defendant; and if he is omitted, he may continue to use and enjoy his easement without interruption, as the action does not extinguish or affect his rights.[53] The rule of this section remains the same, whether the foreclosure be conducted as an action or by advertisement; the notice required in foreclosure by advertisement must be served on the owner of the equity of redemption.[54] If the owner has not recorded his deed, and the mortgagee receives no notice of his ownership, the foreclosure may safely proceed without making the owner a party, providing a *lis pendens* is properly filed.[55] It will be readily seen that the principles of law stated in this section are based upon the broader and more general principle already noticed,—that no person having an interest in the mortgaged premises will be affected by the decree of foreclosure, unless he is made a party to the action and is brought within the jurisdiction of the court.[56]

§ 148. Remedies of omitted owner of mortgaged premises.—If the owner of the equity of redemption is omitted as a defendant, the mortgagor or any other party interested in the action may object to it by demurrer, if the defect ap-

[53] In *Packer* v. *Rochester & S. R. R. Co.* 17 N. Y. 283, 297, the easement granted was to certain mill owners to construct and maintain a race; the mortgagee foreclosing omitted them as defendants. Pratt, J., said: "The mortgage, therefore, stands unforeclosed as to the rights of the mill owners." See also the opinion *per* Denio, J., p. 287.

[54] *Stanton* v. *Kline,* 11 N. Y. 199, reversing 16 Barb. (N. Y.) 9; *St. John* v. *Bumpstead,* 17 Barb. (N. Y.) 100; *VanSlyke* v. *Shelden,* 9 Barb. (N. Y.) 278. See, especially, *Mickles* v. *Dillaye,* 15 Hun (N. Y.) 296, N. Y. Code Civ. Proc. § 2389.

[55] *Kipp* v. *Brandt,* 49 How. (N. Y.) Pr. 358; *Ostrom* v. *McCann,* 21 How. (N. Y.) Pr. 431. See *post,* § 152, N. Y. Code Civ. Proc. § 1670; *Aldrich* v. *Stephens,* 49 Cal. 676; *Daniels* v. *Henderson,* 49 Cal. 245. See also *Tucker* v. *Leland,* 75 N. Y. 186; *Houghton* v. *Kneeland,* 7 Wis. 244; contra, *Hall* v. *Nelson,* 14 How. (N. Y.) Pr. 32, 23 Barb. (N. Y.) 88. See *Carpentier* v. *Williamson,* 25 Cal. 154. In *Webb* v. *Maxan,* 11 Tex. 678, 684, the court held that, if the mortgagee foreclosing received no notice of the subsequent purchaser's deed, the decree would be conclusive against the purchaser; *aliter,* if he had notice.

[56] See *ante,* §§ 135, 136.

pears on the face of the complaint, or by answer, if the defect does not so appear;[57] if objection is not taken, the defect will be deemed waived.[58] If the owner is omitted, it is not necessary for him to maintain an action to redeem in order to assert his rights, for he is already the owner of the title, never having been divested of it; and the purchaser at the sale, having acquired no title, is a stranger to the premises, and can be ejected or proceeded against for trespass.[59] The owner may, however, maintain an action to redeem if he desires; indeed, this is the usual practice, as it brings the question of title directly in issue.[60] If the owner of the equity has assumed the payment of the mortgage, there is a double reason for making him a party, as he has thereby become the principal debtor, and the mortgagor only a surety; and if a judgment of deficiency is desired, it must be obtained first against such owner.[61]

§ 149. Mesne owners of the equity of redemption, no longer owners, generally not necessary.—For the reasons stated in a preceding section, parties who have once owned the equity of redemption in mortgaged premises, and again parted

[57] *Bard* v. *Poole,* 12 N. Y. 508; *Hall* v. *Nelson,* 23 Barb. (N. Y.) 88; *Reed* v. *Marble,* 10 Paige Ch. (N. Y.) 409; *Kittle* v. *VanDyck,* 1 Sandf. Ch. (N. Y.) 76; *Erickson* v. *Rafferty,* 79 Ill. 210; *Dunlap* v. *Wilson,* 32 Ill. 517; *Taylor* v. *Collins,* 51 Wis. 123; *Baker* v. *Hawkins,* 29 Wis. 576; *Cord* v. *Hirsch,* 17 Wis. 403. See *Williams* v. *Meeker,* 29 Iowa, 292.

[58] *Davis* v. *Bechstein,* 69 N. Y. 440, 25 Am. Rep. 218.

[59] *VanSlyke* v. *Shelden,* 9 Barb. (N. Y.) 278; *Watson* v. *Spence,* 20 Wend. (N. Y.) 260. In *Kelgour* v. *Wood,* 64 Ill. 345, it was held that ejectment could not be maintained. See *Cutter* v. *Jones,* 52 Ill. 84, also *Fogal* v. *Pirro,* 10 Bosw. (N. Y.) 100.

[60] See *Miner* v. *Beekman,* 50 N. Y. 337, 344, holding also that the action must be brought within ten years. *Grandin* v. *Hernandez,* 29 Hun (N. Y.) 399, 403; *Carll* v. *Butman,* 7 Me. (7 Greenl.) 102; *Green* v. *Dixon,* 9 Wis. 532. A person who succeeds to the owner's interest may also redeem; *Porter* v. *Kilgore,* 32 Iowa, 380; *Veach* v. *Schaup,* 3 Clarke (Iowa) 194. See the cases cited in notes to § 147 *ante.*

[61] See *post,* chap. xi

with the same by an absolute conveyance, are not necessary defendants to a foreclosure for the purpose of perfecting the title.[62] As they have no interest in the mortgaged property, they can have no interest in an action affecting it. It is only when latent equities, fraud or defects in the deeds may invalidate the mesne conveyances of intermediate purchasers, or when some of their deeds remain unrecorded, that they and their grantors become necessary parties. If they and all their grantors, subsequent to the delivery of the mortgage, have assumed the payment of the mortgage debt, they may properly be defendants if a personal judgment for deficiency is sought against them, or any of them.[63] The interesting question of personal liability for the payment of the mortgage debt when it has been assumed by a grantee in his deed of conveyance, will be fully considered in a subsequent chapter.[64]

§ 150. Purchaser pendente lite not necessary.—The general principle is now recognized by all the courts of this country and of England, that a purchaser, assignee or attaching creditor of mortgaged premises, during the pendency of a suit to foreclose, is bound by the decree made against the party to the action from or through whom he derives title;[65]

[62] *Lockwood* v. *Benedict,* 3 Edw. Ch. (N. Y.) 472. In point, *Merritt* v. *Phenix,* 48 Ala. 87; *Lewis* v. *Elrod,* 38 Ala. 17; *Haley* v. *Bennett,* 5 Port. (Ala.) 452; *Scarry* v. *Eldridge,* 63 Ind. 44; *Barton* v. *Kingsbury,* 43 Vt. 640; *Soule* v. *Albee,* 31 Vt. 142. See *Vrooman* v. *Turner,* 69 N. Y. 280, 25 Am. Rep. 195. See *ante,* § 138. *James* v. *Brainard-Jackson & Co.* 64 Wash. 175, 116 Pac. 633; *Lockwood* v. *White,* 65 Vt. 466, 26 Atl. 639; *Walker* v. *Dickson,* 20 Ont. App. 96.

[63] *Vrooman* v. *Turner,* 69 N. Y. 280, 25 Am. Rep. 195; *Scarry* v. *Eldridge,* 63 Ind. 44. See *Lockwood* v. *Benedict,* 3 Edw. Ch. (N. Y.) 472.

[64] See *post,* chap. xi.

[65] *Fuller* v. *Scribner,* 76 N. Y. 190; *Lamont* v. *Cheshire,* 65 N. Y. 30; *Lenihan* v. *Hamann,* 55 N. Y. 652; *Cleveland* v. *Boerum,* 23 Barb. (N. Y.) 201, 3 Abb. (N. Y.) Pr. 294; and on appeal from the judgment at special term, 27 Barb. (N. Y.) 252, aff'd 24 N. Y. 613; *Zeiter* v. *Bowman,* 6 Barb. (N. Y.) 133; *Watt* v. *Watt,* 2 Barb. Ch. (N. Y.) 371; *Ostrom* v. *McCann,* 21 How. (N. Y.) Pr. 431; *Kindberg* v. *Freeman,* 39 Hun (N. Y.) 466; *Weeks*

it is not necessary to bring a party, so acquiring title, before the court.[66] The reasons for this rule will be found in the two succeeding sections. Such a purchaser acquires, of course, only the rights of title or incumbrance which the person from whom he purchased held at the time of the transfer.

The early decisions upon the proposition of this section endeavored to make a clear distinction between voluntary transfers and those accomplished by operation of law.[67] It has been said by one of our ablest judges,[68] that there are English and American cases holding that when the interest of a party to the action is cast upon the transferee by operation of law, and not by the act of such party, the foreclosure will be defective, unless the transferee is brought before the court; but he intimates that these cases are not to be relied upon, though he refers to the case of Sedgwick v. Cleveland [69] as an illustration.

The statutes in most states now provide for filing a notice of pendency of action, settling this question in accordance with the general principle above stated; and it matters not

v. *Tomes,* 16 Hun (N. Y.) 349; *The People's Bank* v. *Hamilton Co.* 10 Paige Ch. (N. Y.) 481, 490; *Curtis* v. *Hitchcock,* 10 Paige Ch. (N. Y.) 399; *Jackson* v. *Losee,* 4 Sandf. Ch. (N. Y.) 381; N. Y. Code Civ. Proc. § 1671; *Horn* v. *Jones,* 28 Cal. 194; *Taylor* v. *Adams,* 115 Ill. 570; *Chickering* v. *Fullerton,* 90 Ill. 520; *Addison* v. *Crow,* 5 Dana (Ky.) 279; *Osborne* v. *Crump,* 57 Miss. 622. See *Loomis* v. *Riley,* 24 Ill. 307. where a tennant in common of an undivided half of certain lands mortgaged his half during the pendency of a partition suit; *Rogers* v. *Holyoke,* 14 Minn. 220. In *Chapman* v. *West,* 17 N. Y. 125, the action was for the specific performance of a land contract. See Fisher on Mortgages, §§ 380–388, and the English cases cited. *Peninsula Naval Stores Co.* v. *Cox,* 57 Fla. 505, 49 So. 191.

[66] *Johnson* v. *Friant,* 140 Cal. 260, 73 P. 993.

[67] *Cleveland* v. *Boerum,* 23 Barb. (N. Y.) 205. See the same case affirmed on appeal in 24 N. Y. 613.

See *Peninsula Naval Stores Co.* v. *Cox,* 57 Fla. 505, 49 So. 191.

[68] *Cleveland* v. *Boerum,* 24 N. Y. 617, *per* Wright, J., a leading case; *Lenihan* v. *Hamann,* 55 N. Y. 652; *Sedgwick* v. *Cleveland,* 7 Paige Ch. (N.Y.) 290, 291. See *Smith* v. *Sanger,* 3 Barb. (N. Y.) 360; *Anon* v. *Anon,* 10 Paige Ch. (N. Y.) 20. The last two cases seem to be overruled by *Cleveland* v. *Boerum,* 24 N. Y. 613.

[69] 7 Paige Ch. (N. Y.) 291.

whether the transferee acquires his title by the voluntary act of the transferrer, or by operation of law. Though the plaintiff is not bound to amend his complaint, so as to bring in a purchaser or an incumbrancer *pendente lite,* he may do so if he chooses; the purchaser can appear and defend in the name of the party from whom he acquired his interest,[70] or he can be made a party on his own application [71] by substitution, or subrogation.[72] And one who takes a conveyance of real estate pending a suit to have the deed to his grantor declared a mortgage is not a necessary party to the suit; and the fact that he is a citizen of the state in which the suit is pending in the United States court, will not prevent his intervening in the case, of which the court has already jurisdiction, when the object is to assert or protect his rights or equities in property before the court. Where he does not intervene, although he has testified in the case, showing his actual knowledge of its pendency, the court will not refuse relief on the motion of his grantor defendant in the suit on the ground that his grantee might show payments before the bringing of the suit.[73]

§ 151. Common-law doctrine of lis pendens.—The doctrine of *lis pendens* and the statutes enacted in the several states to regulate the same, are of the greatest importance to the plaintiff in determining who are necessary defendants to a foreclosure, and of equal importance to other parties having an interest in the equity of redemption. Lord Bacon has stated the common-law rule to be that "no decree bindeth any that cometh in *bona fide* by conveyance of the defendant

[70] *Cleveland* v. *Boerum,* 24 N. Y. 620, 621; *The People's Bank* v. *Hamilton Co.* 10 Paige Ch. (N. Y.) 484; *Foster* v. *Deacon,* 6 Madd. Ch. 59; *Coles* v. *Forrest,* 10 Beav. 552; Fisher on Mortgages, § 385.

[71] *Cleveland* v. *Boerum,* 24 N. Y. 613; *The People's Bank* v. *Hamilton Co.* 10 Paige Ch. (N. Y.) 484; *Clow* v. *Derby Coal Co.* 98 Pa. St. 432; *Eyster* v. *Gaff,* 91 U. S. (1 Otto), 521, 23 L. ed. 403.

[72] *Seward* v. *Huntington,* 94 N. Y. 114.

[73] *Shropshire* v. *Lyle,* 31 Fed. 694.

before the bill exhibiteth, and is made no party, neither by bill or order; but when he comes in *pendente lite,* and while the suit is in full prosecution, and without any order of allowance or privity by the court, then regularly the decree bindeth."[74] The rule had its origin in the civil law, and was pungently stated in the legal maxim, *pendente lite, nihil innovetur.* It is well settled that a judgment in an action *in rem* binds not only the parties, but also all others claiming or deriving title under them by a transfer *pendente lite.*[75] Indeed, writers deduce from the cases the broad rule that decisions *in rem* are binding and conclusive, not only on the parties actually litigating the case and their privities, but also on all other persons, if the suit was commenced against the proper parties, and judgment was obtained *bona fide* and without fraud.[76]

§ 152. New York statutory provisions for lis pendens; other states.—Many of the states, in their codes or general statutes, have enacted the common-law rule into a statutory requirement and prescribed special rules of practice in connection with it. New York first did this in 1823,[77] by a special

[74] *Bacon's Works,* vol. 4, p. 515. In *Bishop of Winchester* v. *Paine,* 11 Ves. 194, 201, Sir William Grant said that "he who purchases during the pendency of the suit, is bound by the decree that may be made against the person from whom he derives the title; the litigating parties are exempted from the necessity of taking any notice of a title so acquired; as to them it is as if no such title existed, otherwise suits would be interminable, or, which would be the same in effect, it would be the pleasure of one party at what period the suit should be determined. The rule may sometimes operate with hardship, but general convenience requires it."

[75] *Rogers* v. *Holyoke,* 14 Minn. 220; *Hull* v. *Lyon,* 27 Mo. 570; *McPherson* v. *Housel,* 13 N. J. Eq. (2 Beas.) 299; *Youngman* v. *Elmira & W. R. R.* 65 Pa. St. 278.

[76] See *Cleveland* v. *Boerum,* 24 N. Y. 617. The learned jurist, Theodore W. Dwight, as Commissioner of Appeals, in *Lamont* v. *Cheshire,* 65 N. Y. 30, 36, considered at length the history and the nature of a notice of pendency of action, and the office it was designed to fulfill. See *Bellamy* v. *Sabine,* 1 DeG. & J. 566, a leading English case; also *Hunt* v. *Hunt,* 34 Mass. (17 Pick.) 118.

[77] *Laws of New York,* 1823, chap. 182, § 11.

statute, which was re-enacted in the Revised Statutes, [78] and subsequently formed into § 132 of the old Code, and §§ 1670 and 1671 of the Code of Civil Procedure. Prior to 1851 the notice could be filed only at the time of commencing the action; now it can be filed with the complaint, and becomes operative at once before the summons is served on any of the defendants. Prior to 1858 a grantee, whose deed was not recorded, had to be discovered by the plaintiff and made a party to the action,[79] but since, and at present, every person receiving or recording [80] his conveyance after the filing of such notice with the complaint, even though it be a few hours only,[81] is deemed a subsequent purchaser and incumbrancer; he stands in the same position as he would if he had actually purchased the land, or received his incumbrance, after the filing of such notice, and he is bound by such proceedings "to the same extent as if he was a party to the action," [82]—that is, he is barred and foreclosed of all rights in the premises.

A purchaser or lienor may be brought into the action by a supplemental bill if desired.[83] Prior to 1862 the *lis pendens* was inoperative as to each defendant, until the summons had been served upon him,[84] but an amendment of that year (con-

[78] *Revised Statutes,* vol 2, p. 174, § 43.

[79] *Hall* v. *Nelson,* 14 How. (N. Y.) Pr. 32, 23 Barb. (N. Y.) 88.

[80] *Ostrom* v. *McCann,* 21 How. (N. Y.) Pr. 431, citing § 132 of the old N. Y. Code; *Earle* v. *Barnard,* 22 How. (N. Y.) Pr. 437, 440; *Kipp* v. *Brandt,* 49 How. (N. Y.) Pr. 358, strongly in point. Supporting these cases, see *Aldrich* v. *Stephens,* 49 Cal. 676, and *Daniels* v. *Henderson,* 49 Cal. 245.

[81] *Stern* v. *O'Connell,* 35 N. Y. 104; *Ostrom* v. *McCann,* 21 How. (N. Y.) Pr. 431. See *Weyh* v. *Boylan,* 62 How. (N. Y.) Pr. 397, aff'd 63 How. (N. Y.) Pr. 72, where, after the commencement of the action and the filing of a *lis pendens,* the mortgagor conveyed his equity of redemption and died; the grantee was held an unnecessary party on reviving the action.

[82] N. Y. Code Civ. Proc. § 1671.

[83] *Harrington* v. *Slade,* 22 Barb. (N. Y.) 161. See *ante,* § 150.

[84] *Tate* v. *Jordan,* 3 Abb. (N. Y.) Pr. 392; *Butler* v. *Tomlinson,* 38 Barb. (N. Y.) 641, 15 Abb. (N. Y.) Pr. 88; *Muscott* v. *Woolworth,* 14 How. (N. Y.) Pr. 477; *Burroughs* v. *Reiger,* 12 How. (N. Y.) Pr. 172; *Fuller* v. *Scribner,* 16 Hun (N. Y.) 130, aff'd 76 N. Y. 190.

tinued in the present Code of Civil Procedure) made the notice operative from the time of filing the complaint, and also fixed the limit of sixty days within which the summons must be served, or the notice would become void.[85] Prior incumbrancers and persons whose rights are superior to those of the plaintiff are not affected by the notice.[86] So, also, a person who claims title by virtue of a tax deed is not bound by the notice.[87]

§ 153. Effect on parties of omitted or defective lis pendens.—The notice of *lis pendens* is made by statute constructive notice to persons who are not parties to the action, but who acquire their rights from or under those who have been brought within the jurisdiction of the court. As their rights alone are affected, they alone can take advantage of the omission to file the notice, or of any defects in it.[88] Whenever there is a defect in filing the *lis pendens,* as the neglect to file the complaint with it, and any person obtains an interest in or a lien upon the equity of redemption from a party defendant during the pendency of the action and the continuance of the defect, he will not be bound by the decree and may redeem;[89] the purchaser at a sale under the decree of foreclosure will receive a defective title, although an order may have been made that the complaint be filed *nunc pro tunc.*

§ 154. Mortgagor a married woman, having a separate estate, necessary.—Where a married woman holds the fee title of property in her own name as a separate estate, and

[85] N. Y. Code Civ. Proc. § 1670. In point, *Weeks* v. *Tomes,* 16 Hun (N. Y.) 349, aff'd 76 N. Y. 601.

[86] *Chapman v. West, Impl'd,* 17 N. Y. 125; *Bank* v. *Connelly,* 8 Abb. (N. Y.) Pr. 128; *Stuyvesant* v. *Hall,* 2 Barb. Ch. (N. Y.) 151; *Chapman* v. *Draper,* 10 How. (N. Y.) Pr. 367; *Stuyvesant* v. *Hone,* 1 Sandf. Ch. (N. Y.) 419.

[87] *Becker* v. *Howard,* 4 Hun (N. Y.) 359, aff'd 66 N. Y. 5.

[88] *White* v. *Coulter,* 1 Hun (N. Y.) 357.

[89] *Dakin* v. *Insurance Co.* 77 N. Y. 601; *Weeks* v. *Tomes,* 16 Hun (N. Y.) 349. In point, *Olson* v. *Paul,* 56 Wis. 30.

mortgages the same, or where she becomes the owner of the equity of redemption in property previously mortgaged, she is a necessary party to a foreclosure for the purposes stated in this chapter.[90] A married woman had no capacity at common-law to make contracts, and consequently no right to execute a mortgage on her separate estate. Statutes in England and in America have greatly enlarged a married woman's rights in property, so that she can now make valid contracts affecting her real estate; but in Massachusetts, New Jersey and Pennsylvania it is necessary, even at the present day, for the husband to join with his wife in the execution of a mortgage upon her separate estate in order to make the mortgage valid.[91] It is in New York,[92] especially, that married women's rights have been enlarged, so that at present the law applicable to the subject-matter of this work, with reference to a male or a *feme sole,* is equally applicable with reference to a *feme covert.* The interesting question of a married woman's liability for a personal judgment of deficiency will be fully considered hereafter.[93]

§ 155. Wife of a mortgagor or owner of the equity of redemption necessary.—It has become a settled rule of law in all states where the common-law doctrine of dower re-

[90] *Conde* v. *Shepard,* 4 How. (N. Y.) Pr. 75. For an exhaustive history and review of the cases affecting the right of a *feme covert* to mortgage her real estate, see the leading case of *Albany Fire Ins. Co.* v. *Bay,* 4 N. Y. 9, 38, affirming 4 Barb. (N. Y.) 407; opinions by Jewett, Taylor and Pratt, JJ.; *Ellis* v. *Kenyon,* 25 Ind. 134; *Eaton* v. *Nason,* 47 Me. 132; *Galway* v. *Fullerton,* 17 N. J. Eq. (2 C. E. Gr.) 389; *Newhart* v. *Peters,* 80 N. C. 166; *McFerrin* v. *White,* 6 Cold. (Tenn.) 499; *Hill* v. *Edmonds,* 5 DeG. & S. 603.

[91] *Weed Sewing Mach. Co.* v. *Emerson,* 115 Mass. 554; *Merchant* v. *Thomson,* 34 N. J. Eq. (7 Stew.) 73, and the cases cited; *Armstrong* v. *Ross,* 20 N. J. Eq. (5 C. E. Gr.) 109; *Black* v. *Galway,* 24 Pa. St. 18. Conflicting with this case, see *Graham* v. *Long,* 65 Pa. St. 383, and *Glass* v. *Warnick,* 40 Pa. St. 140, 80 Am. Dec. 566.

[92] Laws of New York, 1848, chap. 200; 1849, chap. 375; 1860, chap. 90; 1862, chap. 172; 1884, chap. 381.

[93] See *post,* chap. x.

mains unchanged, and in many states where statutes have prescribed a wife's rights in the real estate of her husband, that the inchoate right of dower of a wife in the lands of her husband is a real and existing interest, and as much entitled to protection as the vested rights of a widow; and that neither can be impaired by any judicial proceeding to which the wife or widow is not made a party. As such rights constitute an interest in real estate, it is plain that a wife or widow must be made a party to a foreclosure suit where she has signed the mortgage, released her rights otherwise, or acquired those rights subsequent to the execution of the mortgage. The right of a wife to be endowed of an equity of redemption has long been put at rest. She is an absolutely necessary party to an action in order to produce such a title as a purchaser at the sale will be compelled to accept.[94] But if the wife has been omitted as a party defendant and dies

[94] *Merchant's Bank* v. *Thomson,* 55 N. Y. 7; *Mills* v. *Van Voorhies,* 20 N. Y. 412; *Denton* v. *Nanny,* 8 Barb. (N. Y.) 618; *Wheeler* v. *Morris,* 2 Bosw. (N. Y.) 524, 529; *Bell* v. *The Mayor,* 10 Paige Ch. (N. Y.) 49, 67. See *Kay* v. *Whittaker,* 44 N. Y. 565, 572, holding that the wife is not an indispensable defendant to sustain the action, but that her rights will not be cut off by the decree, unless she is made a party; *Denton* v. *Nanny,* 8 Barb. (N. Y.) 618; *Blydenburgh* v. *Northrop,* 13 How. (N. Y.) Pr. 289; *Hubbell* v. *Sibley,* 5 Lans. (N. Y.) 56; *Kittle* v. *Van Dyck,* 1 Sandf. Ch. (N. Y.) 76, 79; *Mabury* v. *Ruiz,* 58 Cal. 11; *Daniels* v. *Henderson,* 5 Fla. 452; *Kissel* v. *Eaton,* 64 Ind. 248; *Watt* v. *Alvord,* 25 Ind. 533; *Verry* v. *Robinson,* 25 Ind. 14, 87 Am. Dec. 346; *Richardson* v. *Skolfield,* 45 Me. 386; *Gage* v. *Ward,* 25 Me. 101; *Campbell* v. *Knights,* 24 Me. 332; *Smith* v. *Eustis,* 7 Me. (7 Greenl.) 41; *Lund* v. *Woods,* 52 Mass. (11 Metc.) 566; *Swan* v. *Wiswall,* 32 Mass. (15 Pick.) 126; *Snyder* v. *Snyder,* 6 Mich. 470; *Atkinson* v. *Stewart,* 46 Mo. 510. See *Rands* v. *Kendall,* 15 Ohio, 671, 675, where the law of dower in Ohio is explained, with citations from cases and statutes; *Eldridge* v. *Eldridge,* 14 N. J. Eq. (1 McCart.) 195; *Chiswell* v. *Morris,* 14 N. J. Eq. (1 McCart.) 101; *Ketchum* v. *Shaw,* 28 Ohio St. 503; *State Bank of Ohio* v. *Hinton,* 21 Ohio St. 509; *McArthur* v. *Franklin,* 15 Ohio St. 485, 16 Ohio St. 193; *Conover* v. *Porter,* 14 Ohio St. 450; *Taylor* v. *Fowler,* 18 Ohio, 567, 51 Am. Dec. 469; *Calmes* v. *McCrocker,* 8 S. C. 87; *James* v. *Fields,* 5 Heisk. (Tenn.) 394; *Gregg* v. *Jones,* 5 Heisk. (Tenn.) 443. But see *Verree* v. *Verree,* 2 Brev. (S. C.) L. 211, holding that in 1807 a

during the pendency of the foreclosure, it will not be necessary to bring in her heirs and personal representatives in order to produce a perfect title, as they succeed to no interest.[95] If the mortgagor has two wives, both are necessary defendants.[96] Though a wife may have made a grant of her inchoate right of dower, she remains a necessary party; the grantee acquires no interest by the conveyance, as an inchoate right of dower is inalienable.[97] Wherever the right of dower has been abolished by statute, the wife is not a necessary defendant, as she has no interest in her husband's lands.[98]

If the wife has signed the mortgage, she is, of course, a necessary defendant.[99] "The only reason why the wife of

wife was not entitled to dower in an equity of redemption. In *Newhall* v. *Lynn Bank,* 101 Mass. 428, 3 Am. Rep. 387, the wife of a husband who had made an assignment in bankruptcy was held a necessary party; but in *Huston* v. *Neil,* 41 Ind. 504, it was held that a wife had no interest in the partnership real estate of her husband, and accordingly was not a necessary party to the foreclosure of a mortgage on the same.

Kimbrell v. *Rogers,* 90 Ala. 339, 7 So. 241; *Fitzgerald* v. *Fernandez,* 71 Cal. 504, 12 Pac. 562; *Hefner* v. *Urton,* 71 Cal. 479, 12 Pac. 486; *Holland* v. *Holland,* 131 Ind. 196, 30 N. E. 1075; *Sutherland* v. *Tyner,* 72 Iowa, 232, 33 N. W. 645; *Gibbs* v. *O'Neil,* 85 Mich. 633, 48 N. W. 696; *Kursheedt* v. *Union Dime Savings Inst.* 118 N. Y. 358, 23 N. E. 473, 28 N. Y. S. R. 933, 7 L.R.A. 229; *Vanstory* v. *Thornton,* 114 N. C. 377, 19 S. E. 359. See 112 N. C. 196, 34 Am. St. Rep. 483.

[95] *Miller* v. *Miller,* 48 Mich. 311.

[96] *Wood* v. *Chew,* 13 How. (N. Y.) Pr. 86.

[97] *Earle* v. *Barnard,* 22 How. (N. Y.) Pr. 437.

[98] See *Ethridge* v. *Vernoy,* 71 N. C. 184. See also *Thornton* v. *Pigg,* 24 Mo. 249, for the statute in Missouri, foreclosure being held a statutory action at law, and not an equitable action. See the preceding section for other cases. See *Pitts* v. *Aldrich,* 93 Mass. (11 Allen), 39.

[99] *Hinchliffe* v. *Shea,* 34 Hun (N. Y.) 365; *Leonard* v. *Adm'r of Villars,* 23 Ill. 377; *Chambers* v. *Nicholson,* 30 Ind. 349; *Hinchman* v. *Stiles,* 9 N. J. Eq. (1 Stockt.) 361; *Hartshorne* v. *Hartshorne,* 2 N. J. Eq. (1 H. W. Gr.) 349. Upon the general question of a wife's right of dower in mortgaged premises, see *Campbell* v. *Campbell,* 30 N. J. Eq. (3 Stew.) 415. See the cases cited in the first note to this section. *Powell* v. *Ross,* 4 Cal. 197; *Cary* v. *Wheeler,* 14 Wis. 281. See also *Nimrock* v. *Scanlin,* 87 N. C. 119. In *Pitts* v. *Aldrich,* 93 Mass. (11 Allen) 39, the wife was held not a necessary party where she had signed the mortgage. Colt, J.,

a mortgagor, who joins in the execution of such an instrument, should be made a party, is to bar the equity of redemption in her right of dower, or to give her the opportunity, before it is foreclosed, to redeem and prevent its sale."[1] If the mortgage was executed by the husband before marriage, the wife is as necessary a defendant as though it had been executed by both after marriage and during coverture;[2] after the husband's death the widow remains a necessary party.[3]

Some cases hold that the wife of the mortgagor is a necessary party even when the husband has sold the mortgaged premises.[4] But this is not the case where the wife joins in the conveyance of premises which have previously been mortgaged by her husband.[5] In those states where the statutes provide for homesteads for the heads of families, the wife of the mortgagor of land occupied and claimed by him as a homestead is a necessary party to the foreclosure of the mortgage and to an action of ejectment by the purchaser at the sale thereun-

writing the opinion and collating the authorities, says that the law of Massachusetts on this point differs from that of all the other states. In *Mims* v. *Mims,* 1 Humph. (Tenn.) 425, a widow who had signed a mortgage was held not a necessary party. See *McIver* v. *Cherry,* 8 Humph. (Tenn.) 713; *Kimbrell* v. *Rogers,* 90 Ala. 339, 7 So. 241.

[1] *Wright* v. *Langley,* 36 Ill. 381, 383; *Davis* v. *Taylor, Lowenstein & Co.* 158 Ala. 227, 47 So. 653. See also *Vanstory* v. *Thornton,* 114 N. C. 377, 19 S. E. 359; and 112 N. C. 196.

[2] *Smith* v. *Gardner,* 42 Barb. (N. Y.) 356. See *Northrup* v. *Wheeler,* 43 How. (N. Y.) Pr. 122, where the foreclosure was by advertisement; *Gilbert* v. *Maggord,* 2 Ill. (1 Scam.) 471; *Eaton* v. *Simonds,* 31 Mass. (14 Pick.) 98; *Hildreth* v. *Jones,* 13 Mass. 525. See *Bolton* v. *Ballard,* 13 Mass. 227. Seemingly contra, *Bird* v. *Gardner,* 10 Mass. 364, 6 Am. Dec. 137. In *Wilson* v. *Scott,* 29 Ohio St. 636, the wife of a mortgagor, who had executed the mortgage before marriage, was held not a necessary defendant. See also *Adams* v. *Bartell,* 46 Tex. Civ. App. 349, 102 S. W. 779. See the Indiana and Illinois cases cited on purchase money mortgages in the following notes.

[3] *Burton* v. *Lies,* 21 Cal. 87. See *Bayly* v. *Muehe,* 65 Cal. 345; *Chadbourn* v. *Johnston,* 119 N. C. 282, 25 S. E. 705.

[4] *Holland* v. *Holland,* 131 Ind. 196, 30 N. E. 1075.

[5] *Koerner* v. *Gauss,* 57 Ill. App. 668.

der, although the mortgage is given for purchase money.[6] And in those cases where a married man has filed a declaration of homestead on his mortgaged premises, his wife is a necessary party defendant in foreclosure; and if she is not made a party, the purchaser at the foreclosure sale is not entitled to a writ of assistance against her husband.[7]

§ 156. Wife not executing mortgage—Her remedies if omitted as defendant.—Where the mortgage was given for purchase money, the wife's inchoate right of dower attaches to the equity of redemption, and she is just as necessary a defendant as she would have been had she signed the mortgage, and her rights will not be affected unless she is made a party to the action.[8] But in Illinois,[9] Indiana [10] and

[6] *Gibbs* v. *O'Neil,* 85 Mich. 633, 48 N. W. 696. Holder of a junior judgment not a necessary party. *Sutherland* v. *Tyner,* 72 Iowa, 232, 33 N. W. 645.

As to whether heirs are necessary parties where wife mortgages homestead. See *post,* § 162.

[7] *Hefner* v. *Urton,* 71 Cal. 479, 12 Pac. 486; *Fitzgerald* v. *Fernandez,* 71 Cal. 504, 12 Pac. 562.

[8] *Mills* v. *VanVoorhies,* 20 N. Y. 412, 10 Abb. (N. Y.) Pr. 152, aff'g 23 Barb. (N. Y.) 125. Judge Selden, writing the opinion, cites *Stow* v. *Tifft,* 15 Johns. (N. Y.) 458, 8 Am. Dec. 266, and gives a sketch of the history of the statute for purchase money mortgages. *Wheeler* v. *Morris,* 2 Bosw. (N. Y.) 524; *Blydenburgh* v. *Northrop,* 13 How. (N. Y.) Pr. 289; *Brackett* v. *Baum,* 50 N. Y. 8, *per* Rapallo, J., holds that the wife is not a necessary party in the foreclosure of a purchase money mortgage by advertisement. *Young* v. *Tarbell,* 37 Me. 509; *Fox* v. *Pratt,* 27 Ohio St. 512; *Culver* v. *Harper,* 27 Ohio St. 464; *Welch* v. *Buckins,* 9 Ohio St. 331; *Carter* v. *Goodwin,* 3 Ohio St. 75; *Foster* v. *Hickox,* 38 Wis. 408, authorities collated and the subject generally discussed, *per* Ryan, Ch. J.; *Thompson* v. *Lyman,* 28 Wis. 266; *Cary* v. *Wheeler,* 14 Wis. 281; *Holdane* v. *Sweet,* 55 Mich. 196.

[9] *Short* v. *Raub,* 81 Ill. 509, relying upon *Stephens* v. *Bichnell,* 27 Ill. 444, 81 Am. Dec. 242.

[10] *Fletcher* v. *Holmes,* 32 Ind. 497, 506, 536; opinions *per* Elliott, J., and Gregory, Ch. J., collating and reviewing the cases; Frazer, J., wrote a dissenting opinion. See *Walters* v. *Walters,* 73 Ind. 425. But dower was abolished in Indiana by the Code of 1852, and the wife was made an heir. *Hoskins* v. *Hutchings,* 37 Ind. 324; *May* v. *Fletcher,* 40 Ind. 575, *per* Wooden, J., citing *Fletcher* v. *Holmes,* 32 Ind. 497, 506, 536, and collating the cases. See the Indiana acts of 1875 and 1879. See the early case of *Nottingham* v. *Calvert,* 1 Ind. 527,

Michigan,[11] the contrary ruling prevails, that the wife is not a necessary defendant. If the wife does not sign[12] a mortgage executed by her husband during coverture, an action to foreclose it will not affect her rights, even if she is made a party, without allegations in the complaint setting forth the facts, and even with such allegations, it is doubtful whether her rights will be affected in any way.[13] In an action brought by a widow for the recovery of her dower in lands which had been sold under the foreclosure of a mortgage which she had not executed with her husband, her dower was held paramount to the mortgage and not affected by the foreclosure, although she was made a defendant under the general allegation of having some interest in the premises.[14]

Where a widow's dower has been admeasured in premises mortgaged by her husband alone, the decree of foreclosure should be for the sale of the remaining two-thirds in the first place, and then for the sale of the admeasured third,—subject, however, to the dower.[15] If a wife or widow having a right of dower, is not made a party, it is believed that the mortgagor or any other defendant may object to the omission by demurrer or answer.[16] The wife of a mortgagor is no more a necessary party than the mortgagor himself after she has joined in a deed with him, conveying their equity of redemption to a purchaser.[17]

apparently supporting the New York rule.

[11] *Amphlett* v. *Hibbard,* 29 Mich. 298.

[12] *Baker* v. *Scott,* 62 Ill. 86; *Leary* v. *Shaffer,* 79 Ind. 567; *Sutton* v. *Jervis,* 31 Ind. 265, 99 Am. Dec. 631; *Mooney* v. *Maas,* 22 Iowa, 380, 383, 92 Am. Dec. 395; *Amphlett* v. *Hibbard,* 29 Mich. 298; *Parmenter* v. *Binkley,* 28 Ohio St. 32. A mortgage signed by a wife, but not acknowledged by her, is not so executed as to release her dower. *Sheldon* v. *Patterson,* 55 Ill. 507; *Westfall* v. *Lee,* 7 Clarke (Iowa) 12, 14. See *Walsh* v. *Wilson,* 130 Mass. 124.

[13] *Merchants' Bank* v. *Thomson,* 55 N. Y. 7; *Lewis* v. *Smith,* 9 N. Y. 502, 514, 519, 61 Am. Dec. 706, affirming 11 Barb. (N. Y.) 152; *Lainer* v. *Smith,* 37 Hun (N. Y.) 529; *Payn* v. *Grant,* 23 Hun (N. Y.) 134; *Foster* v. *Hickox,* 38 Wis. 408.

[14] *Lewis* v. *Smith,* 9 N. Y. 502.

[15] *Morton* v. *Noble,* 22 Ind. 160.

[16] See *ante,* § 148.

[17] The reasons stated in § 138,

The remedy of the wife or widow, whenever she is omitted as a party, is to redeem;[18] but this right to redeem does not accrue until the death of the husband, at which time the dower becomes fixed.[19] She can, however, assert her rights before the death of her husband, and have the value of her inchoate dower computed by the annuity tables and paid.[20] Ejectment cannot be maintained by a wife or a widow.[21] If the widow accepts a devise or bequest, which is made to her in lieu of dower, it is believed that she will not be a necessary defendant.[22]

§ 157. Wife of mortgagor; service of summons or process under early practice.—At common law, and in the chancery practice of New York, the summons, or *supœna,* was not required to be served upon the wife of the owner of the equity of redemption, where she was made a party to the foreclosure for the purpose of cutting off her inchoate right of dower; but the husband was bound, except where the estate was the separate property of the wife, to enter a joint appearance and to put in an answer for himself and wife.

This practice was based upon the common-law doctrine

ante, apply to the wife or widow as well as to the mortgagor. *Elmendorf* v. *Lockwood,* 4 Lans. (N. Y.) 393. In *Maloney* v. *Horan,* 12 Abb. (N. Y.) Pr. N. S. 289, where a deed was set aside as fraudulent, the wife was held restored to her dower. See *Popkin* v. *Bumstead,* 8 Mass. 491, 5 Am. Dec. 113.

[18] *Mills* v. *VanVoorhies,* 20 N. Y. 412; *Denton* v. *Nanny,* 8 Barb. (N. Y.) 618; *Ross* v. *Boardman,* 22 Hun (N. Y.) 527; *Bell* v. *Mayor of New York,* 10 Paige Ch. (N. Y.) 49; *Carll* v. *Butman,* 7 Me. (7 Greenl.) 102; *VanVronker* v. *Eastman,* 48 Mass. (7 Metc.) 157; *Gibson* v. *Crehore,* 22 Mass. (5 Pick.) 146. See *Sheldon* v. *Patterson,* 55 Ill. 507, where several mortgages, some of which the wife had not executed, were foreclosed in one action; *Opdyke* v. *Bartles,* 11 N. J. Eq. (3 Stockt.) 133.

[19] *White* v. *Coulter,* 1 Hun (N. Y.) 357, 366, modified in 59 N. Y. 629; *Morton* v. *Noble,* 22 Ind. 160, followed in *Grable* v. *McCulloch,* 27 Ind. 472.

[20] *Unger* v. *Leiter,* 32 Ohio St. 210.

[21] *Smith* v. *Gardner,* 42 Barb. (N. Y.) 356.

[22] *Zaegel* v. *Kuster,* 51 Wis. 31. See *Lewis* v. *Smith,* 9 N. Y. 502, 61 Am. Dec. 706.

that a husband and wife are *one person,* and that the wife's inchoate right of dower was a kind of interest which resulted from the marital relation, and did not belong to her as a separate estate.[23] "The general rule is, that the service of a subpœna against husband and wife on the husband alone is a good service on both, and the reason is, that the husband and wife are one person in law, and the husband is bound to answer for both." [24] It must be kept in mind that such service upon the husband was good only when the wife's interest in the property was an inchoate right of dower; when her separate property was concerned in the action, she had to be personally served.[25] It is to be further observed that the summons or process had to be directed to the wife; if her name was omitted, the court acquired no jurisdiction of her, and her inchoate right of dower would not be cut off or affected in any way by the action; her right to redeem it became perfect at the death of her husband.

§ 158. Wife of mortgagor; service of summons under present practice.—It is believed that this old practice has been changed in New York by the Code of Civil Procedure. There is some conflict of opinion in the reported cases as to the interpretation of § 450,[26] but the latest decisions indicate that the summons must be served upon the wife, and that service upon her husband alone is not sufficient.[27] In a case

[23] *Foote* v. *Lathrop,* 53 Barb. (N. Y.) 183, appeal dismissed in 41 N. Y. 358; *Eckerson* v. *Vollmer,* 11 How. (N. Y.) Pr. 42; *Ferguson* v. *Smith,* 2 Johns. Ch. (N. Y.) 139; *Lathrop* v. *Hcacock,* 4 Lans. (N. Y.) 1; *Leavitt* v. *Cruger,* 1 Paige Ch. (N. Y.) 421.

[24] *Ferguson* v. *Smith,* 2 Johns. Ch. (N. Y.) 139, *per* Chancellor Kent.

[25] *Mills* v. *VanVoorhies,* 10 Abb. (N. Y.) Pr. 152; *Watson* v. *Church,* 3 Hun (N. Y.) 80; *Lathrop* v. *Heacock,* 4 Lans. (N. Y.) 1; *Watson* v. *Church,* 5 T. & C. (N. Y.) 243; *White* v. *Coulter,* 3 T. & C. (N. Y.) 608; *McArthur* v. *Franklin,* 15 Ohio St. 485.

[26] Old N. Y. Code, § 114.

[27] *White* v. *Coulter,* 59 N. Y. 629, modifying 1 Hun (N. Y.) 357. See *Weil* v. *Martin,* 24 Hun (N. Y.) 645; *Hubbell* v. *Sibley,* 5 Lans. (N. Y.) 51. In *Northrup* v. *Wheeler,* 43 How. (N. Y.) Pr. 122, 123, the foreclosure was by advertisement,

in Maryland, a summons was directed to the wife, but not served upon her; the court said that as she had a potential right of dower, and was not within its jurisdiction, she was not affected by the action;[28] and in another case, where a husband appeared and confessed a bill for the foreclosure of a mortgage executed by himself and wife, the wife was held not bound by the decree, as she did not appear in person and no summons was issued against her.[29]

Under the old practice, too, the wife could not appear separately and on her own account in an action to cut off her inchoate dower, without leave of the court; now, however, there is no question that the wife of the owner of the equity of redemption may appear and defend in her own name and by her own attorney, as though she were a *feme sole*.[30] After the death of the husband, service of the summons or notice upon the widow is indispensable.[31]

But it seems that in some of the western states, particularly those carved out of the territory acquired by the "Louisiana Purchase," in which the civil law doctrine of community property prevails, in an action to foreclose a mortgage on what is known as "community property," service upon the wife may be made by delivering a copy of the summons to her husband. This is on the theory that the husband is the manager or trustee of the community property, representing both himself and his wife.[32] But where the wife dies before suit is brought to foreclose, or pending foreclosure proceedings, the wife's heirs must be made parties and served

and service upon the wife was held indispensable under the statute. See also the cases cited below.

[28] *Hurtt* v. *Crane*, 36 Md. 29.

[29] *Pope* v. *North*, 33 Ill. 440.

[30] *Janinski* v. *Heidelberg*, 21 Hun (N. Y.) 439; *Muser* v. *Miller*, 3 N. Y. Civ. Proc. Rep. 394, 65 How. (N. Y.) Pr. 286; *Fitzsimons* v. *Harrington*, 1 N. Y. Civ. Proc. Rep. 360; *Fitzgerald* v. *Quann*, 1 N. Y. Civ. Proc. Rep. 278, 279; contra, *Fitzgerald* v. *Quann*, 1 N. Y. Civ. Proc. Rep. 273, N. Y. Code Civ. Proc. § 450; Throop's Code, p. 440.

[31] *King* v. *Duntz*, 11 Barb. (N. Y.) 191. See *ante*, §§ 155, 156, and the cases cited.

[32] *Johnson* v. *Richmond Beach Improvement Co.* 63 Fed. 493.

with process, otherwise a sale under the decree will be void as to one-half of the lands mortgaged.[33]

§ 159. Wife of mortgagor or owner of equity of redemption, not necessary in those states where the common-law doctrine of dower has been changed.—In those states where statutes have been enacted which completely sever the husband and wife, and make them independent of each other, as to their rights in real property, the wife is not a necessary party to an action to foreclose a mortgage upon her husband's property, even though she signed the mortgage.[34] The reason for this rule is, that, as she has no interest whatever in her husband's real estate, she can have no interest whatever in an action affecting it. In North Carolina the husband has absolute dominion over his land during his life, and can give a perfect conveyance of it without the consent of his wife; in that state, therefore, the wife is not a necessary party to the foreclosure of a mortgage against her husband's property.[35] But if the wife has signed the bond or instrument of indebtedness, charging herself with its payment, and a personal judgment for deficiency is sought against her, she is a necessary party for that purpose.[36]

§ 160. The husband of a mortgagor who is a married woman, having a separate estate, generally not necessary.—In most states where the common-law doctrine of curtesy remains unmodified by statute, a husband who joins with his wife in executing a mortgage on her separate real property is not a necessary defendant, if the sale in the action to foreclose takes place during the wife's life-time.[37] Neither

[33] *Johnston* v. *San Francisco Sav. Union*, 75 Cal. 134, 16 Pac. 753, 7 Am. St. Rep. 129.

[34] *Powell* v. *Ross*, 4 Cal. 197; Thornton v. Pigg, 24 Mo. 249; *Miles* v. *Smith*, 22 Mo. 502; *Etheridge* v. *Vernoy*, 71 N. C. 185. See *Stevens* v. *Campbell*, 21 Ind. 471.

[35] *Etheridge* v. *Vernoy*, 71 N. C. 185.

[36] See *post*, chap. x.

[37] *Trustees of Jones Fund* v.

by common-law nor by the statute of any state does a husband have any interest in his wife's real property until her death. This is the general rule; but in some states the husband is deemed a necessary party, owing to statutory enactments and the special rules of their courts.[38] Four things are requisite to an estate by curtesy,[39] to wit: marriage, actual seisin of the wife, issue, and the death of the wife; and in New York the wife must die intestate. Upon the death of the wife intestate, after the accomplishment of these four requisites, the husband becomes a necessary defendant in order to cut off his curtesy and to perfect the title.[40]

In those states where statutes have made wholly separate and independent of each other the respective estates of a husband and a wife, the husband has no right to curtesy nor to any other interest in his wife's real property, and is consequently not a necessary party, so far as the title is concerned. If, however, he has obligated himself for the indebtedness by

Roth, 18 N. Y. Wk. Dig. 459, citing the statutes, and explaining the legal reasons for the rule.

[38] The husband has been held a necessary party in the following cases: *Hilton* v. *Lothrop,* 46 Me. 297; *Yager* v. *Merkle,* 26 Minn. 429; *Wolf* v. *Banning,* 3 Minn. 202. *Landon* v. *Burke,* 36 Wis. 378, cites a statute making the husband a necessary party; *Mavrich* v. *Grier,* 3 Nev. 52, 93 Am. Dec. 373. In *Andrews* v. *Swanton,* 81 Ind. 474, the husband was held a proper, if not a necessary, party. In some states a mortgage executed by a married woman upon her separate real estate is void, unless her husband joins in the execution; in these states he is of course a necessary party to a foreclosure; *Weed Sewing Mach. Co.* v. *Emerson,* 115 Mass. 554. See the Mass. Laws of 1874, chap. 184; *Camden* v. *Vail,* 23 Cal. 633; *Harrison* v. *Brown,* 16 Cal. 287; *Black* v. *Galway,* 24 Pa. St. 18. See Laws of New York, 1848, chap. 200; also *ante,* § 154, and the second note to the section.

The supreme court of the United States, in the case of *Anderson* v. *Watt* (138 U. S. 694, 34 L. ed. 1078, 11 Sup. Ct. Rep. 449), say that the husband of one in possession of land in Florida claiming title is a necessary party, with his wife, to an action to foreclose a mortgage thereon.

[39] 4 Kent Com. 29.

[40] *Fogal* v. *Pirro,* 10 Bosw. (N. Y.) 100; *Leggett* v. *McClelland,* 39 Ohio St. 624. See *Hope* v. *Shevill,* 137 App. Div. 86, 122 N. Y. Supp. 127.

signing a note or bond, he is a necessary party if a personal judgment for deficiency is sought against him.[41]

§ 161. Heirs of mortgagor or owner of the equity of redemption necessary.—The heirs[42] of a mortgagor or person who dies seized of the equity of redemption in mort-

[41] *Thornton* v. *Pigg*, 24 Mo. 249; *Riddick* v. *Walsh*, 15 Mo. 519, 538; *Building, Loan & Savings Assoc.* v. *Camman*, 11 N. J. Eq. (3 Stockt.) 382. See *post*, chap. x.

[42] *Wood* v. *Morehouse*, 1 Lans. (N. Y.) 405; *Leonard* v. *Morris*, 9 Paige Ch. (N. Y.) 90; *Bigelow* v. *Bush*, 6 Paige Ch. (N. Y.) 345; *Williamson* v. *Field*, 2 Sandf. Ch. (N. Y.) 533; *Bell* v. *Hall*, 76 Ala. 546; *Hunt* v. *Acre*, 28 Ala. 580; *Erwin* v. *Ferguson*, 5 Ala. 158; *Duval* v. *McCloskey*, 1 Ala. 708; *Pillow* v. *Sentelle*, 39 Ark. 61; *Kiernan* v. *Blackwell*, 27 Ark. 235; *Brown* v. *Orr*, 29 Cal. 120; *Burton* v. *Lies*, 21 Cal. 87, 91; *Pritchard* v. *Elton*, 38 Conn. 434; *Britton* v. *Hunt*, 9 Kan. 228; *Brenner* v. *Bigelow*, 8 Kan. 496, 504; *Lane* v. *Erskine*, 13 Ill. 501, approved and followed in *Harvey* v. *Thornton*, 14 Ill. 217; *McKay* v. *Wakefield*, 63 Ind. 27; *Daugherty* v. *Deardorf*, 107 Ind. 527; *Newkirk* v. *Burson*, 21 Ind. 129; *Shaw* v. *Hoadley*, 8 Blackf. (Ind.) 165; *Slaughter* 1. Foust, 4 Blackf. (Ind.) 279; *White* v. *Rittmeyer*, 30 Iowa 268, 272, citing many cases and authorities; *Smith* v. *Manning*, 9 Mass. 422; *Abbott* v. *Godfroy's Heirs*, 1 Mich. 178, *per* Miles, J., collating and reviewing the authorities; *Averett* v. *Ward*, 1 Busb. (N. C.) Eq. 192; *Barrett* v. *Cochran*, 8 S. C. 48; *Williams* v. *Beard*, 1 S. C. 309; *Denison* v. *League*, 16 Tex. 399, 409; *George* v. *Cooper*, 15 W. Va. 666; *Zaegel* v. *Kuster*, 51 Wis. 31, explaining the statute of 1860, chap. 363; *Stark* v. *Brown*, 12 Wis. 572, 78 Am. Dec. 762; see the statute of 1842; *Houghton* v. *Mariner*, 7 Wis 244. In Indiana the widow is made an heir by statute, and is a necessary party. See *Fletcher* v. *Holmes*, 32 Ind. 497, 510, and cases cited. See also *Hardy as adm'r, etc.* v. *Atkinson*, 136 Mo. App. 595, 118 S. W. 516. A sale has been held wholly void for the omission of the heirs; *Shiveley's Admr's* v. *Jones*, 6 B. Mon. (Ky.) 274; *Renshaw* v. *Taylor*, 7 Oreg. 315. In Massachusetts, where there is a tenant in possession on whom to serve the process, the heirs are not necessary parties; *Shelton* v. *Atkins*, 39 Mass. (22 Pick.) 71. The heirs of a subvendee are necessary defendants in the foreclosure of a land contract; *Batre* v. *Auze's Heirs*, 5 Ala. 173. In *Bayly* v. *Muehe*, 65 Cal. 345, the heirs were held not necessary parties where the personal representatives had been made defendants. See also *Flack* v. *Braman*, 45 Tex. Civ. App. 473, 101 S. W. 537.

Anrud v. *Scandinavian-American Bank*, 27 Wash. 16, 67 P. 364; *Carwile* v. *Crump*, 165 Ala. 206, 51 So. 744; *Hill* v. *Townley*, 45 Minn. 167, 47 N. W. 653. See *Ballard* v. *Ken-*

gaged premises are as necessary parties to a foreclosure as the deceased mortgagor or owner would have been, if the action had been brought in his life-time, as they succeed by operation of law under the statute of descent to the entire interest of the decedent in the property, the same as a purchaser would succeed to such interest by grant. It is not sufficient to make the personal representatives of the deceased owner alone defendants,[43] except in cases of foreclosure by advertise-

ncdy, 34 Fla. 483, 16 So. 327; *Harsh* 1. *Griffin,* 72 Iowa, heirs-at-law, 608, 34 N. W. 441.

In *California* it is held that the heirs-at-law of a mortgagor are not necessary parties to an action to foreclose the mortgage, as no equity of redemption vests in the heirs-at-law of the mortgagor of a homestead, upon the death of the latter, where the title thereto vests in the wife of the mortgagor. *Collins* v. *Scott,* 100 Cal. 446, 34 Pac. 1085; *Finger* v. *McCaughey, as administratrix, etc.* 119 Cal. 59, 51 P. 13.

In *Florida* the heir-at-law of a deceased mortgagor is a proper but not a necessary party to an action to foreclose the mortgage, under the state statute making the realty of the decedent assets in the hands of his executor or administrator. *Ballard* v. *Kennedy,* 34 Fla. 483, 16 So. 327.

It has been said that where the holder of a mortgage after the death of the mortgagor foreclosed the mortgage, making no person a party except the holder and the mortgagor, service being made by publication, the proceedings, including the sheriff's deed, are void as against the heir of the mortgagor and his grantee. *Richards* v. *Thompson,* 43 Kan. 209, 23 Pac. 106. The supreme court of Iowa, in the case of *Harsh* v. *Griffin,* 72 Iowa, 608, 34 N. W. 441, say that where minor heirs, owning an undivided two-thirds of certain real estate, are not made parties to the foreclosure of a mortgage thereon, their only right is to redeem from the mortgage. And the supreme court of California hold that the heirs of a deceased mortgagor have the right, notwithstanding their claim to the lands and for partition is hostile to the mortgagee, to intervene in a suit to foreclose the mortgage, in which it is sought under a provision in the mortgage to have the lands placed in the hands of a receiver and to apply the proceeds on a judgment, so that the heirs' right of possession and interest in the homestead lands and in the rents and proceeds are attacked and liable to be interfered with. *Hoppe* v. *Fountain,* 104 Cal. 94, 36 Pac. 389.

In *Florida* since the Revised Statutes went into effect the heirs are necessary parties. *Mote, as ex'r, etc.* v. *Morton,* 46 Fla. 478, 35 So. 656.

[43] *Zaegel* v. *Kuster,* 51 Wis. 31; *Stark* v. *Brown,* 12 Wis. 572, 78 Am. Dec. 762; see the statute of 1842, referred to. In *Missouri* the heirs are by statute not necessary

ment.[44] The guardian of an infant heir is not a necessary party, but the infant must be made a defendant, and the process of the court must be personally served upon him.[45]

In reviving a foreclosure commenced against a deceased mortgagor in his life-time, his heirs are necessary parties in order to produce a perfect title.[46]

The general principles of law that have been previously stated as rendering a mortgagor or an owner of the equity of redemption by purchase a necessary party, are equally applicable to the heirs at law of such a mortgagor or owner.[47]

In California, where the doctrine of community property [48] prevails, it is held that a decree of foreclosure of a mortgage upon community property, rendered after the wife's death,[49] where the husband is served with the process, but the wife's minor children are not, is void with respect to one-half of the lands mortgaged.[50] But where a husband, after his wife's death, executes a trust deed upon community lands, in which

parties; *Perkins* v. *Wood,* 27 Mo. 547; Code of 1845. See *Dixon's Adm'rs* v. *Cuyler's Adm'rs,* 27 Ga. 248, holding the personal representatives instead of the heirs necessary parties. See *post,* § 165.

[44] *Mackenzie* v. *Alster* 64 How. (N. Y.) Pr. 388; *Low* v. *Purdy,* 2 Lans. (N. Y.) 424. See *post,* § 165, and the cases cited in this section. In Illinois, in a foreclosure by *scire facias,* it has been held sufficient under the statute to make either the heirs or the executors or administrators parties; *Rockwell* v. *Jones,* 21 Ill. 279; *John* v. *Hunt,* 1 Blackf. (Ind.) 324, 12 Am. Dec. 245.

[45] *Alexander* v. *Frary,* 9 Ind. 481; *Moore* v. *Starks,* 1 Ohio St. 369. See the N. Y. Code Civ. Proc. § 426.

[46] Thus, a grantor died during the pendency of an action in the nature of a foreclosure, for an accounting and sale of the premises, brought upon a deed given to secure an advance of money; and the suit having been revived against his administrator alone, a bidder at the sale was relieved of his bid on the ground that the title offered was defective, the heirs having been omitted as defendants. *Dodd* v. *Neilson,* 90 N. Y. 243. In *Givens' Admr's* v. *Davenport,* 8 Tex. 451, the heirs of a mortgagor who died pending the foreclosure were held not necessary parties in reviving it; *aliter* where the action was commenced against the personal representatives after the death of the mortgagor.

[47] See *ante,* §§ 146, 147.

[48] See *ante,* § 158.

[49] As to service upon wife when mortgage on community property. See *ante,* § 158.

[50] *Johnson* v. *San Francisco Sav. Union,* 75 Cal. 134, 16 Pac.

the interest of the wife's children as heirs of the mother are expressly excepted, are not entitled to intervene in a suit to foreclose the trust deed, setting up their ownership as their mother's heirs to an undivided half interest in the land, as they have a plain legal remedy to secure their interest and to contest the matter with the grantee or the purchaser in the foreclosure preceedings.[51]

§ 162. Heirs of mortgagor or owner—When not necessary.—If the mortgagor parted in his life-time with the equity of redemption, his heirs at law are not necessary parties;[53] but where the mortgagor at his decease still holds an equitable interest in the equity of redemption, his heirs, succeeding to his identical rights, will or will not be necessary parties according to the rules of law previously stated.[54]

If a judgment for deficiency is sought against the estate of a deceased mortgagor, or of a deceased purchaser, who has duly assumed the payment of the mortgage debt, the legal representatives of the decedent are necessary parties for that purpose;[55] but they are not necessary parties for the purpose

753, 7 Am. St. Rep. 129. See also *Schlarb* v. *Castaing,* 50 Wash. 331, 97 P. 289.

[51] *Hinzie* v. *Kempner,* 82 Tex. 617, 18 S. W. 659.

[52] For other instances of when heirs are not necessary parties, see *Merritt* v. *Daffin,* 24 Fla. 320, 4 So. 806; *Tierney* v. *Spiva,* 97 Mo. 98, 10 S. W. 433.

Grantees of heirs not necessary, when—Under the Missouri statutes of 1845 and 1855 the heirs and devisees of the mortgagor not being necessary parties to a foreclosure suit, it is not necessary to make their grantees defendants. *Tierney* v. *Spiva,* 97 Mo. 98, 10 S. W. 433; *McClung* v. *Cullison,* 15 Okl. 402, 82 P. 499.

[53] *Daly* v. *Burchall,* 13 Abb. (N. Y.) Pr. N. S. 264, 268. In point, *Wilkins* v. *Wilkins,* 4 Port. (Ala.) 245; *Hibernia Savings Society* v. *Herbert,* 53 Cal. 375; *Medley* v. *Elliott,* 62 Ill. 532. See *ante,* §§ 138, 139.

Thus if a mortgagor assigns all his estate to an assignee for benefit of creditors, and dies, his heirs at law are not necessary parties to an action of foreclosure. *Butler* v. *Williams,* 27 S. C. 221, 3 S. E. 211.

[54] See *ante,* §§ 140–143.

[55] See *post,* chap. x.

of foreclosing the title.[56] The reason for this is, that in most states the executors and administrators, or legal representatives, of a deceased person receive no title or interest in the land. Inasmuch as a mortgage executed by a widow, purporting to convey the entire estate in premises set apart to her and her minor children as a homestead, does not affect the interest of such minor children, they are therefore not necessary parties to the foreclosure of such mortgage.[57]

In those states, however, where the real as well as the personal property passes into the hands of executors or administrators, they are necessary parties to a foreclosure in the place of the heirs, who are then not necessary parties;[58] and in statutory foreclosures by advertisement in New York the personal representatives are indispensable parties.[59] If the heirs, or any of them, are omitted as parties, any defendant interested in the action may object by demurrer, if the defect appears upon the face of the complaint, or by answer, and compel such omitted heir to be made a party.[60] And an omitted heir will always be permitted to appear and defend on application to the court.[61]

When the decedent leaves a will, devising the equity of redemption in mortgaged premises, the devisees and beneficiaries become necessary parties instead of the heirs at law.[62] But if the will contains a power of sale directing distribution of the estate among certain heirs, the heirs will be necessary parties, as the fee is devised to them subject to the execution of the power of sale.[63] As the probate of a will of real estate may be impeached within a limited time,[64] it is proper, and may be necessary under certain circumstances, to make the

[56] *Leonard* v. *Morris,* 9 Paige Ch. (N. Y.) 90.

[57] *Hoppe* v. *Fountain,* 104 Cal. 94, 37 Pac. 894.

[58] *Harwood* v. *Marye,* 8 Cal. 580.

[59] See *post,* § 165, the last paragraph and the cases cited.

[60] See *ante,* § 148.

[61] *Zundel* v. *Tacke,* 47 Hun (N. Y.) 239.

[62] See *post,* § 163, on devisees; *Hunt* v. *Acre,* 28 Ala. 580.

[63] *Noonan* v. *Brennemann,* 54 N. Y. Super. Ct. (22 J. & S.) 337.

[64] N. Y. Code Civ. Proc. § 2627.

heirs at law also parties. The plaintiff omits them at the risk of their subsequently redeeming.

When the title to mortgaged premises is conveyed to a man and his wife as tenants by the entirety,[65] or is held jointly by partners or others, the heirs of one of the deceased joint owners are not necessary parties to cut off the equity of redemption and to perfect the title by foreclosure; if, however, the deceased joint owner signed the bond or became in any way liable for the mortgage debt, his legal representatives are proper parties for the purpose of obtaining a judgment of deficiency against his estate. The reason for this rule is based on the common-law doctrine of survivorship, by which the entire title, upon the death of any of the joint owners, vests in the survivors.[66]

In those cases where neither the original trustee nor the assignee of a mortgage held in trust for the benefit of third parties disposes thereof by will, the interest of such trustee or assignee passes on his death to his personal representatives and neither his heirs nor devisees are necessary parties to a suit to foreclose.[67]

§ 163. Devisees of mortgaged premises necessary.— We have already seen that when the title to mortgaged premises devolves upon heirs at law under the statute of descent, they are necessary parties to a foreclosure. A testator is authorized by statute to make a will, superseding the statute of descent in the disposition of his property. Following the analogy of the rule which makes an heir a necessary party, the person or devisee to whom the testator passes the title of his mortgaged premises by will is also a necessary party to foreclose the equity of redemption, as he becomes the owner of the same.[68] A mortgage executed by a devisee upon lands re-

[65] *Bertles* v. *Nunan*, 92 N. Y. 152, 44 Am. Rep. 361. See *ante*, § 142.

[66] 4 Kent Com. 360.

[67] *Lambertville Nat. Bank* v. *Mc-Cready Bag & Paper Co.* (N. J. Ch.) 1 L.R.A. 334, 15 Atl. 388.

[68] *Leggett* v. *Mut. Life Ins. Co.* 64 Barb. (N. Y.) 36; *Robinson* v.

ceived by will, is always subject to equities existing against the premises at the time of the testator's death.[69] If the entire title to the premises is devised, the heir, of course, is not a necessary party, as he has no interest in the property.[70] As a surrogate's decree, admitting a will of real estate to probate, is only presumptive evidence of the matters adjudged in the decree, and as the probate of the will may be impeached within a limited time, the heirs at law may, during such time, become necessary defendants,[71] and they ought not to be omitted from the action, if any of them dispute the validity of the will. Until a decree is made, admitting a will to probate, the heirs are necessary parties; and it is believed that the devisees are also necessary. It is suggested that in such a case the rule of law may be applied which renders both the vendee and the vendor in a land contract of mortgaged premises necessary parties.[72]

§ 164. Legatees and annuitants necessary.—A legacy or an annuity charged by a will upon mortgaged premises is a lien thereupon, the same as though the decedent had mortgaged or otherwise incumbered the equity during his lifetime; and the beneficiary of such a legacy or annuity is an indispensable party in an action to foreclose.[73] It seems, how-

Robinson, 1 Lans. (N. Y.) 117; *Nodine* v. *Greenfield,* 7 Paige Ch. (N. Y.) 547, 34 Am. Dec. 363; *Savings & Loan Society* v. *Gibb,* 21 Cal. 595; *Sanderson* v. *Edwards,* 111 Mass. 335. It matters not whether the devise is absolute or in trust; *Mayo* v. *Tomkies,* 6 Munf. (Va.) 520; *Graham's Exec'rs* v. *Carter,* 2 Hen. & M. (Va.) 6; *Coles* v. *Forrest,* 10 Beav. 552; *Chadbourn* v. *Johnson,* 119 N. C. 282, 25 S. E. 705; *Mote, as ex'r. etc.* v. *Morton,* 46 Fla. 478, 35 So. 656.

Children taking through a devisee by inheritance are necessary parties. *Gruner* v. *Ruffner,* 134 App. Div. 837, 119 N. Y. Supp. 942.

[69] *Simons* v. *Bryce,* 10 S. C. L. 354.

[70] *Macclesfield* v. *Fitton,* 1 Vern. 168; *Lewis* v. *Nangle,* 2 Ves. Sr. 431, 1 Ambl. 150.

[71] N. Y. Code Civ. Proc. § 2627. See the preceding section; exactly in point, *Hunt* v. *Acre,* 28 Ala. 580.

[72] See *ante,* § 144.

[73] *Hebron Society* v. *Schoen,* 60 How. (N. Y.) Pr. 185; *McGown* v. *Yerks,* 6 Johns. Ch. (N. Y.) 450; *Batchelor* v. *Middleton,* 6 Hare, 75.

ever, where a legacy is made generally from the estate, and not charged specifically upon the mortgaged premises, that the legatee is not a necessary party; but such a legatee may be come an indispensable party if there is an insufficiency of personal property to pay the legacy,[74] and it becomes necessary to resort to the mortgaged premises to produce a fund to pay it. Where a power of sale in the will works an equitable conversion of the mortgaged premises into personalty, the residuary legatees and devisees are not necessary parties to foreclosure.[75]

§ 165. Executors and administrators generally not necessary.—In New York and in many other states the administrator of a person who dies seized of an equity of redemption, is not a necessary party defendant to a foreclosure,[76] except where the action is commenced during the pendency of a proceeding in a probate court to sell the decedent's equity of redemption to pay his debts.[77] The reason for this rule is, that administrators have no interest in the real estate of a decedent.[78] Neither are executors necessary parties, unless their office is coupled with an interest in the property by trust, power of sale or otherwise.[79] In a few

[74] *Hebron Society* v. *Schoen*, 60 How. (N. Y.) Pr. 185.

[75] *Boehmcke* v. *McKeon*, 119 App. Div. 30, 103 N. Y. Supp. 930.

[76] For the New York cases see *ante*, §§ 161, 162. *Dodd* v. *Neilson*, 90 N. Y. 243, held that it was not sufficient to make the personal representatives defendants; the heirs were also necessary. *Erwin* v. *Ferguson*, 5 Ala. 158; *Inge* v. *Boardman*, 2 Ala. 331; *Wilkins* v. *Wilkins*, 4 Port. (Ala.) 245; but held necessary in *Dooley* v. *Villalonga*, 61 Ala. 129; *Bissell* v. *Marine Co. of Chicago*, 55 Ill. 165; *Rockwell* v. *Jones*, 21 Ill. 279; *Trapier* v. *Waldo*, 16 S. C. 276; *Stark* v. *Brown*, 12 Wis. 572, 78 Am. Dec. 762; *Houghton* v. *Mariner*, 7 Wis. 244. The personal representative of a deceased joint mortgagor should not be made a party, according to *Wiley* v. *Pinson*, 23 Tex. 486; *Martin* v. *Harrison*, 2 Tex. 456.

Butler v. *Williams*, 27 S. C. 221, 3 S. E. 211. See *In re estate of Hamlin* (*Villilea, as adm'r, etc.* v. *Douglas*) 133 Wis. 140, 17 L.R.A. (N.S.) 1189, 126 Am. St. Rep. 938, 113 N. W. 411.

[77] N. Y. Code Civ. Proc. §§ 2749, 2797, 2798.

[78] *Willard* v. *Nason*, 5 Mass. 240. See *ante*, §§ 161, 162.

[79] And the court of Appeals of New York hold that one of two executors in whom the legal estate

states, personal representatives are held indispensable parties defendant,[80] while a majority of the decisions indicate that it is a proper and advisable practice always to bring before the court the legal representatives of a deceased owner of an equity of redemption.[81]

In the statutory foreclosure of mortgages by advertisement

of the testator does not vest, who fails to qualify, is not a necessary party to an action to foreclose a mortgage of the testator's lands. *Steinhardt* v. *Cunningham,* 130 N. Y. 292, 29 N. E. 100.

[80] In *Missouri* a statute makes it sufficient to bring the personal representatives into the action; *Perkins* v. *Woods,* 27 Mo. 547; *Cadwallader* v. *Cadwallader,* 26 Mo. 76; *Miles* v. *Smith,* 22 Mo. 502; *Riley's Adm'rs* v. *McCord's Adm'rs,* 21 Mo. 285, 24 Mo. 265, holding the personal representatives indispensable; *Hall* v. *Klepzig,* 99 Mo. 83, 12 S. W. 372; *Randolph* v. *Widow, etc., of Chapman,* 21 La. An. 486. See *Dixon* v. *Cuyler,* 27 Ga. 248, holding the heirs not necessary parties. *Hall* v. *Musler,* 1 Disney (Ohio) 36. In *Biggerstaff* v. *Loveland,* 8 Ohio, 44, it was held sufficient to make the personal representatives parties defendant on the ground that the statute reads, "heirs, executors or administrators." See also *Heighway* v. *Pendleton,* 15 Ohio, 735, 749, 758, where it was held that the statute of 1807 made the equity of redemption a "chattel descendible" to the personal representatives, and not to the heirs. *Mebane* v. *Mebane,* 80 N. C. 34, 38, distinguishing and ruling contrary to *Averett* v. *Ward,* 1 Busb. (N. C.) Eq. 192; *Massie's Heirs* v. *Donaldson,* 8 Ohio, 377; *Hunsecker* v. *Thomas,* 89 Pa. St. 154; *Wallace* v. *Holmes,* 40 Pa. St. 427, citing the statute; *Bryce* v. *Bowers,* 11 Rich. (S. C.) Eq. 41; *Wright* v. *Eaves,* 10 Rich. (S. C.) Eq. 582; *Gibbes* v. *Holmes,* 10 Rich. (S. C.) Eq. 484, 493. See *Trapier* v. *Waldo,* 16 S. C. 276, apparently overruling these cases. In Texas it has been held necessary under a statute to present the claim on the mortgage to the personal representatives before foreclosing; *Graham* v. *Vining,* 1 Tex. 639; the remedy against the mortgagor's estate must be pursued in the probate court. Limited in *Cole* v. *Robertson,* 6 Tex. 356, 55 Am. Dec. 784, to the effect that a foreclosure *in rem,* but not an action *in personam,* can be maintained without a previous demand on the personal representatives.

Merritt v. *Daffin,* 24 Fla. 320, 4 So. 806.

[81] Personal representatives are held proper parties in *Bayly* v. *Muehe,* 65 Cal. 345; *Savings and Loan Society* v. Gibb, 21 Cal. 595; *Burton* v. *Lies,* 21 Cal. 87; *Fallon* v. *Butler,* 21 Cal. 24, 81 Am. Dec. 140; *Darlington* v. *Effey,* 13 Iowa, 177; *Hodgdon* v. *Heidman,* 66 Iowa, 645, holds personal representatives proper parties if a judgment for deficiency is desired; *Brenner* v. *Bigelow,* 8 Kan. 496, 504; *Carwile* v. *Crump,* 165 Ala. 206, 51 So. 744.

in New York, the rule is fixed and absolute that the notice must be served upon the "mortgagor, or, if he is dead, upon his *executor or administrator;*" [82] it is not required to be served upon the heirs or devisees. If no personal representatives have been appointed, foreclosure by advertisement can not be maintained.[83]

§ 166. Trustees, holding an interest of whatever kind in mortgaged premises for beneficiaries, necessary.— Wherever the title to, or an interest in, mortgaged premises is passed to a person in trust for specific purposes, for the benefit of other persons, the trustee is always a necessary party to a foreclosure in order to cut off the entire equity of redemption. The reported cases, almost without an exception, sustain this proposition, no matter what the character or purpose of the trust may be.[84] Though none of the cases

[82] *Anderson* v. *Austin,* 34 Barb. (N. Y.) 319; *Cole* v. *Moffitt,* 20 Barb. (N. Y.) 18; *Hornby* v. *Cramer,* 12 How. (N. Y.) Pr. 490; *Low* v. *Purdy,* 2 Lans. (N. Y.) 424, 2 N. Y. Rev. Stat. 545; Laws of 1844, chap. 346; N. Y. Code Civ. Proc. § 2388, subdiv. 4.

[83] *Mackenzie* v. *Alster,* 64 How. (N. Y.) Pr. 388, 12 Abb. (N. Y.) N. C. 110. Boardman, J., queries in *VanSchaack* v. *Sanders,* 32 Hun (N. Y.) 515, 19 N. Y. Week. Dig. 170, whether service on a devisee is not sufficient where the executors have not qualified.

[84] *Bard* v. *Poole,* 12 N. Y. 495; *Case* v. *Price,* 9 Abb. (N. Y.) Pr. 111; *Christie* v. *Herrick,* 1 Barb. Ch. (N. Y.) 254; *Leggett* v. *Mutual Life Ins. Co.* 64 Barb. (N. Y.) 38; *Toole* v. *McKiernan,* 48 N. Y. Super. Ct. (16 J. & S.) 163; *Grant* v. *Duane,* 9 Johns. (N. Y.) 591; *Nodine* v. *Greenfield,* 7 Paige Ch. (N. Y.) 547, 34 Am. Dec. 363; *Paton* v. *Murray,* 6 Paige Ch. (N. Y.) 474; *King* v. *McVicker,* 3 Sandf. Ch. (N. Y.) 192; *Williamson* v. *Field's Ex'rs,* 2 Sandf. Ch. (N. Y.) 533, 563; *Wilson* v. *Russ.* 17 Fla. 691; *C. & G. W. R. Land Co.* v. *Peck,* 112 Ill. 408, 435; *Walsh* v. *Truesdale,* 1 Ill. App. 126; *Clark* v. *Reyburn,* 75 U. S. (8 Wall.) 318, 19 L. ed. 354; Fisher on Mortgages, §§ 365, 367; *Wilton* v. *Jones,* 2 Y. & C. C. C. 244. The heirs at law of a trustee are not necessary parties; *N. & C. Bridge Co.* v. *Douglass,* 12 Bush. (Ky.) 673. See *Gardner* v. *Brown,* 88 U. S. (21 Wall.) 36, 22 L. ed. 527, where a trustee had not filed a required bond.

Lambert v. *Hyers,* 22 Ill. App. 616; *Maher* v. *Tower Hotel Co.* 94 Fed. 225; *Moyse* v. *Cohn,* 76 Miss. 590, 25 So. 169. And it is said that a trustee in whom the legal title to

state the reason for this principle, it is believed that it is based upon the fact that all trustees are held accountable by the courts for the performance of their trusts, and that without being made parties they would have no opportunity to be heard in an action affecting the subject of their trust.

Even if the trust were not coupled with an interest, there might be latent equities or hidden rights which would impair the title offered at a foreclosure sale, if the trustee were omitted as a party defendant. It is specially necessary, and, in fact, indispensable, to make a trustee of an express trust, or one who has an interest coupled with a trust, a party.[85] Trusts created by will are so various in character and often approach so near a mere power, that each case must be judged by itself as it arises; and this is notably true, when it is remembered that the common-law theory of trusts and the statutory enactments of the various states respecting them are so complicated and intricate.[86] The trustee must be made a party in his representative, and not in his individual, capacity.[87]

§ 167. **Cestuis que trust and beneficiaries—When necessary.**—The decisions of the courts and the statutes of this state have long established the *dictum,* and that the *cestuis que trust* and beneficiaries of a trust are necessary defendants to a foreclosure, in order to cut off the entire equity of redemption.[88] Judge Story says: "It will not in general be

premises is vested by a mortgage sought to be foreclosed may properly be made a party defendant, individually as well as in his capacity as trustee, to a cross-bill filed by a judgment creditor of the mortgagor, praying that the mortgage be declared fraudulent and void and the proceeds of the property be applied to his judgment. *Mobile Sav. Bank* v. *Burke,* 94 Ala. 125, 10 So. 328.

[85] In *Case* v. *Price,* 17 How. (N. Y.) Pr. 348, it was held that when no estate, legal or equitable, vested in the trustee, he was not a necessary party; *aliter* when the trustee takes any interest in the property. See the cases cited *supra.*

[86] *Nodine* v. *Greenfield,* 7 Paige Ch. (N. Y.) 547, 34 Am. Dec. 363.

[87] *Rathbone* v. *Hooney,* 58 N. Y. 463.

[88] *Leggett* v. *Mutual L. I. Co.* 64 Barb. (N. Y.) 23, 36, reversed in part in 53 N. Y. 400; *Case* v. *Price,*

sufficient if the equity of redemption is conveyed or devised to a trustee in trust, to bring him before the court; but the *cestuis que trust* (the beneficiaries) should also be made parties." [89] "It is conceded to be the general rule, that if the equity of redemption is vested in a trustee in trust, the *cestuis que trust* must be made parties to the foreclosure." [90]

And even where the receipt of trustees was to be sufficient

17 How. (N. Y.) Pr. 348; *Toole* v. *McKiernan*, 48 N. Y. Super. Ct. (16 J. & S.) 163; *Terrett* v. *Crombie*, 6 Lans. (N. Y.) 82, modified in 55 N. Y. 683; *Nodine* v. *Greenfield*, 7 Paige Ch. (N. Y.) 544, 34 Am. Dec. 363; *King* v. *McVickar*, 3 Sandf. Ch. (N. Y.) 192; *Williamson* v. *Field*, 2 Sandf. Ch. (N. Y.) 562. See *Dodd* v. *Neilson*, 90 N. Y. 243, 247. In *Lockman* v. *Reilley*, 10 Abb. (N. Y.) N. C. 351, certain beneficiaries were held unnecessary parties; but in that case the equity of redemption had been changed into personalty by the terms of a will. *Woolner* v. *Wilson*, 5 Ill. App. 439; *Day* v. *Wetherby*, 29 Wis. 363; *Clark* v. *Reyburn*, 75 U. S. (8 Wall.) 318, 19 L. ed. 354. See *Broward* v. *Hoeg*, 15 Fla. 370, for a case where alleged beneficiaries were held not necessary parties. In *Johnson* v. *Robertson*, 31 Md. 476, the *cestui que trust*, being a non-resident, was held an unnecessary party; her interests were held bound by a decree taken *pro confesso* against her trustee. In *Wood* v. *Nisbit*, 20 Ga. 72, the premises were conveyed to a person as trustee, who executed a purchase money mortgage as trustee; the *cestui que trust* was held not a necessary party. Contrary to the text, see Fisher on Mortgages, § 367 *et seq.*, and the English cases, *Hanman* v. *Riley*, 9 Hare Append. 40; *Goldsmid* v. *Stonehewer*, 9 Hare Append. 39, 17 Jur. 199; *Sale* v. *Kitson*, 17 Jur. 171, 3 DeG., M. & G. 119; *Tuder* v. *Morris*, 1 Sm. & Gif. 503; *Cropper* v. *Mellersh*, 1 Jur. N. S. 299. See *Coles* v. *Forrest*, 10 Beav. 557.

The general rule is that a *cestui que trust* is a proper but not a necessary party to foreclosure of a mortgage given by his trustee; and if for any reason his presence upon the record as a party defendant is desirable, the remedy is not by demurrer for a defect of parties, but by motion to have him brought in *Harlem Co-Op. Bldg. & Loan Assoc.* v. *Quinn*, 32 N. Y. S. R. 909, 10 N. Y. Supp. 682. And the United States circuit court for the western district of Tennessee have held that where one partner conveys to the other his interest, upon a contract that the latter will assume and pay his debts and an annuity to himself, a bill to foreclose the mortgage should make the creditors parties. *Hunt* v. *Fisher*, 29 Fed. 801.

[89] Story's Eq. Pl. §§ 193, 197.

[90] *Williamson* v. *Field*, 2 Sandf. Ch. (N. Y.) 562, a leading case, *per* Vice-Chancellor Sandford. All the books agreed in sustaining this proposition. *Gore* v. *Stacpoole*, 1 Dow's P. C. 18, 31, *per* Lord Eldon; Story's Eq. Pl. §§ 193, 194, 207. Calvert on Parties, 181, 182.

to discharge purchasers from all liability to the beneficiaries, the equity of redemption having been conveyed to trustees to sell and divide among certain specified persons, the *cestuis que trust* were held necessary parties to a bill brought to foreclose the mortgage.[91] The nature of the trust should appear on the face of the instrument creating it. Where the conveyance does not reveal the fact that it is a trust deed, together with the names of the beneficiaries, the foreclosure will produce a perfect title, and the rights of the *cestuis que trust* will be cut off, though they are not made parties to the action.[92]

§ 168. Cestuis que trust—When not necessary.—As far as the reported cases show, there are only two exceptions to the general rule above stated. First, "in cases of remote limitation of the equity of redemption, in which, on account of the impossibility of bringing in parties not *in esse,* or not ascertained, but who may ultimately become entitled, it is held sufficient to bring before the court the persons *in esse* who have the first estate of inheritance, together with the persons having all the precedent estates and prior interests."[93] But where a mortgagor conveyed his equity of redemption to trustees in settlement for his daughter on her marriage, out of which she was to receive an annuity, and the trustees were to raise out of the same a sum of money for the children of the marriage, the daughter and her children were deemed necessary parties to a suit for the foreclosure of the mortgage.[94]

Second, in cases where the beneficiaries are so numerous

[91] *Calverley* v. *Phelp,* 6 Madd. 229.

[92] *Johnston* v. *Donvan,* 106 N. Y. 269; *Brown* v. *Cherry,* 38 How. (N. Y.) Pr. 352, 56 Barb. (N. Y.) 635; *Young* v. *Whitney,* 18 Fla. 54.

[93] *Williamson* v. *Field,* 2 Sandf. Ch. (N. Y.) 562. Special attention is called to this case for its learned and exhaustive discussion of the relation of trustees to their *cestuis* que trust, in cases of mortgage foreclosure.

[94] *Anderson* v. *Stather,* 16 L. J. (Eq.) N. S. 152, before Sir Knight Bruce, Vice-Chancellor.

that it would be intolerably oppressive to compel the plaintiff to bring them all into the action, it is held sufficient to make the trustees defendants.[95] Thus, in a case where real estate had been purchased by a joint fund raised by subscriptions from above two hundred and fifty subscribers, and the property was conveyed to A., B. and C. as trustees, who executed a purchase money mortgage, Chancellor Kent held on the foreclosure that "the trustees were selected in this case to hold and represent the property for the sake of convenience, and because the subscribers were too numerous to hold and manage the property as a co-partnership. The trustees are sufficient for the purpose of this bill, which is for a sale of the pledge; it would be intolerably oppressive and burdensome, to compel the plaintiff to bring in all of the *cestuis que trust*. The delay and the expense incident to such a proceeding would be a reflection on the justice of the court. This is one of those cases in which the general rule cannot, and need not, be enforced; for the trustees sufficiently represent all the interests concerned; they were selected for that purpose, and we need not look beyond them." [96] Where a trust is created for the benefit of numerous creditors, the same explanation holds good, and the creditors are not necessary parties, but may be safely represented by the trustees; [97] but the beneficiaries may

[95] *Christie* v. *Herrick,* 1 Barb. Ch. (N. Y.) 254; *VanVechten* v. *Terry,* 2 Johns. Ch. (N. Y.) 197 *Paton* v. *Murray,* 6 Paige Ch. (N. Y.) 474. See *C. & G. W. R. Land Co.* v. *Peck,* 112 Ill. 408, 435, citing *VanVechten* v. *Terry,* 2 Johns. Ch. (N. Y.) 197, and discussing this principle at length; *Swift* v. *Stebbins,* 4 Stew. & Port. (Ala.) 447; *Willis* v. *Henderson,* 5 Ill. (4 Scam.) 13, 38 Am. Dec. 120, *N. Y. Franklinite Co.* v. *Ames,* 12 N. J. Eq. (1 Beas.) 507.

[96] *VanVechten* v. *Terry,* 2 Johns. Ch. (N. Y.) 197.

[97] *Grant* v. *Duane,* 9 Johns. (N. Y.) 591. See the clear opinion of Caton, J., in *Willis* v. *Henderson,* 5 Ill. (4 Scam.) 13, 20, 38 Am. Dec. 120; Fisher on Mortgages, § 374. For the English cases, see *Thomas* v. *Dunning,* 5 DeG. & S. 618; *Newton* v. *Earl of Egmont,* 4 Sim. 574; *Troughton* v. *Binkes,* 6 Ves. 573. A few creditors may represent the remainder; *Holland* v. *Baker,* 3 Hare, 68. See also *Smart* v. *Bradstock,* 7 Beav. 500; *Powell* v. *Wright,* 7 Beav. 444; *Law* v. *Bagwell,* 4 Dru. & War. 406; *Doody* v. *Higgins,* 9 Hare Append. 32; *Gore* v. *Harris,* 15 Jur. 761; *Wallwyn* v. *Coutts,* 3

properly be made defendants, if the plaintiff desires to bring them into the action.[98]

§ 169. **Statutes making cestuis que trust necessary.**—The Statutes of many states are clear in declaring that in cases of trusts made to one or more persons for the use of others, no estate or interest, legal or equitable, shall vest in the trustee; but that every beneficiary who by virtue of a trust is entitled to the actual possession of lands and the profits thereof, shall be deemed to have a legal estate therein, according to his beneficiary interest.[99] No court has ever held, so far as can be ascertained, that a *cestui que trust* may be omitted as a party to a foreclosure, except in the two cases already mentioned.[1] Even where a trustee executed the mortgage under authority of a court, it was held that the beneficiaries were necessary parties;[2] the same would hold true if the mortgage were executed by a trustee under authority contained in a will or other instrument.[3]

The general rule of law of this section is undoubtedly founded on the broad principle, that all persons having an interest in the equity of redemption should be made parties, and that none of them will be concluded as to their rights unless they are brought into the action so that the court acquires jurisdiction of them. Although the trustee has a *quasi* interest in the premises, the beneficiaries are, nevertheless, the actual parties in interest, owning as they do the equitable, if not the legal, title to the premises.

§ 170. **Remaindermen and reversioners necessary.**—All persons having a vested estate of inheritance in remainder

Mer. 707; *Garrard* v. *Lord Louderdale*, 3 Sim. 1.

[98] *Union Bank* v. *Bell*, 14 Ohio St. 200.

[99] 1 N. Y. Rev. Stat. 728, §§ 47, 49, *Rawson* v. *Lampman*, 5 N. Y. 456.

[1] See *ante*, § 166, and the notes, for special instances.

[2] *Williamson* v. *Field*, 2 Sandf. Ch. (N. Y.) 533.

[3] *Albany Fire Ins. Co.* v. *Bay*, 4 N. Y. 9, 19. But see *Wagnon* v. *Pease*, 104 Ga. 417, 30 S. E. 895.

or reversion in mortgaged premises, must be brought into court in an action to foreclose a mortgage; but where there are several future and contingent interests in the equity of redemption in mortgaged premises, it is not necessary generally to make every person having a future and contingent interest a party to a bill of foreclosure. It seems sufficient, if the person who has the first vested estate of inheritance, and the several intermediate remaindermen and persons having or claiming rights or interests in the premises prior to the vested estates, are brought before the court.[4]

It is clear equitable law that in order to make a foreclosure valid as against all claimants, he who has the first estate of inheritance must be brought before the court; and even then the intermediate remaindermen for life ought also to be brought before the court, to give them an opportunity to pay off the mortgage if they desire.[5] In a case where mortgaged premises were bequeathed by a mortgagor to his wife for life

[4] *Brevoort* v. *Brevoort,* 70 N. Y. 136; *Rathbone* v. *Hooney,* 58 N. Y. 463; *Leggett* v. *Mutual Life Ins. Co.* 64 Barb. (N. Y.) 23, 36; *Eagle F. Ins. Co.* v. *Cammet,* 2 Edw. Ch. (N. Y.) 127; *Nodine* v. *Greenfield,* 7 Paige Ch. (N. Y.) 544, 34 Am. Dec. 363; *Williamson* v. *Field,* 2 Sandf. Ch. (N. Y.) 533, 563. See *Lockman* v. *Reilley,* 95 N. Y. 64, 10 Abb. (N. Y.) N. C. 351, where questions affecting the interpretations of a will were also involved. See *Iowa Loan & Trust Co.* v. *King,* 58 Iowa, 598. Also *Breit* v. *Yeaton,* 101 Ill. 242, an action for partition. For the English authorities, see Fisher on Mortgages, 309 *et seq.; Lloyd* v. *Johnson,* 9 Ves. 37; *Gifford* v. *Hort,* 1 Sch. & Lef. 386, 408; *Yates* v. *Hambly,* 2 Atk. 237; *Sutton* v. *Stone,* 2 Atk. 101; *Hopkins* v. *Hopkins,* 1 Atk. 581, 590; *Roscarrick* v. *Barton,* 1 Ch. Cas. 218; *Fishwick* v. *Lowe,* 1 Cox Cas. in Eq. 411; *Choppell* v. *Rees,* 1 DeG., M. & G. 393; *Gore* v. *Stacpoole,* 1 Dow. 18, 31; *Cholmondeley* v. *Clinton,* 2 Jac. & W. 133.

The supreme court of New York have recently said that the holders of vested remainders in a share of an estate devised in trust to pay the income to testator's son for life and divide the principal among his children are not represented by the trustee in a foreclosure suit to which he is made a party, so as to cut off their rights in the premises. *Levy* v. *Levy,* 79 Hun (N. Y.) 290, 29 N. Y. Supp. 384, 60 N. Y. S. R. 561, 31 Abb. (N. Y.) N. Cas. 468.

[5] *Gore* v. *Stacpoole,* 1 Dow. 31, opinion rendered in the House of Lords, *per* Lord Chancellor Eldon.

with remainder in fee to the children of his brother, who should be living at the time of her death, and to the issue of such of the children as should then have died leaving issue, with the power to his executors to sell his real estate and invest the proceeds for the benefit of the devisees, the court decided that the children of the brother, who were *in esse* at the death of the testator, took vested remainders in fee, subject to open and let in after-born children, and subject also to be divested by death during the continuance of the life estate of the widow, or to be defeated by the execution of the power of sale given to the executors by the will; and that accordingly the children of the brother who were *in esse* at the time of filing the bill, ought to have been made parties to the foreclosure, and that their equity of redemption was not barred by a decree in a suit in which the widow, the executors and the heirs at law alone were made parties.[6]

§ 171. A defendant in esse necessary.—All the courts are agreed in cases involving these questions, that there must be a defendant who is a person *in esse*,[7] and who holds a vested estate of inheritance; and they are further agreed, that all persons having estates and interests prior or superior thereto, must be defendants.[8] As Vice-Chancellor McCoun says, "A decree against the party having the estate of in-

[6] *Nodine* v. *Greenfield*, 7 Paige Ch. (N. Y.) 544, 34 Am. Dec. 363, a leading case, *per* Chancellor Walworth, citing and quoting Lord Eldon, in *Gore* v. *Stacpoole*, 1 Dow. 31.

[7] See *Clark* v. *Reyburn*, 75 U. S. (8 Wall) 318, 19 L. ed. 354, where mortgaged premises had been conveyed in trust for the benefit of children born and to be born; all the children *in esse* at the time of filing the bill of foreclosure were held necessary parties. See the cases cited in the preceding section. *Rutledge* v. *Fishburne*, 66 S. C. 155, 44 S. E. 564, 97 Am. St. Rep. 757.

[8] English authorities: Fisher on Mortgages, §§ 311, 315. A tenant for life is necessary; *Reynoldson* v. *Perkins*, Ambl. 564. See *Handcock* v. *Shaen*, Coll. P. C. 122, holding that intermediate remaindermen are necessary. See *Chappell* v. *Rees*, 1 DeG., M. & G. 393; *Gore* v. *Stacpoole*, 1 Dow. 31.

heritance will bind those in remainder or who in any way come afterwards; there must be a clear tenancy in tail to dispense with the necessity of a remainderman being a party to a bill of foreclosure. If there be an express estate for life, and it is doubtful whether the same person is also tenant in tail, the remainderman who has the first estate of inheritance ought to be a party."[9] Though the cases are uniform in using the term, "the first estate of inheritance," it would certainly be advisable to make even the remotest remainderman or reversioner, if he is *in esse*, also a party; it will avoid the raising of any question by him upon the determination or failure of the intermediate estate.

§ 172. Assignee in bankruptcy or by voluntary general assignment, and receiver, necessary.—An assignee in bankruptcy, under the former national bankrupt act, or by voluntary general assignment under the statutes of the several states, of the owner of the equity of redemption in mortgaged premises, is a necessary defendant[10] to a foreclosure,

[9] *Eagle Fire Ins. Co.* v. *Cammet*, 2 Edw. Ch. (N. Y.) 127. In this case M. C. mortgaged real estate and died after making his will, by which he gave all his real and personal estate to his widow until second marriage or death; then to his daughter Mary, as long as she should live; and if she should have no heirs at her death, then to the children of J. C. It was held that the daughter Mary had only a life estate, and that on a bill of foreclosure the children of J. C. ought to have been made parties. "The first tenant in tail," says Lord Camden, "is sufficient; he sustains the interests of everybody; thus any remaindermen are considered ciphers." Reynoldson v. Perkins, Ambl. 564.

[10] *Lenihan* v. *Hamann*, 55 N. Y 652; *Bard* v. *Poole*, 12 N. Y. 507, a case of voluntary assignment; *Cleveland* v. *Boerum*, 23 Barb. (N. Y.) 205, aff'd 24 N. Y. 613; *Wagner* v. *Hodge*, 34 Hun (N. Y.) 524, a case of voluntary assignment, in which the defendant assignee was described merely in his individual capacity and not as assignee; it was held that he was properly and sufficiently made a defendant; followed in *Landon* v. *Townshend*, 44 Hun (N. Y.) 561; *Spring* v. *Short*, 90 N. Y. 538, 545; *Winslow* v. *Clark*, 47 N. Y. 261, 263; *Burnham* v. *De Bevorse*, 8 How. (N. Y.) Pr. 159; *Harris* v. *Cornell*, 80 Ill. 54; *Stimpson* v. *Pease*, 53 Iowa, 572; *Eyster* v. *Gaff*, 91 U. S. (1 Otto), 521; 23 L. ed. 403; *Gardner* v.

if the petition in bankruptcy or the voluntary assignment was made before the commencement of the action to foreclose; so also the receiver of an insolvent corporation is a necessary defendant.[11] If an action is brought by the Attorney-General in the name of the People for the dissolution of an insolvent

Brown, 88 U. S. (21 Wall.) 36, 22 L. ed. 527. In *Chickering* v. *Failes*, 26 Ill. 507, the assignee was held a necessary party if the foreclosure was by an equitable action, but not if it were conducted by *scire facias*. *King* v. *Bowman*, 24 La. An. 506; *Moors* v. *Albro*, 129 Mass. 9; *Freeland* v. *Freeland*, 102 Mass. 475; *Thorpe* v. *Ricks*, 1 Dev. & B. (N. C.) Eq. 619, 620; *Dwyer* v. *Garlough*, 31 Ohio St. 158; *Stafford* v. *Adair*, 57 Vt. 63; Fisher on Mortgages, § 308. *Ostrander* v. *Hart*, 30 N. Y. S. R. 170, 8 N. Y. Supp. 809; *Julien* v. *Lalor*, 47 Hun (N. Y.) 164, 14 N. Y. S. R. 392. But where the circumstances of the case are such as to create a legal presumption that the purposes for which the trusts under a general assignment were created, have ceased, and that consequently the estate of the trustee has ceased, and the title to realty covered thereby has reverted to the assignor,—the title acquired under a sale in a suit to foreclose a mortgage made by an assignor on land included in the assignment, but which had not been conveyed by the assignee, may be held good and marketable, although the assignee was not made a party to the foreclosure suit. *Kip* v. *Hirsh*, 103 N. Y. 565, 9 N. E. 317

[11] *Raynor* v. *Selmes*, 52 N. Y. 579, reversing 7 Lans. (N. Y.) 440. See *Herring* v. *N. Y., L. E. & W. R. Co.* 105 N. Y. 340, 371.

Yet a receiver in bankruptcy and tenants under him, in possession of mortgaged premises, are not such necessary parties to a suit to foreclose the mortgage as to render a decree made in their absence erroneous. *Heffron* v. *Gage*, 44 Ill. App. 147. And the New York supreme court recently declared that a valid sale of the property of a corporation under a decree of foreclosure may be made without making a receiver of the corporation appointed after the entry of the decree a party to the foreclosure action, and without notice to him, especially where the judgment appointing him expressly declares that it shall not in any way prejudice the rights of the plaintiff in the foreclosure under his decree, and shall not operate as a stay in such action. *Preston* v. *Loughran*, 58 Hun (N. Y.) 210, 12 N. Y. Supp. 313.

The supreme court of Illinois, in the recent case of *Heffron* v. *Gage*, 149 Ill. 182, 36 N. E. 569, say that a receiver appointed to take possession of and conduct a hotel business, in proceedings for the dissolution of a hotel partnership, is not vested with any such title to or interest in the property as will render it necessary to make him and all his lessees parties to a bill to foreclose a trust deed executed on such property by the partners before the proceedings for dissolution.

corporation and the appointment of a receiver, the People and the receiver are not necessary, though proper, defendants to the foreclosure of a valid existing mortgage.[12]

This rule follows in analogy the broader principle of law which makes the owner of the equity of redemption always a necessary party to a foreclosure.[13] The assignee succeeds by the assignment to all the rights of the assignor, and becomes the owner of the equity. It must be carefully noticed, that to make the assignee a necessary party, the assignment must be made while the assignor owns the equity of redemption and before the commencement of the action to foreclose. The assignor is not a necessary party after the assignment;[14] he may, however, properly be made a defendant;[15] neither are his general creditors necessary or proper parties.[16]

§ 173. Assignee in bankruptcy pendente lite not necessary.—Among the early decisions in New York,[17] it was held that if an assignment were made during the pendency of an action to foreclose, the decree of sale would be void as against the assignee, unless he were brought in as a party. The later decisions in all the courts of the country, however, are uniform in applying to assignees in bankruptcy the general rule previously stated, that purchasers *pendente lite* are not necessary parties.[18] Justice Miller held, in the Supreme Court of the United States,[19] that where an assignee in bankruptcy

[12] *Herring* v. *N. Y., L. E. & W. R. Co.* 105 N. Y. 341, 371.

[13] See *ante*, §§ 137, 146, 147.

[14] *Rochfort* v. *Battersby*, 14 Jur. 229; *Lloyd* v. *Lander*, 5 Madd. 282; *Collins* v. *Shirley*, 1 Russ & M. 638; *Kerrick* v. *Saffery*, 7 Sim. 317; Fisher on Mortgages, § 306.

[15] *Franklyn* v. *Fern*, Barn. Ch. (folio) 30, 32; *Singleton* v. *Cox*, 4 Hare, 326; *Rafferty* v. *King*, 1 Keen 619; *Collins* v. *Shirley*, 1 Russ. & M. 638, cited in 9 Sim 399; *Eades* v. *Harris*, 1 Y. & C. 234, Fisher on Mortgages, § 307.

[16] *Spring* v. *Short*, 90 N. Y. 538.

[17] *Johnson* v. *Fitzhugh*, 3 Barb. Ch. (N. Y.) 360; *Burr* v. *Burr*, 10 Paige Ch. (N. Y.) 20; *Sedgwick* v. *Cleveland*, 7 Paige Ch. (N. Y.) 290, 291.

[18] See *ante*, § 150. See the cases cited in the preceding section.

[19] *Eyster* v. *Gaff*, 91 U. S. (1 *Otto*) 521, 23 L. ed. 403.

of a mortgagor is appointed during the pendency of a foreclosure of the mortgaged premises, he stands as any other purchaser would stand, on whom the title had fallen after the commencement of the suit. If there is any reason for interposing, the assignee should be substituted for the bankrupt or be made a defendant on petition.

Justice Allen, in deciding the same question in the New York Court of Appeals,[20] in 1873, held substantially the same ruling, and further that such a foreclosure might be restrained by injunction by a United States court in bankruptcy, but that, if allowed to proceed, the purchaser at the sale would acquire a good title as against the mortgagor or owner of the equity of redemption and against all parties claiming under them, including an assignee in bankruptcy. An exhaustive discussion of the question decided in these cases was given by Justice Strong in Cleveland v. Boerum.[21] Indeed, this was the earliest case to sustain the proposition of this section; it collates and reviews all the previous cases. The error of the early decisions was due to the distinction made by the courts, between transfers made *pendente lite* by the voluntary act of the assignor and those accomplished by operation of law.

§ 174. Infants, lunatics, idiots and habitual drunkards necessary parties.—Provision has been made in the statutes of most of the states for a proceeding to dispose of the real property of infants, lunatics, idiots and habitual drunkards by sale, mortgage or lease. Prior to these statutes, there was a proceeding in the common-law practice to accomplish the same purpose. Where a mortgage has been executed by a guardian or a committee of an incompetent person, pursuant to an order of a court, the infant, lunatic, idiot or habitual drunkard, as the case may be, is a necessary defendant in an

[20] *Lenihan* v. *Hamann,* 55 N. Y. 652.

[21] 23 Barb. (N. Y.) 202; aff'd 24 N. Y. 613.

action to foreclose the mortgage.[22] Some of the states declare the effect of such conveyances. The New York Code of Civil Procedure declares that such a mortgage "has the same validity and effect as if it was executed by the person in whose behalf it was executed, and as if the infant was of full age, or the lunatic, idiot or habitual drunkard was of sound mind and competent to manage his own affairs."[23] A mortgage executed under such a proceeding does not bind a wife's inchoate right of dower, and she is not a necessary or proper party to a foreclosure of the mortgage unless she has voluntarily signed it.[24] If an infant or incompetent person whose real property has been mortgaged in such a proceeding should die before an action to foreclose was commenced, his heirs, devisees or legatees, as the case might be, would become necessary parties.[25]

It is to be observed that a proceeding to mortgage the property of an infant or incompetent person is statutory; and

[22] *Prentiss* v. *Cornell,* 31 Hun (N. Y.) 167. See *Agricultural Ins. Co.* v. *Barnard,* 96 N. Y. 525, holding also that a bond is not necessary with such a mortgage, but that it is discretionary with the court to require it. See *Lyon* v. *Lyon,* 67 N. Y. 250; *McManis* v. *Rice,* 48 Iowa, 361. In *Eslava* v. *LePretre,* 21 Ala. 504, 56 Am. Dec. 266, the committee of a lunatic, who had been irregularly appointed, executed a mortgage jointly with her husband; on foreclosure the lunatic was held a necessary party, owing to the defect in the appointment. In *Parker* v. *Lincoln,* 12 Mass. 16, a mortgage was executed to an infant who had a guardian; the mortgagor, bringing an action to redeem, was obliged to make both the infant and his guardian parties to the action. It would seem that in Illinois an infant is not a necessary party in any legal proceedings where he has a guardian to represent his interests; *Campbell* v. *Harmon,* 43 Ill. 18; *Merritt* v. *Simpson,* 41 Ill. 391. In *Boston Bank* v. *Chamberlain,* 15 Mass. 220, an infant had executed a mortgage; after reaching his majority he conveyed the premises subject to the mortgage. In an action to foreclose, infancy at the time of executing the mortgage was pleaded in defense, but held no bar to its validity.

[23] N. Y. Code Civ. Proc. § 2358; *Valentine* v. *Haff,* 72 N. Y. 184; *Matter of Price,* 67 N. Y. 231; *Cole* v. *Gourlay,* 9 Hun (N. Y.) 493.

[24] See *ante,* § 155, 156.

[25] See *ante,* §§ 161–164.

it is assumed here that the proceeding has been properly conducted, and the mortgage duly executed. The plaintiff in the foreclosure must allege in his complaint facts, showing the interest of the infant or incompetent person in the premises, if he is made a defendant.[26] Great care should be taken to secure legal service of the summons upon the infant or incompetent person; it is also essential that a guardian *ad litem* be appointed to represent the interests of the infant.[27] The guardian or committee who executes the mortgage pursuant to an order of the court is a very desirable, if not an indispensable, party to the action to foreclose, especially as he is interested in caring for any surplus that may arise, and in seeing that no deficiency is created.

§ 175. Mortgage executed by administrator or executor to pay decedent's debts; heirs and devisees of the decedent necessary.—Many of the states have made statutory provisions in their codes or otherwise, for disposing of a deceased person's real estate to pay his debts, which provisions are, in form and purpose, not unlike those made for disposing of the property of infants and incompetent persons. The practice under such provisions varies in different states. But it is a general principle of law, recognized by all courts, that administrators or executors, in mortgaging or selling a decedent's real estate, act simply in a capacity representative of the decedent, and are guided by orders of the probate court.

The title to the premises mortgaged in such a proceeding vests in the heirs or devisees immediately upon the death of the decedent, and is encumbered only pursuant to a statutory

[26] *Aldrich* v. *Lapham*, 6 How. (N. Y.) Pr. 129.

[27] See *Ingersoll* v. *Mangam*, 84 N. Y. 622, stating what constitutes proper service on a non-resident infant under the age of fourteen years. Where there is a defect in the action which results in a failure to cut off the interest of the infant, he can maintain an action to set aside the foreclosure as to himself, on arriving at his majority; *McMurray* v. *McMurray*, 66 N. Y. 175.

proceeding designed to marshal and pay his debts. In New York it is declared that a mortgage, executed pursuant to such a proceeding, has the same effect as if it had been made by the decedent immediately before his death.[28] The administrator or executor who signed the mortgage under the order of the probate court, is a very proper, if not an absolutely necessary, party to an action to foreclose, as he is in some measure interested in the action.[29]

§ 176. Corporations necessary parties by corporate name.—Corporations play such an important part in the commercial, industrial and social life of this age, that legislatures and courts have materially enlarged their rights and privileges so that more than ever they are a "single individual" [30] in the law. They are generally vested with all the rights and may assume all the obligations known to the law. With limited exceptions they may acquire real estate and convey the same by deed or mortgage.[31]

Whenever a corporation in its corporate name becomes the owner of the equity of redemption in mortgaged premises, or executes a mortgage upon its real estate, it is a necessary defendant to a foreclosure in its corporate name.[32] This rule is based upon the broad principle that corporations may sue and be sued in law by their corporate names.[33] A stockholder is generally not a necessary defendant in the foreclosure of a mortgage on corporate property;[34] but a stockholder in a

[28] N. Y. Code Civ. Proc. § 2760.

[29] See *McMannis* v. *Rice*, 48 Iowa, 361.

[30] 2 Kent, 267.

[31] See *Aurora Agricultural & H. Society* v. *Paddock*, 80 Ill. 263. As to what is necessary to authorize a manufacturing corporation to execute a mortgage in New York, see *Rochester Savings Bank* v. *Avcrell*, 96 N. Y. 467; *Greenpoint Sugar Co.* v. *Whitin*, 69 N. Y. 328.

[32] *Reed* v. *Bradley*, 17 Ill. 321; *Ottawa Northern Plank Road Co.* v. *Murray*, 15 Ill. 336; *Donnelly* v. *Rusch*, 15 Iowa, 99.

[33] 2 Kent, 284, 293; *People's Bank* v. *Hamilton Manufacturing Co.* 10 Paige Ch. (N. Y.) 481.

[34] *Smith* v. *The Smith Moquette Loom Co.* 20 N. Y. Wk. Dig. 342.

defunct corporation has such an interest as entitles him to defend a foreclosure on the corporate real estate.[35]

§ 177. Tenants and occupants necessary.—Every tenant who takes a lease from the owner of the equity of redemption in mortgaged premises, subsequent to the execution and delivery of the mortgage, is a necessary defendant to a foreclosure.[36] The occupant or person in possession of the premises at the time of the commencement of the foreclosure is also indispensable, no matter how or under what circumstances he came into possession.[37] A tenant or occupant not made a party is not bound by the decree, and if omitted, he can not be ejected till the expiration of his tenancy.[38] His

[35] *Chouteau* v. *Allen*, 70 Mo. 292.

[36] *Globe Marble Mills Co.* v. *Quinn*, 76 N. Y. 23, 32 Am. Rep. 259; *Clarkson* v. *Skidmore*, 46 N. Y. 297, modifying 2 Lans. (N. Y.) 238; *Whalen* v. *White*, 25 N. Y. 462; *Zeiter* v. *Bowman*, 6 Barb. (N. Y.) 133; *Simers* v. *Saltus*, 3 Den. (N. Y.) 214; *Fuller* v. *Van-Geesen*, 4 Hill (N. Y.) 171; *Ostrom* v. *McCann*, 21 How. (N. Y.) Pr. 431, 433; *Peck* v. *Knickerbocker Ice Co.* 18 Hun (N. Y.) 183; *Hirsch* v. *Livingston*, 3 Hun (N. Y.) 9, 48 How. (N. Y.) Pr. 243; *Clason* v. *Corley*, 5 Sandf. (N. Y.) 447; *Campbell* v. *Savage*, 33 Ark. 678; *Gartside* v. *Outley*, 58 Ill. 210, 215, 11 Am. Rep. 59; *Tuttle* v. *Lane*, 17 Me. 437; *Fletcher* v. *Cary*, 103 Mass. 475; *Hemphill* v. *Ross*, 66 N. C. 477, 480; *Coe* v. *Manseau*, 62 Wis. 81; *Gale* v. *Carter*, 154 Ill. App. 478. See *McCauley* v. *Brady*, 123 Mo. App. 558, 100 S. W. 541. See also *Snedecker* v. *Thompson*, 26 Misc. 160, 56 N. Y. Supp. 775.

[37] *Ostrom* v. *McCann*, 21 How. (N. Y.) Pr. 431, 433; *Buckner* v. *Sessions*, 27 Ark. 219; *McLain* v. *Badgett*, 4 Ark. 244; *Cox* v. *Vickers*, 35 Ind. 27; *Equitable Life Assurance Co.* v. *Bostwick*, 100 N. Y. 628, 3 N. E. 296; *Colgrove* v. *Tallman*, 67 N. Y. 95, 23 Am. Rep. 90; *Gale* v. *Carter*, 154 Ill. App. 478.

It has been said the general rule that possession of real estate is notice to all the world of the rights of the possessor does not apply where the possession is continuous after a full conveyance by the person in possession, and recording of the deed. Hence, one in possession, who conveys by absolute deed, with an oral agreement that he shall have a re-conveyance upon certain conditions, is not a necessary party to the foreclosure of a mortgage made by his grantee after a re-conveyance by the latter, but before the recording of such conveyance; nor has the person in possession any right to redeem from the sale under the mortgage. *Sprague* v. *White*, 73 Iowa, 670, 35 N. W. 751.

[38] *Sproule* v. *Samuel*, 5 Ill. (4

omission will, moreover, produce such a defect of title as to relieve a purchaser at the sale of his bid.[39]

A tenant is not affected by a foreclosure till the sale is consummated and the deed delivered. [40] And if he is omitted as a party, he will be entitled to the emblements, and all crops that may be grown before the expiration of his term; a purchaser at the sale will receive his title subject to the rights of the tenant.[41] In a case where pending a foreclosure a tenant went into possession and raised and cut a crop of wheat before the action was concluded, he was allowed to carry it away.[42] If a tenant is made a party and his rights are cut off by the action, he will be entitled from the surplus money, if any, to the value of his unexpired term and damages for ejectment; if there is no surplus, he can maintain an action against the lessor for damages.[43] Foreclosure before the expiration of a tenant's term will not prejudice his right to remove fixtures.[44]

A tenant or other person, who holds possession after the execution and delivery of the deed by the referee to sell, may be ejected at once, if he was made a party to the action;[45] but in some states confirmation of the referee's report of sale is necessary before ejectment can be maintained.[46] If a lessee on being requested by the purchaser to attorn yield up the possession of the premises, it is equivalent to an actual evic-

Scam.) 135, 139; *Downward* v. *Groff,* 40 Iowa, 597, 598; *Suiter* v. *Turner,* 10 Iowa, 517, 527. In point, *McDermott* v. *Burke,* 16 Cal. 580; *Richardson* v. *Hadsall,* 106 Ill. 476, 479; *Delespine* v. *Campbell,* 45 Tex. 628. See the New York cases in the preceding notes.

[39] *Hirsch* v. *Livingston,* 3 Hun (N. Y.) 9, 48 How. (N. Y.) Pr. 243.

[40] *Whalin* v. *White,* 25 N. Y. 462.

[41] *Cassilly* v. *Rhodes,* 12 Ohio, 88, a leading case on the subject of tenants' rights.

[42] *Johnson* v. *Camp,* 51 Ill. 219.

[43] *Clarkson* v. *Skidmore,* 46 N. Y. 297, modifying 2 Lans. (N. Y.) 238.

[44] *Globe Marble Mills Co.* v. *Quinn,* 76 N. Y. 23, 32 Am. Rep. 259.

[45] *Kershaw* v. *Thompson,* 4 Johns. Ch. (N. Y.) 609; *Hirsch* v. *Livingston,* 3 Hun (N. Y.) 9, 10, N. Y. Code Civ. Proc. § 2232.

[46] *Peck* v. *Knickerbocker Ice Co.* 18 Hun (N. Y.) 183, 186; *Astor* v. *Turner,* 11 Paige Ch. (N. Y.) 436, 43 Am. Dec. 766; *Clason* v. *Corley,* 5 Sandf. (N. Y.) 447.

tion and will be a good defense to an action by the mortgagor for rent accruing subsequently.[47]

[47] *Simers* v. *Saltus*, 3 Den. (N. Y.) 214; *Jones* v. *Clark*, 20 Johns. (N. Y.) 51; *Magill* v. *Hinsdale*, 6 Conn. 464, 469, 16 Am. Dec. 70; *Wakeman* v. *Banks*, 2 Conn. 445; *Rockwell* v. *Bradley*, 2 Conn. 1.

CHAPTER VII.

PARTIES DEFENDANT—NECESSARY TO PERFECT THE TITLE —SUBSEQUENT MORTGAGEES AND LIENORS.

§ 178. Introductory.
§ 179. Subsequent mortgagees, still owning their mortgages, necessary defendants.
§ 180. Subsequent mortgagees—Remedies if omitted as defendants.
§ 181. Subsequent mortgagee owning prior mortgage—Practice on foreclosure.
§ 182. Subsequent judgment creditors, still owning judgments, necessary.
§ 183. Judgment creditors *pendente lite* and creditors at large not necessary.
§ 184. Judgment creditors—Remedies if omitted as defendants.
§ 185. Mechanic's lien, owner of, necessary.
§ 186. Subsequent lienor, an assignor no longer holding the incumbrance, not necessary.
§ 187. Subsequent lienors, holding any kind of an equitable or contingent interest in the lien, generally necessary.
§ 188. Assignee of subsequent mortgage, judgment or other lien, necessary.
§ 189. Assignee of subsequent mortgage or lien *pendente lite* not necessary.
§ 190. Incumbrancer *pendente lite* not necessary.
§ 191. Subsequent mortgagee or lienor a married woman does not alter rule; necessary.
§ 192. Heirs, devisees, legatees and annuitants of deceased subsequent lienor generally not necessary.
§ 193. Executors and administrators of a deceased subsequent lienor necessary.
§ 194. Assignee in bankruptcy and voluntary general assignee of subsequent lienor necessary.
§ 195. General guardian of infant, and committee of lunatic, idiot or habitual drunkard, trustees and beneficiaries, holding subsequent mortgage or lien, necessary.
§ 196. Purchasers at tax sales, boards of supervisors, state comptrollers and municipal corporations, defendants.

§ 178. Introductory.—In this chapter will be continued the consideration of parties who are necessary to a fore-

closure, for the purpose of producing to the purchaser at the sale as perfect a title as the mortgagor could have granted at the time of the execution of the mortgage; that is, such a title as a court will compel a bidder at the sale to accept. As has been stated, this and the preceding chapter are devoted to those parties who are necessary and indispensable to the accomplishment of such a purpose.

In the preceding chapter attention has been given exclusively to those parties who are necessary to an action to foreclose and to cut off the fee title and the entire equity of redemption, as it existed in the mortgagor and the owners of the equity from him by grant, descent, devise or otherwise, even to the remotest degree in quantity of title or interest. In this chapter attention will be given only to those parties who acquired incumbrances and liens upon the equity of redemption, subsequent to the execution of the mortgage under foreclosure. It is to be kept clearly in mind that the word "necessary," as it will be used in this chapter, has its meaning limited and defined by the purpose of the plaintiff in the action, which is, as has been stated, to produce and offer at the foreclosure sale a perfect title. The word "necessary" has been used by courts and text-book writers with a great deal of inaccuracy and confusion, simply because applied with an absolute and invariable meaning, whereas it is a general and indefinite term and always relative in signification.

Keeping it in view, then, that it is the design of this chapter to consider those parties only who have acquired an interest in the equity of redemption by lien or incumbrance, subsequent to the execution of the mortgage under foreclosure, it may be said generally that all such parties are necessary to an action to foreclose, in order to extinguish their claims and the claims of all persons holding under them.[48] It matters not whether the lien is created by the voluntary act of the owner of the equity, as in executing a

[48] *Older* v. *Russell,* 8 App. Div. 518, 40 N. Y. Supp. 892.

mortgage, or by process and operation of law, as in docketing a judgment against him. The theory of the law is, that such an incumbrance is a pledge of the equity for the debt, and gives the lienor an equitable interest in the mortgaged premises.

As the owner of the equity may, by an absolute conveyance, transfer his entire interest, and thereby make his transferee a necessary party as we have seen, so he can on the same principle pledge, by a mortgage, judgment or otherwise, a part or the whole of his interest in the premises, and thereby render the incumbrancer a necessary party in order to wipe out his interest. Though a lienor does not acquire the fee title to the equity, he acquires an interest in the premises which the statutes of the various states have long established, and which the courts have long recognized and sustained; and which parties dealing with the premises, can not ignore, except at their own peril. It is to be observed here that the interests in the mortgaged premises held by parties considered in this chapter are *personal property,* while the interests held by parties considered in the preceding chapter were *estates in real property.*

An action to foreclose will not be dismissed if subsequent incumbrancers are not made parties; it can be sustained without them, but their rights will not be concluded and their interests in the mortgaged premises extinguished, unless they are brought into the action.[49] It has been held that an incumbrancer may even be dismissed from the action on motion of the plaintiff, unless he objects;[50] and a subsequent incum-

[49] *Donnelly* v. *Rusch,* 15 Iowa, 99; *Heimstreet* v. *Winnie,* 10 Iowa, 430, relied upon in *Street* v. *Beal,* 16 Iowa, 68, 70, 85 Am. Dec. 504. In *Campbell* v. *Bane,* 119 Mich. 40, 77 N. W. 322, a subsequent lienor is held to be a proper party defendant.

As to subsequent lienor not being necessary party, see *Hughes* v. *Riggs,* 84 Md. 502, 36 A. 269.

[50] *Heimstreet* v. *Winnie,* 10 Iowa, 430.

brancer may intervene and be made a defendant on his own application.[51]

While it is true, as a general rule, that the equities of junior incumbrancers made defendants in a mortgage-foreclosure suit may be adjusted in such suit as between themselves;[52] yet a second mortgage is not affected by a foreclosure sale under a prior mortgage, where the purchaser pays nothing for the conveyance and conveys the land to the mortgagor without consideration.[53]

In those cases where one is made defendant in foreclosure on the ground that he claims some interest in or lien upon the premises, which accrued subsequently to the mortgage, may by his answer set up a paramount claim which may be tried and adjudged, unless plaintiff discontinues as to him.[54] But he cannot be compelled to litigate his title in that action.[55]

§ 179. Subsequent mortgagees, still owning their mortgages, necessary defendants.—All authorities in all countries where mortgages are foreclosed by equitable actions, are agreed that subsequent and junior mortgagees are necessary parties to the foreclosure of a prior mortgage in order to extinguish and cut off their liens.[56] The action can be

[51] *Parott* v. *Hughes,* 10 Iowa, 459.

[52] *Norwood* v. *Norwood,* 36 S. C. 321, 31 Am. St. Rep. 875, 15 S. E. 382.

[53] *Moore* v. *Lindsey,* 52 Mo. App. 474.

[54] *Lego* v. *Medley,* 79 Wis. 211, 24 Am. St. Rep. 706, 48 N. W. 375.

[55] *Tinsley* v. *Atlantic Mines Co.* 20 Colo. App. 61, 77 P. 12.

[56] *Gage* v. *Brewster,* 31 N. Y. 218; *Brainard* v. *Cooper,* 10 N. Y. 356; *Peabody* v. *Roberts,* 47 Barb. (N. Y.) 91; *Arnot* v. *Post,* 6 Hill (N. Y.) 65; *Franklyn* v. *Hayward,* 61 How. (N. Y.) Pr. 43; *Vanderkemp* v. *Shelton,* 11 Paige Ch. (N. Y.) 28; *Waller* v. *Harris,* 7 Paige Ch. (N. Y.) 167; *Vroom* v. *Ditmas,* 4 Paige Ch. 526; *Benedict* v. *Gilman,* 4 Paige Ch. (N. Y.) 58; *Carpentier* v. *Brenham,* 40 Cal. 221; *Shores* v. *Scott River Co.* 21 Cal. 135; *Montgomery* v. *Tutt,* 11 Cal. 307, 314; *Whitney* v. *Higgins,* 10 Cal. 547, 551, 70 Am. Dec. 748; *Goodman* v. *White,* 26 Conn. 320; *Broome* v. *Beers,* 6 Conn. 207; *Swift* v. *Edson,* 5 Conn. 534; *Smith* v. *Chapman,* 4 Conn. 346; *Hodgen* v. *Guttery,* 58 Ill. 431; *Strang* v. *Allen,* 44 Ill. 428. See *Shinn* v. *Shinn,* 91 Ill. 477, where the action was upon a deed of trust in the

sustained without them, but a defective title would be offered at the sale which no court would compel a bidder to accept.[57] The rule has long been settled that in a bill to foreclose a mortgage, the rights of incumbrancers not made parties to the

nature of a mortgage. In *Kenyon* v. *Shreck,* 52 Ill. 382, subsequent incumbrancers were held not necessary parties to a proceeding for foreclosure by *scire facias; aliter,* if the foreclosure is by an action in equity. *Catterlin* v. *Armstrong,* 79 Ind. 514; *Hosford* v. *Johnson,* 74 Ind. 479, 481; *Hasselman* v. *McKernan,* 50 Ind. 441; *McKernan* v. *Neff,* 43 Ind. 503; *Holmes* v. *Bybee,* 34 Ind. 262; *Murdock* v. *Ford,* 17 Ind. 52; *Proctor* v. *Baker,* 15 Ind. 178. See also, in point, *Mack* v. *Graver,* 12 Ind. 254; *Pattison* v. *Shaw,* 6 Ind. 377, holding junior incumbrancers proper, but not necessary, parties. *Meredith* v. *Lackey,* 14 Ind. 529, 16 Ind. 1; *Walker* v. *Schreiber,* 47 Iowa, 529; *Newcomb* v. *Dewey,* 27 Iowa, 381; *Knowles* v. *Rablin,* 20 Iowa, 103; *Anson* v. *Anson,* 20 Iowa, 58, 89 Am. Dec. 514; *Johnson* v. *Harmon,* 19 Iowa, 56; *Macey* v. *Fenwick,* 4 B. Mon. (Ky.) 309; *Rogers* v. *Holyoke,* 14 Minn. 220; *Brown* v. *Nevitt,* 27 Miss. 801; *White* v. *Bartlett,* 14 Neb. 320; *Hinson* v. *Adrian,* 86 N. C. 61; *Mills* v. *Traylor,* 30 Tex. 7; *Weed* v. *Beebe,* 21 Vt. 495; *Deuster* v. *McCamus,* 14 Wis. 307; *Moore* v. *Cord,* 14 Wis. 213; *Murphy* v. *Farwell,* 9 Wis. 102; *Farwell* v. *Murphy,* 2 Wis. 533. For the English authorities, see Fisher on Mortgages, § 318; *Burgess* v. *Sturges,* 14 Beav. 440; *Tylee* v. *Webb,* 6 Beav. 552; *Adams* v. *Paynter,* 1 Coll. Ch. 530; *Johnson* v. *Holdsworth,* 1 Sim. N. S. 106; *Delabere* v. *Norwood,* 3 Sw. 144; *Payne* v. *Compton,* 2 Y. & C. 457. See the following sections and notes; also the cases cited in the remaining notes to this section. In *Rowan* v. *Mercer,* 10 Humph. (Tenn.) 359, subsequent mortgagees were held proper, but not necessary, parties; the decree and sale were held conclusive without them.

Boucofski v. *Jacobsen,* 36 Utah, 165, 26 L.R.A.(N.S.) 898, 104 Pac. 117; *Dickinson* v. *Duckworth,* 74 Ark. 138, 85 S. W. 82. See *Karl* v. *Conner,* 30 Ky. Law Rep. 238, 97 S. W. 1111.

The supreme court of Maryland in the recent case of *Chilton* v. *Brooks,* 71 Md. 445, 18 Atl. 868, say that on the foreclosure of a mortgage under a power of sale contained therein, subsequent incumbrancers need not be made parties. And according to the Supreme Court of North Carolina, subsequent incumbrancers are proper parties in a foreclosure proceeding, but not necessary parties. *Williams* v. *Kerr,* 113 N. C. 306, 18 S. E. 501.

[57] *Cullum* v. *Batre,* 2 Ala. 415, correcting *Judson* v. *Emanuel,* 1 Ala. 598; *Hess* v. *Feldkamp,* 2 Disney (Ohio) 332. See *Hayward* v. *Stearns,* 39 Cal. 58; *Valentine* v. *Havener,* 20 Mo. 133; *Russell* v. *Mullanphy,* 4 Mo. 319. See the cases *supra.*

suit, are not barred or affected by the decree.[58] If the foreclosure is conducted by advertisement the same rule prevails.[59] If the subsequent mortgagee is a trustee for numerous bondholders, it is sufficient to make him a defendant in his representative capacity, without bringing the bondholders into the action;[60] a bondholder may interplead, however, *pro interesse suo*.[61] The successor of a trustee is also a necessary defendant if he has accepted the trust.[62]

§ 180. Subsequent mortgagees—Remedies if omitted as defendants.—If a junior mortgagee is omitted as a party, his remedy is to redeem from the sale under foreclosure;[63] and this right must be exercised in most states within ten years from the time when the mortgage debt becomes due.[64] In his redemption an accounting for rents and profits

[58] *McCall* v. *Yard*, 9 N. J. Eq. (1 Stockt.) 358, 11 N. J. Eq. (3 Stockt.) 58. See also *Gould* v. *Wheeler*, 28 N. J. Eq. (1 Stew.) 541; *Willink* v. *Morris, Canal & Banking Co.* 4 N. J. Eq. (3 H. W. Gr.) 377.

[59] *Winslow* v. *McCall*, 32 Barb. (N. Y.) 241.

[60] *Alabama & Vicksburg Ry. Co.* v. *Thomas*, 86 Miss. 27, 38 So. 770.

[61] *McElrath* v. *Pittsburgh & S. R. Co.* 68 Pa. St. 37; *Supervisors of Iowa County* v. *Mineral Point R. R.* 24 Wis. 93.

[62] *Delaplaine* v. *Lewis*, 19 Wis. 476.

[63] *Wiley* v. *Ewing*, 47 Ala. 418; *Carpentier* v. *Brenhan*, 40 Cal. 221; *Hodgen* v. *Guttery*, 58 Ill. 431; *Gower* v. *Winchester*, 33 Iowa, 303; *Newcomb* v. *Dewey*, 27 Iowa, 381; *Roney* v. *Bell*, 9 Dana (Ky.) 4; *Cooper* v. *Martin*, 1 Dana (Ky.) 25; *Clary* v. *Marshall*, 5 B. Mon. (Ky.) 274; *Bank of U. S.* v. *Carroll*, 4 B. Mon. (Ky.) 50; *Avery* v. *Ryerson*, 34 Mich. 362; *Baker* v. *Pierson*, 6 Mich. 522; *Renard* v. *Brown*, 7 Neb. 449; *Holliger* v. *Bates*, 43 Ohio St. 437; *Dickinson* v *Duckworth*, 74 Ark. 138, 85 S. W. 82. See the cases *supra*.

It is said that the assignee of a second mortgage by assignment duly recorded, who was not made a party to a foreclosure by action after the assignment of a prior mortgage, at the sale under which the mortgagee became the purchaser, may maintain an action for the foreclosure of her mortgage notwithstanding the sale under the prior mortgage, and is not confined to redeeming from such sale and prior mortgage. *Bigelow* v. *Davol*, 62 Hun (N. Y.) 245, 16 N. Y. Supp. 646.

[64] *Gage* v. *Brewster*, 31 N. Y. 218; *Peabody* v. *Roberts*, 47 Barb. (N. Y.) 91; *County of Floyd* v. *Cheney*, 57 Iowa, 160, 163; *Craw-*

can be compelled,[65] and the junior mortgagee will be obliged to pay only the mortgage debt, principal and interest without the costs of the previous foreclosure.[66] Though the property may have been sold under foreclosure for less than the mortgage, the party redeeming will nevertheless be obliged to pay the amount due on the mortgage with interest; if the property sold for more than the amount of the mortgage, its selling price becomes the amount to be paid to redeem.[67] After a mortgage has been paid, an action to redeem can not be maintained upon it.[68] It has been held in some cases that a junior mortgagee, who was omitted as a defendant in an action to foreclose a senior mortgage, may maintain a foreclosure of his own mortgage, instead of redeeming from the sale under the senior mortgage, and becoming thereby the equitable assignee of the senior mortgage.[69]

ford v. *Taylor,* 42 Iowa, 260; *Gower* v. *Winchester,* 33 Iowa, 303. In Illinois the time is only seven years; *Ewing* v. *Ainsworth,* 53 Ill. 464.

The supreme court of New York, in the case of *Moulton* v. *Carnish,* 61 Hun (N. Y.) 438, 16 N. Y. Supp. 267, say that notwithstanding the provisions of the New York Code of Civil Procedure (Code Civ. Proc. § 1626) as to ordinary foreclosure, the former remedy in equity to require a subsequent incumbrancer who has not been made a party to a suit to foreclose a prior mortgage and the sale thereunder, to redeem therefrom within six months, or be forever foreclosed, still remains.

[65] *Gage* v. *Brewster,* 31 N. Y. 218; *Ten Eyck* v. *Casad,* 15 Iowa, 524. See the next note.

[66] *Gage* v. *Brewster,* 31 N. Y. 218, opinions *per* Denio, Ch. J., Ingraham and Mullen, JJ. Mullen, J., in his opinion, makes a careful analysis and review of Chancellor Walworth's opinion in *Vanderkamp* v. *Shelton,* 11 Paige Ch. (N. Y.) 28, approving it in all respects. See *Brainard* v. *Cooper,* 10 N. Y. 356; *Vroom* v. *Ditmas,* 4 Paige Ch. (N. Y.) 526; *Benedict* v. *Gilman,* 4 Paige Ch. (N. Y.) 58, reviewed and commented on in the same opinion. See also *Belden* v. *Slade,* 26 Hun (N. Y.) 635.

[67] *Johnson* v. *Harmon,* 19 Iowa, 56, *per* Wright, Ch. J., writing an exhaustive opinion. *American Buttonhole Co.* v. *Burlington M. L. Association,* 61 Iowa, 464.

[68] *McHenry* v. *Cooper,* 27 Iowa, 137, 141.

[69] *Peabody* v. *Roberts,* 47 Barb. (N. Y.) 91. In *Walsh* v. *Rutgers Fire Ins. Co.* 13 Abb. (N. Y.) Pr. 33, such a foreclosure was held necessary. *Coleman* v. *Witherspoon,* 76 Ind. 285; *McKernan* v. *Neff,* 43 Ind. 503; *Atwater* v. *West,*

"There seems to be no impropriety whatever under the authorities in concluding that the plaintiff may maintain the present action as one for the foreclosure of his mortgage, notwithstanding the foreclosure and sale previously had under the senior mortgage. This conclusion is of very great practical importance in cases like the one now before the court, because it is, to say the least, exceedingly doubtful whether the action to redeem can be brought after the expiration of ten years from the time the mortgage debt became due, or the last payment was made upon it. * * * If an action to redeem in a case like the present one is the only action which the incumbrancer can maintain, and that must be commenced within ten years after the right has accrued, the legal anomaly, after that, will be presented of a party having a demand presumed by law to be unpaid, without any legal or equitable means of applying towards its payment the security created expresssly for that purpose."[70] A junior mortgagee or incumbrancer, who is omitted in the foreclosure of a prior mortgage, may be cut off by a strict foreclosure,[71] conducted by the purchaser at the foreclosure sale, who by his purchase of the premises becomes the equitable assignee of the prior mortgage.[72]

§ 181. Subsequent mortgagee owning prior mortgage —Practice on foreclosure.—A junior mortgagee, who

28 N. J. Eq. (1 Stew.) 361, an important case; *Chilver* v. *Weston,* 27 N. J. Eq. (12 C. E. Gr.) 435; *Stewart* v. *Johnson,* 30 Ohio St. 24; *Besser* v. *Hawthorn,* 3 Oreg. 129, 3 Oreg. 512; *Murphy* v. *Farwell,* 9 Wis. 102. *In Bache* v. *Purcell,* 6 Hun (N. Y.) 518, a junior mortgagee was allowed to foreclose, even though he had been made a party defendant to a foreclosure by a senior mortgagee. But see *Fliess* v. *Buckley,* 90 N. Y. 286, holding that a junior mortgagee cannot maintain a foreclosure to reach surplus moneys arising on the foreclosure of a senior mortgage.

[70] *Peabody* v. *Roberts,* 47 Barb. (N. Y.) 91, 102, *per* Daniels, J., whose opinion seems to be at variance with *Gage* v. *Brewster,* 31 N. Y. 218.

[71] *Brainard* v. *Cooper,* 10 N. Y. 359; *Franklyn* v. *Hayward,* 61 How. (N. Y.) Pr. 43.

[72] *Gage* v. *Brewster,* 31 N. Y. 218; *Brainard* v. *Cooper,* 10 N. Y. 356.

owns a prior mortgage, must set forth, in his complaint to foreclose the prior mortgage, his claim upon the junior mortgage, or it will be cut off by the action; he can not compel the premises to be sold subject to his junior mortgage. "The practice of the court requires that the complainant in his bill should set out all his claims upon the mortgaged property, and have the same in that suit duly litigated and disposed of by the decree, and that, if he omits to set out any incumbrance which he holds upon the premises junior to the mortgage described in the bill, such junior incumbrance will be cut off by a sale on a decree foreclosing the first mortgage, and making no allusion to any further lien."[73]

As a general rule a foreclosure bars the claims of all persons having liens subsequent to the mortgage foreclosed, who are parties to the suit. The plaintiff is a party, and if he fails to set up his claim on the junior mortgage, the neglect is his own, and can not be remedied by undertaking to impose a condition on the judgment of foreclosure and sale, for which the judgment itself gives no warrant. If the subsequent mortgagee has released the mortgaged premises from the lien of his mortgage, he is no longer a necessary defendant. The owner of real property, parcel B, subject to a mortgage which also covers other property, parcel A, in which last named property he has no interest, is not a necessary party to an action to foreclose a prior mortgage on said parcel A; and though the said parcel A be sold under the decree for such sum as leaves nothing to be applied on the second mortgage, covering also plaintiff's premises, he can not, by virtue of his said ownership of parcel B, be allowed to come in and redeem.[74]

[73] *Walsh* v. *Rutgers Fire Ins. Co.* 13 Abb. (N. Y.) Pr. 33; *Wheeler* v. *VanKuren,* 1 Barb. Ch. (N. Y.) 490; *Homœopathic Medical Life Ins. Co.* v. *Sixbury,* 17 Hun (N. Y.) 428, *per* Talcott, P. J.; *Roosevelt* v. *Ellithrop,* 10 Paige Ch. (N. Y.) 415; *Tower* v. *White,* 10 Paige Ch. (N. Y.) 395. See *Clements* v. *Griswold,* 46 Hun (N. Y.) 377.

[74] *Barnes* v. *Decker,* 49 N. Y. Supr. Ct. (17 J. & S.) 221.

§ 182. Subsequent judgment creditors, still owning judgments, necessary.—A person who obtains and dockets a judgment against the owner of an equity of redemption in mortgaged premises, is a necessary defendant to a foreclosure of the mortgage commenced after the docketing of the judgment;[75] a judgment creditor can not be joined by the mortgagee as a co-plaintiff.[76] In some states judgment creditors are held only proper and not indispensable parties; but the courts which hold this are agreed that a judgment crdeitor's rights are not affected, unless he is brought into the action, and that his omission produces an imperfect title.[77] In Maryland it seems to be the rule to make prior as well as subse-

[75] *Verdin* v. *Slocum,* 71 N. Y. 345; *Morris* v. *Wheeler,* 45 N. Y. 708; *Brainard* v. *Cooper,* 10 N. Y. 356; *Winebrener* v. *Johnson,* 7 Abb. (N. Y.) Pr. N. S. 202; *Shaw* v. *McNish,* 1 Barb. Ch. (N. Y.) 326; *Niagara Bank* v. *Roosevelt,* 9 Cow. (N. Y.) 409; *Arnot* v. *Post,* 6 Hill (N. Y.) 65; *Haines* v. *Beach,* 3 Johns. Ch. (N. Y.) 466; *Hubbell* v. *Sibley,* 5 Lans. (N. Y.) 56; *People's Bank* v. *Hamilton Manuf. Co.* 10 Paige Ch. (N. Y.) 481; *Vroom* v. *Ditmas,* 4 Paige Ch. (N. Y.) 531; *Benedict* v. *Gilman,* 4 Paige Ch. (N. Y.) 58; *Alexander* v. *Greenwood,* 24 Cal. 505; *Ritch* v. *Eichelberger,* 13 Fla. 169; *Kelgour* v. *Wood,* 64 Ill. 345; *Strang* v. *Allen,* 44 Ill. 428; *Ducker* v. *Belt,* 3 Md. Ch. Dec. 13; *Wylie* v. *McMakin,* 2 Md. Ch. Dec. 413; *Hinson* v. *Adrian,* 86 N. C. 61. See the three preceding sections and notes.

See *Wehrheim* v. *Smith,* 226 Ill. 346, 80 N. E. 908; *Gammon* v. *Johnson,* 126 N. C. 64, 35 S. E. 185.

A judgment creditor of the mortgagor will not be made a party defendant to a mortgage foreclosure, for the purpose only of alleging collusion between the mortgagor and mortgagee to defraud creditors and the invalidity of the mortgages, and not to enforce the judgment lien or share in the proceeds of sale. *Bruce* v. *Nicholson,* 109 N. C. 202, 26 Am. St. Rep. 562, 13 S. E. 790.

In *Iowa,* however, in an action to foreclose a mortgage on a homestead, the holder of a junior judgment is not a necessary party defendant. *Sutherland* v. *Tyner,* 72 Iowa, 232, 33 N. W. 645.

It has been said that in a suit to foreclose a mortgage given by a corporation on all of its assets, an unsecured creditor who had obtained judgment since the execution of the mortgage has a right to become a party defendant by petition. *Moon* v. *Wellford,* 84 Va. 34, 4 S. E. 572.

[76] *Felder* v. *Murphy,* 2 Rich. (S. C.) Eq. 58.

[77] *Person* v. *Merrick,* 5 Wis. 231. In *Leonard* v. *Groome,* 47 Md. 499. the judgment creditor was held not indispensable, on the ground that he was presumed to know of the

quent incumbrancers parties to a foreclosure.[78] The above general rule applies if the foreclosure is conducted by advertisement under the statute. All judgment creditors must be served with the notice,[79] and if a judgment is perfected against the owner of the equity at any time after the first publication of the notice and before the day of sale, the judgment creditor becomes a necessary party and must be served with the notice. This ruling is based on the language of the statute.[80]

In a recent foreclosure certain judgment creditors were not originally made parties; but after the entry of judgment they appeared by attorneys, on whose stipulation it was ordered that all papers and proceedings be amended *nunc pro tunc,* by inserting their names in the decree, and that they be bound in all respects by the action. The bidder at the sale refused to complete his purchase, on the ground that there was a defect of the parties in the omission of the judgment creditors; the court determined that it was incumbent upon the plaintiff to establish unequivocally the authority of the attorneys to enter into the stipulation, and that without such authority the judgment creditors were not bound, and the bidder could not be compelled to take the title.[81] The omission of a judgment creditor, who holds a judgment against the owner of a life estate in mortgaged premises, will produce such a defect of title as to release a bidder from his bid at the foreclosure sale.[82]

If a judgment is docketed against a person who subsequently purchases real estate and executes a purchase money mort-

senior mortgage, and therefore to be able to protect his own interests. See *Harris* v. *Hooper,* 50 Md. 537. See also *Gaines* v. *Walker,* 16 Ind. 361, holding a judgment creditor only a proper party. See § 179, and the note on the Indiana cases.

[78] *Heuisler* v. *Nickum,* 38 Md. 270; *Tome* v. *Mer. Mec. B. & L. Co.* 34 Md. 12, Md. Code, vol. 2, art. 4, §§ 782, 792.

[79] *Root* v. *Wheeler,* 12 Abb. (N. Y.) Pr. 294.

[80] *Groff* v. *Morehouse,* 51 N. Y. 503.

[81] *Lyon* v. *Lyon,* 67 N. Y. 250, 253, *per* Miller, J. See also *Waldo* v. *Williams,* 3 Ill. (2 Scam.) 470, where the omission was corrected by an *alias* writ.

[82] *Verdin* v. *Slocum,* 71 N. Y. 345, reversing 9 Hun (N. Y.) 150.

gage thereon, the judgment becomes an incumbrance on the equity of redemption subsequent in its lien to the purchase money mortgage, and the judgment creditor is a necessary defendant to a foreclosure of the mortgage.[83] Likewise a judgment against a person who in any way becomes the owner of the equity of redemption in mortgaged premises becomes a lien upon the premises, and the judgment creditor is a necessary party in an action to foreclose the mortgage.

Where there has been a conveyance of real property in consideration of the agreement of the grantees to care for the grantor during the remainder of his life, to secure the performance of which a mortgage upon the property is executed to the grantor, when made in good faith, divests the title; and a subsequent judgment creditor of the grantor has no interest in the foreclosure of the mortgage, which has been assigned by the grantor.[84]

§ 183. Judgment creditors pendente lite and creditors at large not necessary.—A judgment is a lien from the time it is docketed,[85] but if the proceedings to recover the judgment have not been completed, the judgment is not a lien and the judgment creditor is not a necessary defendant. Thus a party who had recovered an award against a mortgagor, but had not yet reduced it to a judgment, has been held not a necessary party, for the reason that he had no lien on the land;[86] and where creditors had perfected their judgments against a mortgagor a few days after he had made a general assignment, they were held unnecessary parties, and though they were made parties to the action, they were not allowed to interpose a defense, as the assignee was the only necessary

[83] *Winebrener* v. *Johnson*, 7 Abb. (N. Y.) Pr. N. S. 202; *DeSaussure* v. *Bollmann*, 7 S. C. 329, 339.

[84] *Chandler* v. *Whitely*, 100 Mich. 313, 58 N. W. 1011.

[85] N. Y. Code Civ. Proc. §§ 1250, 1251; *Allen* v. *Case*, 13 Wis. 621.

[86] *Jones* v. *Winans*, 20 N. J. Eq. (5 C. E. Gr.) 96.

defendant.[87] A creditor at large has no status in court, and is not a necessary party; he will not even be allowed to intervene on his own application.[88]

What is said here refers to money judgments; but the same rules apply to equitable decrees and orders affecting mortgaged premises, which are entered in a "judgment book," and also to the persons benefited or bound by such decrees and orders.[89] A judgment creditor who has levied an execution remains a necessary party until the sheriff's certificate of sale is issued to the purchaser, and his judgment has been satisfied in full.[90] An attaching creditor is also a necessary party,[91] but a judgment creditor whose judgment is docketed pending the foreclosure, is not a necessary defendant; he may, however, intervene by petition, or redeem before the sale.[92] If a subsequent judgment creditor is omitted as a party defendant,

[87] *Spring* v. *Short,* 90 N. Y. 538, 545.

[88] *Herring* v. *N. Y., L. E. & W. R. R. Co.* 105 N. Y. 340; *People* v. *Erie Railway Co.* 56 How. (N. Y.) Pr. 122; *Gardner* v. *Lansing,* 28 Hun (N. Y.) 413; *Thompson* v. *Huron Lumber Co.* 4 Wash. 600, 30 Pac. 741; *Clinton, as trustee, etc.* v. *South Shore Natural Gas & Fuel Co.* 61 Misc. 339, 113 N. Y. Supp. 289 (construing Code Civ. Proc. § 452). See also *Louisville Trust Co.* v. *Louisville, N. A. & C. Ry. Co.* 174 U. S. 674, 19 S. C. 827, 43 L. ed. 1130.

Thus it has been said that the general creditors of a trustee who executed a mortgage to secure the repayment of trust funds converted to his own use cannot question the right to foreclose it, on the ground that no default has been made in the execution of the trust and that nothing will be due to the *cestuis que trust* until the determination of the life estate. *Wolft* v. *Jaffray,* 88 Iowa, 358, 55 N. W. 91.

[89] N. Y. Code Civ. Proc. § 1236.

[90] See *ante,* § 143; N. Y. Code Civ. Proc. § 1440. In point, *Bullard* v. *Leach,* 27 Vt. 491. In *Woods* v. *Love,* 27 Mich. 308, the purchaser at an execution sale, to whom a sheriff's certificate had been issued and registered, was held an unnecessary party. *Short* v. *Bacon,* 99 N. Y. 275; *Smith* v. *Moore,* 73 Ind. 388.

[91] *Bramhall* v. *Flood,* 41 Conn. 68; *Lyon* v. *Sanford,* 5 Conn. 547; *Campion v. Kille,* 14 N. J. Eq. (1 McCart.) 229, 15 N. J. Eq. (2 McCart.) 476; *Chandler* v. *Dyer,* 37 Vt. 345, overruling *Nichols* v. *Holgate,* 2 Aik. (Vt.) 138, and the *dictum* in *Downer* v. *Fox,* 20 Vt. 388. See also the statute of 1864.

[92] *People's Bank* v. *Hamilton Manuf. Co.* 10 Paige Ch. (N. Y. 481. See *post,* § 190, on incumbrancers *pendente lite.*

any defendant who has a real interest in the premises may object by demurrer, if the defect appears on the face of the complaint, or by answer if it does not so appear, and compel the omitted party to be brought into court.[93] This rule is consistent with equity practice and principles, and is believed to have its foundation in the fact that if a judgment creditor were omitted, the title offered at the sale would be defective, and no bidder would offer as much as for a perfect title, thereby causing a loss to parties having an interest in or a lien upon the equity of redemption.

§ 184. Judgment creditors—Remedies if omitted as defendants.—Whenever a judgment creditor is omitted as a defendant and the mortgaged premises are sold under a decree of foreclosure, his only remedy is to redeem.[94] Under the early New York decisions, a judgment creditor was required to issue a *fieri facias,* or execution, against the equity of redemption in order to obtain a sheriff's certificate of sale and deed, thereby making his judgment a specific, instead of a general, lien before he could redeem;[95] but it is now well

[93] *Leveridge* v. *Marsh,* 30 N. J. Eq. (3 Sew.) 59; *Ballard* v. *Anderson,* 18 Tex. 377. See *ante,* § 148.

[94] *Gage* v. *Brewster,* 31 N. Y. 218; *Brainard* v. *Cooper,* 10 N. Y. 356; *Winebrener* v. *Johnson,* 7 Abb. (N. Y.) Pr. N. S. 202; *Belden* v. *Slade,* 26 Hun (N. Y.) 635; *American Buttonhole Co.* v. *Burlington M. L. Asso.* 61 Iowa, 464, relying upon *Anson* v. *Anson,* 20 Iowa, 55, 89 Am. Dec. 514; *Jones* v. *Harstock,* 42 Iowa, 147; *Newcomb* v. *Dewey,* 27 Iowa, 381. See also *Rice* v. *Kelso,* 57 Iowa, 115, 118; *Wright* v. *Howell,* 35 Iowa, 288, 292; *Stuart* v. *Scott,* 22 Kan. 585; *Martin* v. *Fridley,* 23 Minn. 13; *Pratt* v. *Frear,* 13 Wis. 462. As to what amount must be paid to redeem, see *Iowa Co.* v. *Beeson,* 55 Iowa, 262. See also the preceding sections. In New York and most other states the redemption must be within ten years. See the cases cited in the first note to § 182, *ante.* But in Illinois the redemption must be within seven years; *Ewing* v. *Ainsworth,* 53 Ill. 464. See *Miller* v. *Finn,* 1 Neb. 254, holding that redemption will not be allowed, if the purchaser under the foreclosure offers to pay the claim of the omitted incumbrancer.

[95] *Brainard* v. *Cooper,* 10 N. Y. 362; *Winebrener* v. *Johnson,* 7 Abb. (N. Y.) Pr. N. S. 202; *Niagara Bank* v. *Roosevelt,* 9 Cow. (N. Y.) 413; *Arnot* v. *Post,* 6 Hill (N. Y.) 66. Thus, in *Arnot* v. *Post,* 6 Hill

settled that a judgment creditor, omitted as a party to the foreclosure, may redeem directly with his judgment as a general lien, instead of making it a specific lien by execution and a sheriff's sale.

Thus, judgment creditors who had been omitted from a foreclosure issued executions, and in time obtained a sheriff's deed; they then brought an action to redeem, and it was held that the judgment creditors, not having been made parties to the action by which the mortgage was foreclosed, were not bound by the decree, and that the foreclosure as to them was utterly void. The judgment creditors would, therefore, have a right to redeem the premises from the purchaser at the sale under the judgment of foreclosure, even though they had not made their liens specific by an execution and sale upon their judgments. And the foreclosure being, under the decisions of the Court of Appeals, utterly void as to said judgment creditors, it necessarily follows that they had a right to issue execution and to sell the premises under it, in the same manner as if the mortgage had not been foreclosed; and it further follows that the purchaser at said sale, upon receiving his deed from the sheriff, acquired a good title to the extent of the right, title and interest of the judgment debtor in said premises at the time of the docketing of the judgments against him, or which he at any time thereafter acquired in the premises.[96]

(N. Y.) 66, Bronson, J., held that an omitted judgment creditor's right to sell after the foreclosure is just as perfect as it is before, and a sale is the only mode in which he can assign his legal rights. Without a sale he has nothing but a lien, but by a sale the purchaser acquires a real interest in the land.

[96] *Winebrener* v. *Johnson,* 7 Abb. (N. Y.) Pr. N. S. 208, *per* Freedman, J., citing and relying upon *Brainard* v. *Cooper,* 10 N. Y. 356; *Haines* v. *Beach,* 3 Johns Ch. (N. Y.) 460. *Brainard* v. *Cooper* was before the New York Court of Appeals three times for argument, and now stands as the leading case upon the rights of judgment creditors who are omitted as parties to a foreclosure. The question as to whether a naked or a general judgment lien is a sufficient title to maintain an action for redemption, is considered at length, and after an exhaustive review of the English and American cases, Gardner, J., writing the opinion, concludes that

At present a judgment creditor has the alternative practice of redeeming directly under his general lien, or of issuing an execution and redeeming under the specific lien of a sheriff's deed. A purchaser at a foreclosure sale, in his relation to a judgment creditor, is deemed merely an equitable assignee of the mortgage.[97] A redeeming creditor is now obliged to pay only the mortgage debt, principal and interest, without the costs of the foreclosure; but the purchaser at the foreclosure sale and his grantees will be entitled to an accounting of rents, taxes and disbursements for improvements.[98]

§ 185. Mechanic's lien, owner of, necessary.—All persons holding mechanics' liens, which, as incumbrances upon the mortgaged premises, are subsequent to the mortgage, are necessary parties to an action to foreclose.[99] It may not always be easy to determine whether a mechanic's lien, as a lien upon the premises, is subsequent to the mortgage, but questions affecting that subject can not be discussed here; for the purposes of this work it is assumed that the mechanic's lien is subsequent. A mechanics' lien is a special statutory charge upon real estate, peculiar to American law; the English law knows no such lien.[1] As the various states have regulations of their own concerning mechanics' liens, it is impossible to state any very general rules affecting them, except that a notice of the lien is uniformly required to be filed in the office of the clerk of the county where the premises are situated, and that a mortgagee foreclosing is bound to take notice of no liens except those which are filed subsequent to the execution of his mortgage and prior to the commencement

such a general judgment lien is sufficient without execution, and a sheriff's deed to make it specific.

[97] *Brainard* v. *Cooper,* 10 N. Y. 356; *Arnot* v. *Post,* 6 Hill (N. Y.) 67.

[98] *Gage* v. *Brewster,* 31 N. Y. 218; *Brainard* v. *Cooper,* 10 N. Y. 356; *Winebrener* v. *Johnson,* 7 Abb. (N. Y.) Pr. N. S. 211.

[99] *Emigrant Industrial S. Bank* v. *Goldman,* 75 N. Y. 127, 129; *Payne* v. *Wilson,* 74 N. Y. 348; *Jones* v. *Harstock,* 42 Iowa, 147.

[1] *Kneeland on Mechanics' Liens,* pp. 8–13.

of the action and the filing of the *lis pendens*. The rules of law and practice which have been stated as applying to subsequent mortgagees and judgment creditors, it is believed, apply with equal force to the owners of mechanics' liens.

§ 186. Subsequent lienor, an assignor no longer holding the incumbrance, not necessary.—No principle of law or practice is more familiar, than that only those parties who are interested in the subject-matter of an action should be brought before the court. It is almost axiomatic that a subsequent lienor, who has parted absolutely with his lien, can have no interest in an action to foreclose a prior mortgage. There are almost no cases which pointedly support this proposition; but it is beyond dispute, as reasoned from analogous cases,[2] that the proposition is true. Chancellor Kent has held it as a general principle, "that a person who has no interest in the suit and is a mere witness, against whom there could be no relief, ought not to be a party;"[3] and further, where an assignment is absolute and "the mortgagee parts with all his interest in the mortgage, and there is nothing special and peculiar in the case, that there is no necessity to make the mortgagee a party to a bill to foreclose."

Moreover, if the assignment were absolute and unconditional on its face, while the mortgagee retained some equitable interest in the mortgage, it would be unjust and contrary

[2] *Andrews* v. *Gillespie*, 47 N. Y. 487; *Christie* v. *Herrick*, 1 Barb. Ch. (N. Y.) 255; *Whitney* v. *McKinney*, 7 Johns. Ch. (N. Y.) 144; *Ward* v. *VanBokkelen*, 2 Paige Ch. (N. Y.) 289. These cases are quoted from in *post*, §§ 197–200. They uniformly hold that a mortgagee who has made an absolute and unconditional assignment of his mortgage, is not a necessary party to an action brought to foreclose the same mortgage. If such a mortgagee and assignor is not a necessary party, it must certainly follow that a subsequent mortgagee, who has parted with his entire interest in the mortgage, is not a necessary party to an action brought to foreclose a prior mortgage. Most in point, see *Winslow* v. *McCall*, 32 Barb. (N. Y.) 241, relying upon *Wetmore* v. *Roberts*, 10 How. (N. Y.) Pr. 51.

[3] *Whitney* v. *McKinney*, 7 Johns. Ch. (N. Y.) 147.

to first principles to hold a prior mortgagee foreclosing, responsible for not taking notice of equities existing between a subsequent mortgagee and his assignee, when he had no knowledge of the same. If, however, knowledge of such equities were brought to the mortgagee foreclosing, it would be dangerous for him to omit either the assignor or the assignee of the subsequent mortgage. If a junior mortgagee has been paid in full, he is, of course, no longer a necessary or a proper defendant.[4] All that has been said in this section with reference to subsequent mortgagees and their assignees, applies with equal force to subsequent holders of judgments, mechanics' and other liens, and their assignees.[5]

The principles of law stated in this and the immediately succeeding sections are so axiomatic to the practicing attorney, and are so little discussed by writers on the subject of this work, that it may seem useless to mention them here; but the headings of these sections seemed necessary to the author, in order to sustain and preserve the logical analysis and arrangement of the subject. A slight examination will show that the analysis of this chapter follows in many respects that of the first chapter of this part of the work. The object of this is to embrace every possible and conceivable case of an incumbrance that could arise, whether the courts have rendered decisions thereupon or not.

§ 187. Subsequent lienors, holding any kind of an equitable or contingent interest in the lien, generally necessary.—Whenever a person holding a subsequent mortgage, judgment or other lien on mortgaged premises assigns his lien conditionally, as a collateral security or otherwise, so that he retains an equitable interest in it, he is a necessary party to an action to foreclose a prior mortgage.[6]

[4] *McHenry* v. *Cooper*, 27 Iowa, 137.

[5] In *McKee* v. *Murphy*, 34 N. Y. Supr. Ct. (2 J. & S.) 261, though a judgment creditor had assigned his judgment with a power of attorney, he was held a necessary defendant, the power of attorney not operating as an absolute assignment.

[6] In *Blair* v. *Marsh*, 8 Iowa, 144,

The assignee of the subsequent mortgage lien is also a necessary party. It is believed, however, that this proposition should be qualified to the effect, that the plaintiff in foreclosure must have notice from the record or otherwise of the character and conditions of the assignment. The reason for this rule evidently is, that all outstanding interests in the equity of redemption by lien or otherwise must be reached and covered by the action. The law sustaining the proposition of this section is analogous in principle to that which requires a mortgagor who has apparently parted with his equity of redemption, but still holds an equitable interest in it, to be made a defendant to a foreclosure.[7]

There is another line of cases [8] which, by analogy, support the proposition of this section. They uniformly hold, where a mortgage is assigned as a collateral security, and an action to foreclose is commenced by the assignee or the assignor, the other refusing to become a co-plaintiff, that he can and must be made a party defendant to the action, for the reason that otherwise a perfect decree could not be "made which would protect the mortgagor and the purchaser of the mortgaged premises from any future claims which the assignor might make." [9] If this law is good for a prior mortgage under foreclosure, why is it not equally good for a subsequent mortgage, under precisely the same circumstances? The only difference is, that in the foreclosure of the prior mortgage, the mort-

the assignor and the assignee of a "title bond" were both made parties to the foreclosure of a prior existing mortgage, the title bond having been assigned merely as a collateral security. A junior mortgagee, who has assigned his mortgage as a collateral security, may redeem from a senior mortgagee foreclosing; *Manning* v. *Markel,* 19 Iowa, 103.

[7] See *ante,* § 143; *Patton* v. *Smith,* 113 Ill. 499.

[8] *Bloomer* v. *Sturges,* 58 N. Y. 168, 177; *Andrews* v. *Gillespie,* 47 N. Y. 487; *Christie* v. *Herrick,* 1 Barb. Ch. (N. Y.) 254; *Slee* v. *Manhattan Company,* 1 Paige Ch. (N. Y.) 48; *Kittle* v. *VanDyck,* 1 Sanf. Ch. (N. Y.) 76. See *post,* §§ 201, 202, and the notes and cases cited.

[9] *Christie* v. *Herrick,* 1 Barb. Ch. (N. Y.) 254, 259, *per* Chancellor Walworth.

gagee and the assignee are cognizant of the equities between them, while in the latter case the plaintiff may have no knowledge of the equities existing between the subsequent mortgagee and his assignee.

§ 188. Assignee of subsequent mortgage, judgment or other lien, necessary.—A party who acquires unconditionally, by assignment or otherwise, the whole of a junior mortgage, judgment or other lien upon mortgaged premises, becomes at once the party in interest, in place of the original lienor, and is consequently a necessary defendant in an action to foreclose a prior mortgage.[10] This proposition, like those stated in the two preceding sections, is deduced from general principles of law quite as much as it is induced as a conclusion from adjudged cases. Chancellor Walworth, however, has held in an action to foreclose a mortgage, that "it is now well settled, at least in this state, that after an absolute assignment of a chose in action the assignee, at law as well as in equity, is considered the real party to the suit. A decree in equity between the defendant and the assignee would now have the same effect in a court of law as if the assignor was a party to such decree."[11] "This court does not look at the nominal parties to a contract. They look at the real parties to it at the time the suit is commenced—the parties in actual interest —and recognize their rights in the same manner as if the con-

[10] In point, *Winslow* v. *McCall*, 32 Barb. (N. Y.) 241, relying upon *Wetmore* v. *Roberts*, 10 How. (N. Y.) Pr. 51, which holds further that the assignee may redeem, the same as the original lienor, if he is omitted as a defendant. In point, *Augustine* v. *Doud*, 1 Ill. App. 588. See also *White* v. *Bartlett*, 14 Neb. 320, where the assignment was not recorded and the plaintiff had no knowledge of it; the action was held to cut off the subsequent judgment, although the assignee was not made a defendant.

[11] *Ward* v. *VanKokkelen*, 2 Paige Ch. (N. Y.) 289, 295. A note to this decision by Mr. Paige, the reporter, gives an exhaustive discussion of the question of the assignment of choses in action, citing many cases in chronological order from English and American reports, showing that in the early part of this century the assignor still remained a necessary party, while the assignee was hardly deemed proper.

tract was executed by or to them. Thus the assignee of a chose in action is recognized as the real party, and this court, rejecting all legal fictions, treats him as such, and insists that the suit shall be brought in his name."[12] The law supporting the proposition stated in this section is analogous to that which makes the purchaser and owner of the equity of redemption by grant from a mortgagor a necessary party to a foreclosure;[13] the only difference being that in the latter case the defendant holds the fee title, while in the former he held only a lien on the fee.

§ 189. Assignee of subsequent mortgage or lien pendente lite not necessary.—A person who during the pendency of an action to foreclose a mortgage purchases a mortgage, judgment or other incumbrance upon the mortgaged premises, which is subsequent in its lien to the mortgage under foreclosure, is not a necessary party to the action, and the plaintiff will not be obliged to bring such a purchaser before the court;[14] the purchaser may, however, as he succeeds to all the rights of the subsequent lienor, appear and defend in the name of the party from whom he acquires his lien, or be substituted on application in his place.[15] The statutory enactments of the Code, which were discussed in the preceding

[12] *Western Reserve Bank* v. *Potter,* Clarke Ch. (N. Y.) 437, *per* Vice-Chancellor Whittlesey.

[13] See *ante,* §§ 146, 147.

[14] In point, *Case* v. *Bartholow,* 21 Kan. 300, where a subsequent mortgage was purchased pending the foreclosure of a prior mortgage.

[15] See *Koch* v. *Purcell,* 45 N. Y. Supr. Ct. (13 J. & S.) 162, as to the rights of such an assignee with reference to the action, and any surplus arising on the sale. See *Fisher on Mortgages,* §§ 380, 388, and the English cases cited. See *ante,* §§ 151, 152, where a discussion of the common-law doctrine of *lis pendens* and of the statutory enactments in the various states is given. It may be generally stated that the principles of law there presented, as applying to the purchaser of the equity of redemption in mortgaged premises during an action to foreclose, apply also to the purchaser of a lien on the same equity during the foreclosure. The statute of *lis pendens* in New York also unquestionably supports this proposition.

chapter as applying to the equity of redemption, apply with equal force to liens upon that equity.[16]

To sustain the proposition stated in this section, resort must be had to the principle of analogy, as there are no reported cases bearing directly upon the point. As has been shown, the purchaser of the equity of redemption in mortgaged premises, during the pendency of an action to foreclose, is not a necessary defendant;[17] no reason presents itself why the purchaser of a lien on the same equity of redemption under similar circumstances should be made a defendant. It is assumed, of course, that the assignor of the purchaser *pendente lite,* is a party defendant to the action; a purchaser *pendente lite,* if his assignor is not a party to the action, is no more bound by the decree of foreclosure than the assignor himself would be. The assignee of a mortgage is an incumbrancer within § 1671 of the New York Code of Civil Procedure, and if he takes title by assignment after, or records his assignment subsequently to, the filing of a *lis pendens,* he is chargeable with notice.[18]

§ 190. Incumbrancer pendente lite not necessary.— Likewise it is reasoned by analogy that a person who obtains a lien by mortgage, judgment[19] or otherwise upon the equity of redemption in mortgaged premises, during the pendency of an action to foreclose, is not a necessary party to the action, providing it was commenced[20] or the *lis pendens* was filed[21] before the lien was obtained or recorded.[22] In such a case, however, while the plaintiff is not bound to bring the incumbrancer before the court, the incumbrancer himself may inter-

[16] see *ante,* § 152.

[17] See *ante,* § 152.

[18] *Lamont* v. *Cheshire,* 65 N. Y. 30; *Hovey* v. *Hill,* 3 Lans. (N. Y.) 167.

[19] *Montgomery* v. *Birge,* 31 Ark. 491; *Linn* v. *Patton,* 10 W. Va. 187.

[20] *Lyon* v. *Sanford,* 5 Conn. 548.

[21] *Fuller* v. *Scribner,* 16 Hun (N. Y.) 130, aff'd 76 N. Y. 190.

[22] *Bank of U. S.* v. *Carroll,* 4 B. Mon. (Ky.) 50. See *ante,* § 152.

vene by petition at any time before the sale, and if allowed by the court to come in at all, he will obtain as good and perfect a standing in the case as any other party, and may defend if he has a defense to offer.[23]

A *lis pendens* is not effective until the complaint is filed, and the complaint can not be filed *nunc pro tunc* so as to affect the rights which a judgment creditor may have acquired in the meantime.[24] In a case where a judgment had been recovered and docketed against the owner of the equity of redemption in mortgaged premises, after the filing of a *lis pendens* and the service of the summons upon one or more of the defendants, but prior to the service upon the owner of the equity, the court would not relieve the bidder at the sale of his bid, on the ground of a defect of parties to the action; the judgment creditor was not a necessary party.[25]

In another case, where no *lis pendens* had been filed and a judgment was recovered and docketed between the time of entering the decree of foreclosure and the day of sale, it was held that the judgment creditor could merely redeem at any time before the sale, but that thereafter his rights would be effectually barred.[26] In the foreclosure of a senior mortgage

[23] *F. and M. Bank of Milwaukee* v. *Luther,* 14 Wis. 96. See *People's Bank* v. *Hamilton Mfg. Co.* 10 Paige Ch. (N. Y.) 481, where a creditor obtained a judgment against the owner of the equity of redemption, and docketed the same about a week after the decree of foreclosure was entered, but before the sale; a *lis pendens* had been duly filed at the commencement of the action. Execution was issued and the judgment creditor bid in the premises; he thereupon presented to the court his petition, setting forth all the facts of the case and his defense. Chancellor Walworth recognized the petition, and held it to be the proper practice and procedure, but refused to allow the judgment creditor to intervene, for the reason that his petition did not state a defense in proper form.

[24] *Weeks* v. *Tomes,* 16 Hun (N. Y.) 349; aff'd 76 N. Y. 601.

[25] *Fuller* v. *Scribner,* 76 N. Y. 190, aff'g 16 Hun (N. Y.) 130, and distinguishing *Rogers* v. *Bonner,* 45 N. Y. 379; the judgment creditor was a subsequent incumbrancer within the meaning of §§ 1670 and 1671 of the N. Y. Code of Civil Procedure.

[26] *McHenry* v. *Cooper,* 27 Iowa, 137, 146. See *Pratt* v. *Pratt,* 96 Ill. 184, where a second mortgage was executed pending a foreclosure.

the owner of a junior recorded mortgage was omitted as a party, as the deed from the original mortgagor to the person executing the junior mortgage had not been recorded, and the senior mortgagee had no notice of the deed or subsequent mortgage from the record or otherwise; the rights of the junior mortgagee were held concluded and cut off by the action.[27] In another case the owner of a recorded unindexed second mortgage was omitted as a party defendant to the foreclosure of a prior mortgage, and the foreclosure was held void as to him.[28]

§ 191. Subsequent mortgagee or lienor a married woman does not alter rule; necessary.—Mortgages, judgments and all other liens upon real estate are now unquestionably personal property. At common-law the husband became upon marriage the owner of his wife's personal property, including, of course, mortgages, judgments, etc., even though they were placed in his wife's name after marriage. In an action to foreclose a prior mortgage the husband of a woman who held a subsequent incumbrance was, undoubtedly, necessary as a party defendant to the action; she also was a necessary party. The common-law rule has, however, been so completely superseded that it is believed there is no state in America where it is now in force. It is safely asserted that the husband of a *feme covert,* who holds a subsequent lien upon premises under foreclosure by a prior mortgagee, is not a necessary party to the action. The wife, however, who holds the lien in her own name, is always as necessary a party as though she were a *feme sole.*[29] Likewise, the wife of a person holding a subsequent lien is not a necessary party, as she has no interest in it.[30]

[27] *Kipp* v. *Brandt,* 49 How. (N. Y.) Pr. 358.

[28] *Mutual Life Ins. Co.* v. *Dake,* 1 Abb. (N. Y.) N. C. 380, aff'd 87 N. Y. 257.

[29] See *ante,* §§ 179–184.

[30] See *Kay* v. *Whittaker,* 44 N. Y. 565.

§ 192. Heirs, devisees, legatees and annuitants of deceased subsequent lienor generally not necessary.—Under the statutes of no state do the heirs at law receive the legal title and possession of the personal property of a deceased person. It is the theory of American law that upon a person's death the title to all his personal property vests in an executor or administrator, while the title to his real property always vests in his heirs or devisees. Consequently the heirs and devisees of a decedent, who hold a subsequent lien upon mortgaged premises, are neither necessary nor proper parties to an action to foreclose a prior mortgage.[31]

In an action where the heirs and the personal representatives of a deceased subsequent mortgagee were all made parties to the foreclosure of a prior mortgage, it was held, where the question was, whether the plaintiff could tax costs for five defendant heirs, that "there was no necessity nor any apparent excuse for making the five children of the subsequent mortgagee parties. The executor fully represented the rights of the decedent as a junior mortgagee, and the heirs at law should not have been made defendants. The extra costs of making them parties must therefore be disallowed."[32] The same proposition is also true of devisees, legatees and annuitants, under a will, for they take no title to the subsequent lien, as it passes at once to the executor, unless it is bequeathed specifically to the devisee, legatee or beneficiary, in which case he, as the immediate owner of the same, would become a necessary defendant. The beneficiary, in such a case, takes title directly, as he would by a specific assignment from the testator in his life-time.[33]

[31] *Shaw* v. *McNish,* 1 Barb. Ch. (N. Y.) 328. See *ante,* §§ 161–164, and the cases cited.

[32] *Shaw* v. *McNish,* 1 Barb. Ch. (N. Y.) 328, *per* Chancellor Walworth.

[33] In *Jeneson* v. *Jeneson,* 66 Ill. 260, a decedent gave one of several notes secured by a mortgage to an heir, who was held a necessary defendant to the foreclosure of a prior mortgage.

§ 193. Executors and administrators of a deceased subsequent lienor necessary.—As has been previously stated, the entire personal estate of a decedent, both at law and in equity, including mortgages, judgments and all kinds of liens upon real estate, vests in his personal representatives, —that is, in his executors or administrators. Without exception in any state in the Union, the executor or administrator takes the entire legal title to all kinds of liens created upon real estate. Of course, the title which a personal representative has in the goods of a decedent is not the absolute ownership which a person has in his own property; nevertheless, the law treats the personal representative as the absolute owner, with full control and power of disposition, as if the property were his own.

It easily follows that the executor of a deceased subsequent mortgagee or lienor, is a necessary defendant in an action to foreclose a prior mortgage, representing, as he does, the entire interest of the junior lienor.[34] If a subsequent lien is specifically bequeathed, the beneficiary becomes a necessary party in place of the executor. If a subsequent lienor dies during the pendency of an action to foreclose, the action must be revived against his personal representatives. It is intimated that if a deceased subsequent lienor is a non-resident of the state, the plaintiff foreclosing may take out letters of administration for the purposes of the action in the county where the mortgaged premises are situated;[35] but provision

[34] *Lockman* v. *Reilly,* 95 N. Y. 64; *Shaw* v. *McNish,* 1 Barb. Ch. (N. Y.) 326, quoted from in the preceding section; *Ger. Sav. Bank* v. *Muller,* 10 N. Y. Week. Dig. 67; *White* v. *Rittemeyer,* 30 Iowa, 268, 272, citing many cases and authorities. *Shields* v. *Keys,* 24 Iowa, 298, 307, was a foreclosure of a mechanic's lien, citing *Baldwin* v. *Thompson,* 15 Iowa, 504, and *Burton* v. *Hintrager,* 18 Iowa, 348. See *ante,* §§ 161–164. In *Lockman* v. *Reilly,* 95 N. Y. 64, *per* Rapallo, J., the premises were bought in by an executor who was plaintiff in the foreclosure of a junior mortgage; on the foreclosure of the senior mortgage the executor of the junior mortgagee was held the only necessary defendant, as the real estate was to be regarded as personalty.

[35] In point, *Lothrop's Case,* 33 N. J. Eq. (6 Stew.) 246.

is made in the practice of most states for serving the summons upon non-residents by publication or otherwise.

If no administrator or executor has been appointed or has qualified as the personal representative of a deceased subsequent mortgagee or lienor, it is doubtful whether the plaintiff foreclosing a prior mortgage can properly and safely rely upon making only the heirs at law and next of kin of the subsequent lienor parties defendant to the action. This practice is sometimes resorted to where the heirs at law and next of kin are few in number and can be easily served; they are, indeed, the actual and ultimate owners of the subsequent lien, but, as has been seen, they are neither necessary nor proper parties where there is a personal representative.[36] Even though it may be inconvenient, and may often necessitate considerable delay, it is nevertheless the safest practice and the one here recommended to cause an administrator of such deceased subsequent lienor to be appointed before the action to foreclose is commenced, or at least before it proceeds to judgment.[37]

§ 194. Assignee in bankruptcy and voluntary general assignee of subsequent lienor necessary.—The case of Bard v. Poole[38] holds quite pointedly that an assignee in bankruptcy, who receives from his assignor an interest in a mortgage, is a necessary defendant in an action for the foreclosure of a prior mortgage. To sustain the proposition of this section, resort is again had to reasoning by analogy, upon which so much of this chapter is dependent. The same rules

[36] See the preceding section; Fisher on Mortgages, § 359; *Whittla* v. *Halliday*, 4 Dru. and War. 267.

[37] In point, *Lothrop's Case*, 33 N. J. Eq. (8 C. E. Gr.) 246, where limited administration was granted for the purposes of the foreclosure. See *Koger* v. *Weakly*, 2 Port. (Ala.) 516; *Coursen's Will*, 4 N. J. Eq. (3 H. W. Gr.) 408. In point, Fisher on Mortgages, § 369. See *Long* v. *Storie*, 23 L. J. Ch. N. S. 200, where a creditor was appointed administrator for the purposes of the action.

[38] 12 N. Y. 495, 507, *per* Denio, J.

and illustrations, which have shown an assignee in bankruptcy of the owner of the equity of redemption [39] in mortgaged premises to be a necessary defendant in an action to foreclose, apply, it is believed, with equal force to an assignee in bankruptcy of a person holding a lien upon the same equity of redemption; the assignee is equally a necessary party in both cases.[40] The same rules apply to assignees by voluntary general assignment and to receivers of insolvent corporations. If the assignee dies pending the foreclosure and after having been made a defendant, the action must be revived against his successor in office, or the right to redeem will survive to the successor.[41]

§ 195. General guardian of infant, and committee of lunatic, idiot or habitual drunkard, trustees and beneficiaries, holding subsequent mortgage or lien, necessary.— If a subsequent mortgage is drawn in the name of the general guardian or committee of an incompetent person, the guardian or committee will, unquestionably, be a necessary party defendant in an action to foreclose a prior mortgage, and the beneficiary will also be a very proper, if not a necessary, party.[42] If, however, the subsequent lien is executed or recovered

[39] See *ante,* § 172.

[40] Reference is had to § 168 *ante,* where it appears that the assignee of a subsequent lien by sale and transfer is a necessary party. The same title and interest being transferred to an assignee in bankruptcy, no reason presents itself why the assignee in bankruptcy is not also a necessary defendant. From the proposition presented in §§ 146–148 *ante,* the reasoning by analogy becomes even stronger.

[41] *Avery* v. *Ryerson,* 34 Mich. 362.

[42] In *Willink* v. *Morris Canal Banking Co.* 4 N. J. Eq. (3 H. W. Gr.) 377, the trustees and *cestuis que trust* were both held necessary defendants; but in *Iowa County* v. *Mineral Point R. R.* 24 Wis. 93, it was held sufficient to make the trustee representing the bondholders a defendant, and that the bondholders would be bound by the decree, they being too numerous to be brought into the action. See *Loehr* v. *Colborn,* 92 Ind. 24; *Shinn* v. *Shinn,* 91 Ill. 477, also the English cases, *Wetherell* v. *Collins,* 3 Madd. 255, and *Osbourn* v. *Fallows,* 1 Russ. & M. 741, stating circumstances under which the beneficiaries are not necessary parties.

in the name of the beneficiary, then the infant, lunatic, idiot or habitual drunkard will be a necessary party in his own name, without his guardian or committee appearing as a party to the action. The process of the court, however, is generally required to be served upon the guardian or committee as well as upon the incompetent person.[43]

§ 196. **Purchasers at tax sales, boards of supervisors, state comptrollers and municipal corporations, defendants.**—It is a universal principle of law that unpaid taxes are a lien upon the real estate against which they are assessed prior to mortgages, judgments and all other incumbrances. When real estate is sold for the satisfaction of unpaid taxes, the purchaser likewise acquires a title that is good against all pre-existing incumbrances to the extent of his purchase price, unless divested by an incumbrancer redeeming.

Purchasers at general tax sales, and states, counties and cities, for whose benefit any unpaid tax was levied, are not necessary parties to the foreclosure of a mortgage upon the premises taxed;[44] but they are very proper parties[45] as prior incumbrancers for the purpose of determining the exact

[43] N. Y. Code Civ. Proc. § 426.

[44] *Brown* v. *Atlanta National Building & Loan Asso.* 46 Fla. 492, 35 So. 403. See *Erie County Savings Bank* v. *Schuster,* 187 N. Y. 111, 79 N. E. 843.

The holder of a tax certificate, while likely a proper party is not a necessary party to a suit to foreclose a mortgage, where the time to foreclose the tax certificate has not accrued. *Western Land Co.* v. *Buckley,* 3 Neb. (Unof.) 776, 92 N. W. 1052.

The United States Supreme Court, in the case of *Hefner* v. *Northwestern Mutual Life Insurance Co.* 123 U. S. 747, 31 L. ed. 309, 8 Sup. Ct. Rep. 337, say that in a case where the title to land was in the mortgagor at the date of the mortgage, and a tax title was subsequent in time, although paramount in right to the title acquired under mortgage foreclosure, upon foreclosure of the mortgage in equity the court could determine the validity of the tax title; and the owner of such title was a proper, if not necessary, party to foreclosure.

[45] *Cohen* v. *Solomon,* 66 Fed. 411. See *Williams* v. *Cooper,* 124 Cal. 666, 57 P. 577. But see *Tinsley* v. *Atlantic Mines Co.* 20 Colo. App. 61, 77 P. 12.

amount of their claims, and of having them extinguished as liens upon the property, by a provision in the judgment for their payment out of the proceeds of the sale.[46] A purchaser at a tax sale will not be affected by the subsequent foreclosure of a mortgage to which he is not made a party.[47] The purchaser's title is absolute and prior to the mortgage, subject only to be redeemed by the mortgagee. Under the rulings of the courts it is clearly the best practice to make purchasers at tax sales, the owners of tax certificates, and all parties, domestic corporations and others, having any interest in unpaid taxes, parties defendant to a foreclosure, that their claims may be ascertained and paid.[48]

Provision is made in the New York Code of Civil Procedure, and in the statutes of some other states, requiring the referee to sell, or the master in chancery, to pay all outstanding taxes, assessments, water rates, etc., from the proceeds of the sale.[49] Where such provision can be made in the decree of sale, it is not so desirable to make parties holding tax certificates defendants to the foreclosure.

[46] *Roosevelt Hospital* v. *Dowley*, 57 How. (N. Y.) Pr. 489, *per* Van Vorst, J. See *post*, chap. IX.

[47] *Becker* v. *Howard*, 66 N. Y. 5, 8. But see *Adair* v. *Mergentheim*, 114 Ind. 303, 16 N. E. 603; *Chard* v. *Holt*, 136 N. Y. 30, 32 N. E. 740.

[48] See the cases *supra*; *Becker* v. *Howard*, 4 Hun (N. Y.) 359, *per* E. Darwin Smith, J.; *Ayres* v. *Adair County*, 61 Iowa, 728, *per* Adams, J., discussing at length the rights of a purchaser at a tax sale in relation to a pre-existing mortgage. See *Crum* v. *Cotting*, 22 Iowa, 411. See *Straka* v. *Lander*, 60 Wis. 115, in which action to foreclose, it was alleged that a tax deed of the premises had been issued to one of the defendants and that the plaintiffs had redeemed from the tax liens. The municipality which issued the tax deed was held not to be a necessary party; the question of the validity of the deed or of the redemption could not be determined in the foreclosure.

[49] N. Y. Code Civ. Proc. § 1676.

CHAPTER VIII.

PARTIES DEFENDANT—NECESSARY TO PERFECT THE TITLE —PARTIES HOLDING PART OR EQUITABLE INTERESTS IN THE MORTGAGE UNDER FORECLOSURE, OR IN LIENS CONTEMPORARY THEREWITH, NOT JOINING AS PLAINTIFFS, NECESSARY DEFENDANTS.

§ 197. Introductory.
§ 198. Assignor, having made an absolute assignment of the mortgage or no longer holding an interest in it, not necessary.
§ 199. Assignor—When a proper and desirable party.
§ 200. Assignee of a mortgage absolutely assigned, never a necessary defendant.
§ 201. Assignor of a mortgage, assigned conditionally or as collateral security, a necessary party.
§ 202. Assignee of a mortgage assigned collaterally, a necessary defendant in foreclosure by the assignor.
§ 203. Joint or several mortgagees; action commenced by one, the others necessary defendants.
§ 204. Contemporary and equal mortgagees; foreclosure commenced by one, others necessary defendants.
§ 205. Foreclosure by holder of note—Independent mortgagee necessary party.
§ 206. Ownership of mortgage doubtful or in dispute; action commenced by one claimant, other claimants advisable defendants.
§ 207. Trustees and beneficiaries sometimes necessary defendants.

§ 197. Introductory.—In the two preceding chapters, attention has been given to those parties who were necessary defendants in an action to foreclose a mortgage, in order to extinguish the entire equity of redemption and all the liens that had accrued upon it since the execution of the mortgage. It sometimes occurs that a mortgage is held by joint owners, or that there are liens contemporary with it, or that it is assigned collaterally or conditionally, whereby equitable questions are raised as to its true ownership. Part owners and others having equitable interests in the mortgage under

foreclosure may refuse to join as co-plaintiffs. In such cases it is always necessary to make them defendants, that their interests may be extinguished. This rule is based upon the general principle which was early considered [50] in this work, that all parties interested in the mortgage or in the mortgaged premises are necessary parties, plaintiff or defendant, in an action to foreclose. It is also a well recognized rule, especially in equitable actions, that a person interested in the subject-matter of an action, who refuses to become or who is omitted as a co-plaintiff, may be made a defendant.[51]

It is to be observed that the parties defendant discussed in this chapter could equally well be parties plaintiff, with one or two exceptions; and that, being omitted or refusing to join as parties co-plaintiff, they become absolutely necessary parties defendant in an action to foreclose, in order to produce at the sale a perfect title and to accomplish the purposes for which a party is necessary, as repeatedly stated in this part of the work. Chancellor Walworth, in considering the necessity of making a party holding an equitable interest in the mortgage a party to the action in order to produce a perfect decree for the purchaser at the sale, has held: "Where the mortgage is assigned as a mere security for the payment of a debt, or where but a part of the mortgaged debt is assigned to the plaintiff, the assignor is a necessary party to a bill filed to foreclose the mortgage, so that a perfect decree may be made which will protect the mortgagor and the purchaser of the mortgaged premises under the decree to be made in the suit, from any future claims which the assignor may make, notwithstanding his assignment." [52] A conveyance upon a foreclosure sale, to produce this result, must convey the entire interest of the mortgagor and the mortgagee, and be an

[50] See *ante*, § 87.

[51] N. Y. Code Civ. Proc. § 448.

[52] *Christie* v. *Herrick*, 1 Barb. Ch. (N. Y.) 259; *Johnson* v. *Hart*, 3 *Johns.* Cas. (N. Y.) 322; *Hobart* v. *Abbott*, 2 P. Wms. 643; N. Y. Code Civ. Proc. § 1632.

entire bar against each of them and against all persons claiming under them.

The New York Code of Civil Procedure provides "that a conveyance upon the sale, made pursuant to a final judgment in an action to foreclose a mortgage upon real property, vests in the purchaser the same estate, only, that would have vested in the mortgagee, if the equity of redemption had been foreclosed. Such a conveyance is as valid, as if it was executed by the mortgagor and the mortgagee, and is an entire bar against each of them, and against each party to the action who was duly summoned, and every person claiming from, through or under a party, by title accruing after the filing of the notice of the pendency of the action, as prescribed in the last section." [53] It is apparent then that if any person, who holds an interest in the mortgage under foreclosure, as part owner or otherwise, is omitted as a party to the action, the decree will not be binding upon him, and his interest will not be cut off; his relation to the subject-matter of the action continues as though the action had never been commenced.

§ 198. Assignor, having made an absolute assignment of the mortgage or no longer holding an interest in it, not necessary.—When the owner of a bond and mortgage makes an absolute and unconditional transfer of the same by assignment or otherwise, he ceases to have any interest in it, and is, consequently, no longer a necessary party to an action to foreclose the mortgage; [54] neither are his heirs,

[53] N. Y. Code Civ. Proc. § 1632.

[54] *Clark* v. *Mackin,* 95 N. Y. 346; *Andrews* v. *Gillespie,* 47 N. Y. 487; Christie v. Herrick, 1 Barb. Ch. (N. Y.) 254; *Western Reserve Bank* v. *Potter,* Clarke Ch. (N. Y.) 437; *Whitney* v. *McKinney,* 7 Johns. Ch. (N. Y.) 147; *Ward* v. *Van Bokkelen,* 2 Paige Ch. (N. Y.) 295; *Prout* v. *Hoge,* 57 Ala. 28; *Walker* v. *Bank of Mobile,* 6 Ala. 452; *Barraque* v. *Manuel,* 7 Ark. 516; *Markel* v. *Evans,* 47 Ind. 326; *Gower* v. *Howe,* 20 Ind. 396, but held necessary in *Strong* v. *Downing,* 34 Ind. 300. In point, *Wilson* v. *Spring,* 64 Ill. 14, where the assignor assigned one of a number of notes secured by a mortgage; *Williams* v. *Smith,* 49 Me. 564;

executors or administrators necessary parties.[55] An administrator who assigned a mortgage to an heir as part of his distributive share of the decedent's estate, is not a necessary party to a foreclosure brought by the heir.[56] Chancellor Kent held, in 1823, that "where the assignment is absolute, and the mortgagee parts with all his interest in the mortgage, and there is nothing special or peculiar in the case, the assignee is under no necessity to make the mortgagee a party to a bill to foreclose. The general principle is, that a person who has no interest in the suit, and who is a mere witness, against whom there could be no relief, ought not to be a party." [57]

Another learned jurist, in referring to the history and the reasons for this principle, determined that it is "well settled that where there has been an absolute assignment of all the interest of the mortgagee in the debt secured by the mortgage, he is not a necessary party to a bill to redeem, or to a bill of foreclosure. The reason why it was formerly considered necessary to make the assignor of a chose in action a party to a bill in equity brought by the assignee, I apprehend, must have been, that courts of law did not sanction and protect such assignments considering them a species of maintenance; and the assignor, having the legal title or interest in the thing assigned, might sustain an action at law thereon, notwithstanding a decree in equity to which he was not a

Miller v. *Henderson,* 10 N. J. Eq. (2 Stockt.) 320. *Aliter,* if the assignment is not absolute, *Larimer* v. *Clemer,* 31 Ohio St. 499; *Omohundro* v. *Henson,* 26 Gratt. (Va.) 511; *Scott* v. *Ludington,* 14 W. Va. 387. See *Wright* v. *Sperry,* 21 Wis. 331, and the notes to *ante,* §§ 92-94. Fisher on Mortgages, § 347, and the English authorities cited.

[55] But in North Carolina the heirs of the mortgagee are held necessary parties to a bill of foreclosure; *Etheridge* v. *Vernoy,* 71 N. C. 184, 186, 70 N. C. 713; *Kerchner* v. *Fairley,* 80 N. C. 25. See also *Pullen* v. *Heron Mining Co.* 71 N. C. 567.

[56] *Westerfield* v. *Spencer,* 61 Ind. 339.

[57] *Whitney* v. *McKinney,* 7 Johns. Ch. (N. Y.) 147; *Fenton* v. *Hughes,* 7 Ves. 287. See also *McGuffey* v. *Finley,* 20 Ohio, 474, and the notes to §§ 92–94, *ante.*

party. This reason has long since ceased, and the above settled rule is now in force." [58]

§ 199. Assignor—When a proper and desirable party.—If the assignor has guaranteed the payment or collection of the mortgage debt, he is a necessary party defendant, if a judgment for deficiency is sought against him.[59] If usury, fraud or other defenses or equities existed against the mortgage in its inception or while the mortgagee held it, he will be as assignor a very proper, if not a necessary, party to the foreclosure conducted by his assignee;[60] so also, if the assignment is imperfect in form,[61] or is by parol,[62] the assignor will be held a necessary party. In an action to foreclose, brought by the assignee of the mortgage debt without the mortgage, the assignor has been held a necessary defendant.[63]

It is now well settled that one who transfers a chose in action warrants impliedly, at least, that there is no legal defence to its collection arising out of his own connection with its origin.[64] It has been held that the assignor, under such circumstances, is not a necessary party to the action, for the

[58] *Clark* v. *Mackin,* 95 N. Y. 346; *Newman* v. *Chapman,* 2 Rand. (Va.) 93, 14 Am. Dec. 766. See also *Chambers* v. *Goldwin,* 9 Ves. Sr. 269; *Ward* v. *Van Bokkelen,* 2 Paige Ch. (N. Y.) 295, *per* Chancellor Walworth.

[59] See *post,* § 253, on the liability of an assignor for a judgment of deficiency. See *Field* v. *Thistle,* 60 N. J. Eq. 444, 46 A. 1099.

[60] *Ward* v. *Sharp,* 15 Vt. 115. See *ante,* § 94.

[61] *Holdridge* v. *Sweet,* 23 Ind. 118.

[62] *Denby* v. *Mellgrew,* 58 Ala. 147.

[63] In *Bibb* v. *Hawley,* 59 Ala. 403, the assignor was held a necessary party in case of an unindorsed note where the assignment was by a separate written instrument. See *Strong* v. *Downing,* 34 Ind. 300. See also *ante,* §§ 101–103, 114, 115.

[64] *Littauer* v. *Goldman,* 72 N. Y. 506, 28 Am. Rep. 171; *Andrews* v. *Gillespie,* 47 N. Y. 487; *Delaware Bank* v. *Jarvis,* 20 N. Y. 226. So held of a bond and mortgage which were usurious and void, and assigned by the mortgagee; *Ross* v. *Terry,* 63 N. Y. 613.

reason that upon the coming in of the answer setting up usury, fraud, or other defences, the assignee as plaintiff may give notice of such defence to the assignor and offer to him the future conduct of the suit, which would make the judgment binding upon him, and place the plaintiff in the best possible position for maintaining an action against the assignor for a breach of warranty.[65]

§ 200. Assignee of a mortgage absolutely assigned, never a necessary defendant.—As the assignee of a mortgage becomes its absolute owner, he occupies the position of the original mortgagee in all respects, and of course can sustain no other relation to an action to foreclose than that of plaintiff.[66] He is always, however, a necessary party to the action in some relation, as a perfect title could not be offered at the sale, unless his interest by lien were extinguished. In an action by the mortgagor to redeem, he is, *vice versa,* a necessary defendant, in place of his assignor, the mortgagee.[67]

[65] In such a case it has been held that, "if the assignor was a necessary party to a complete determination of the controversy, she should have been so made under the provisions of § 452, instead of depriving the defendant (mortgagee) of a right to which he was clearly entitled, because of her absence as such party. It was the protection of the interest of the plaintiff (assignee), and not that of the defendant, that made her a necessary party if so at all. By the sale and assignment of the mortgage to the plaintiff's testator, the assignor impliedly warranted that there was no legal defense to its collection arising out of its origin. * * * But it was not necessary to make the assignor a party, to accomplish this object. It is well settled that a purchaser of property, with a warranty of title, upon being sued for the recovery thereof by one claiming a paramount title thereto, may give notice to his vendor of the action, and offer to him the conduct of the defense; and that upon his so doing, the vendor is bound by the judgment in respect to the title, whether or not the defense is undertaken by him." *Andrews* v. *Gillespie,* 47 N. Y. 492, *per* Grover, J.

[66] *Lennon* v. *Porter,* 68 Mass. (2 Gray), 473, holding also that a mesne assignee is not a necessary defendant; *Burton* v. *Baxter,* 7 Blackf. (Ind.) 297. See *ante,* §§ 90–94, and notes.

[67] *Whitney* v. *McKinney,* 7 Johns. Ch. (N. Y.) 147, *per* Chancellor Kent.

§ 201. Assignor of a mortgage, assigned conditionally or as collateral security, a necessary party.—A mortgagee who assigns his bond and mortgage conditionally, as a collateral security or otherwise, retaining to himself at the same time an equitable interest of any kind, is a necessary party to a foreclosure of the mortgage instituted by the assignee; if he is not joined as a co-plaintiff, he will be a necessary defendant.[68] The logical reason for this rule is, that a complete

[68] *In re Estate of Gilbert,* 25 N. Y. Wk. Dig. 470; *Dalton* v. *Smith,* 86 N. Y. 176; *Union College* v. *Wheeler,* 61 N. Y. 88; *Bloomer* v. *Sturges,* 58 N. Y. 175; *Bard* v. *Poole,* 12 N. Y. 495; *Wes. Res. Bank* v. *Potter,* Clarke Ch. (N. Y.) 432; *Johnson* v. *Hart,* 3 Johns. Cas. (N. Y.) 322; *Slee* v. *Manhattan Co.* 1 Paige Ch. (N. Y.) 48; *Kittle* v. *VanDyck,* 1 Sandf. Ch. (N. Y.) 76. See *Hughes* v. *Johnson,* 38 Ark. 285; *St. John* v. *Freeman,* 1 Ind. 84; *Brown* v. *Johnson,* 53 Me. 246; *Cutts* v. *York Manufacturing Co.* 14 Me. 326, 18 Me. 190; *Stevens* v. *Reeves,* 33 N. J. Eq. (6 Stew.) 427; *Ackerson* v. *Lodi Branch R. R.* 28 N. J. Eq. (1 (Stew.) 542; *Woodruff* v. *Depue,* 14 N. J. Eq. (1 McCart.) 168, authorities stated in the briefs of the counsel; *Miller* v. *Henderson,* 10 N. J. Eq. (2 Stockt.) 320; *Fithian* v. *Corwin,* 17 Ohio St. 118; *Wright* v. *Sperry,* 21 Wis. 331. See *Chew* v. *Brumagen,* 21 N. J. Eq. (6 C. E. Gr.) 520, 529, exhaustively collating and reviewing the New York cases; reported also in 19 N. J. Eq. (4 C. E. Gr.) 130, on appeal to the Supreme Court of the United States, the assignor was held not a necessary party; the assignee was held to be a trustee for him to the extent of the surplus over his own debt, for which he held the mortgage as a collateral security; *Chew* v. *Brumagen,* 80 U. S. (13 Wall. 497, 20 L. ed. 663. In *Salmon* v. Allen, 11 Hun (N. Y.) 29, a complicated case, the first pledgee had re-assigned the bond and mortgage as a collateral security for his own obligations; on foreclosure both of the assignees and the original mortgagee were held necessary parties. See also *Graydon* v. *Church,* 4 Mich. 646, where the assignor was not made a party and he subsequently became insolvent; Fisher on Mortgages, § 348; *Norrish* v. *Marshall,* 6 Madd. 475; *Hobart* v. *Abbot,* 2 P. Wms. 643. See also *ante,* §§ 104–106, and the notes.

The supreme court of Michigan, in the case of the *Michigan State Bank of Eaton Rapids* v. *Trowbridge,* 92 Mich. 217, 52 N. W. 632, say that a mortgagee and another who have indorsed the note accompanying the mortgage as additional security, under an agreement to that effect, may be made defendants, and the deficiency judgment obtained against them, by one to whom the mortgage and note have been assigned as collateral security, under the Michigan statute (How. Mich. Stat. § 6704), providing for the joinder, with the mortgagor as defendants,

decree could not otherwise be made which would protect the mortgagor and the purchaser of the mortgaged premises from any claims which the assignor might subsequently make, as the court would acquire no jurisdiction of him, and an interest in the premises would remain unextinguished.

Thus, in an action where it appeared that a mortgagee had assigned his mortgage as a collateral security, and subsequently made a general assignment for the benefit of creditors, it was held that the assignees or trustees for the creditors succeeded to the rights of the mortgagee, and were necessary defendants in an action to foreclose brought by the pledgee of the mortgage.[69] Kent has stated as cogent reasons why the assignor should be made a defendant where the assignment is made as a collateral security, that he should have an opportunity to redeem his bond and mortgage by paying the debt, and also to show, if he could, that he had in fact paid his debt and so was entitled to a re-assignment of the mortgage; and further, that otherwise the mortgaged premises might be sold without his knowledge.[70] In an early case, it was held that the "assignor was, therefore, the principal party interested in the mortgage at the time the bill was filed; and although the legal title to the bond and mortgage was in the plaintiff (assignee) solely, the *equitable interest* was mainly in the assignor. There is no doubt but that she was a necessary party to the suit."[71] This rule holds good, even though the assignment of the mortgage is absolute on its face and expresses a full consideration, when the actual fact is, that only a portion of the consideration was paid, and that such payment was only a loan.[72] Where it appeared in a suit

of any and all persons who have secured the debt by an obligation or other evidence of debt.

[69] *Bard* v. *Poole,* 12 N. Y. 495, a case often cited.

[70] *Johnson* v. *Hart,* 3 Johns. Cas. (N. Y.) 322; *Bard* v. *Poole,* 12 N. Y. 508. See *Compton* v. *Jones,* 65 Ind. 117, where the debt had been paid, and the assignor was erroneously omitted as a party.

[71] *Kittle* v. *VanDyck,* 1 Sandf. Ch. (N. Y.) 78.

[72] *Kittle* v. *VanDyck,* 1 Sandf. Ch. (N. Y.) 78.

brought by the assignee of a mortgage, assigned as collateral security, to foreclose the same, that it was the intention of the assignor to give such assignee the right to receive the moneys due upon the mortgage and to foreclose the same in his own name, it was held that the assignor was not a necessary party, and that the decree of sale was perfect without him.[73]

§ 202. Assignee of a mortgage assigned collaterally, a necessary defendant in foreclosure by the assignor.— A mortgagee who has assigned a mortgage as collateral security for a less amount than the mortgage may, as assignor, file a bill of foreclosure in his own name, especially if the purchaser or assignee holding the mortgage as collateral security refuses to foreclose.[74] As has been seen, the purchaser might have commenced the action and made the mortgagee a defendant, if he refused to become a co-plaintiff;[75] and in that case the assignee would have become a trustee of the surplus.[76] In case the mortgagee, as assignor, commences an action as sole plaintiff, the assignee, if he refuses to become a co-plaintiff, will be a necessary party defendant.[77] This rule is based upon the same principle stated in the preceding section, that the entire interest of the mortgagee must be brought under the jurisdiction of the court. If that part of the mortgagee's interest which is assigned as a collateral security is not represented in the foreclosure by the assignee, the decree of sale will, of course, be defective, and the purchaser will

[73] *Christie* v. *Herrick,* 1 Barb. Ch. (N. Y.) 254.

[74] See *ante,* §§ 104–106, and notes.

[75] *Hoyt* v. *Martense,* 16 N. Y. 231; *Brown* v. *Johnson,* 53 Me. 246. See *ante,* §§ 104–106.

[76] *Norton* v. *Warner,* 3 Edw. Ch. (N. Y.) 106.

[77] *Norton* v. *Warner,* 3 Edw. Ch. (N. Y.) 106; *Simson* v. *Satterlee,* 6 Hun (N. Y.) 305, aff'd 64 N. Y. 657; *McMillan* v. *Gordon,* 4 Ala. 716. So a person who has attached a mortage debt is held a necessary party defendant; *Pine* v. *Shannon,* 30 N. J. Eq. (3 Stew.) 404. To the contrary, unless the sheriff has obtained actual possession of the papers, see *Anthony* v. *Wood,* 19 N. Y. Wk. Dig. 177.

not acquire the whole interest of the mortgagee and the mortgagor.[78]

If the assignee refuses to become a co-plaintiff, and is made a defendant, the reason why he is made a defendant must be alleged in the complaint, or it will be demurrable;[79] if the objection is not taken by demurrer, it will be considered waived. If the defect does not appear upon the face of the complaint, it may be objected to by any party interested in the action, by answer. The same is also true where the action to foreclose is commenced by the assignee, as described in the preceding section, and the assignor or mortgagee is omitted as a party.[80]

§ 203. Joint or several mortgagees; action commenced by one, the others necessary defendants.—Where a joint or several mortgage is foreclosed by one of the mortgagees, and the remaining mortgagees refuse to unite as co-plaintiffs in the action, they are uniformly held necessary defendants,[81] for the reason that their omission fails to give the court complete jurisdiction over the mortgage debt. Thus, a mortgage had been executed to several creditors to secure their respective claims; on foreclosure by some as plaintiffs, who omitted others as parties to the action, the court held that the omitted parties might maintain a separate action for foreclosure, but that all should have been originally brought before the court.[82]

In an action by A. to foreclose a mortgage executed to A.

[78] N. Y. Code Civ. Proc. § 1632.

[79] *Carpenter* v. *O'Dougherty*, 2 T. & C. (N. Y.) 427, N. Y. Code Civ. Proc. § 448.

[80] See *ante*, § 106.

[81] See *ante*, §§ 95–100, and notes. See also *Denison* v. *League*, 16 Tex. 399, 409; *Porter* v. *Clements*, 3 Ark. 364, 380; *Vickers* v. *Cowell*, 1 Beav. 529. Fisher, on Mortgages, § 349. In *Lovell* v. *Farrington*, 50 Me. 239, one of two mortgagors refusing to join as a co-plaintiff in an action to redeem was held a necessary defendant.

[82] *Howe* v. *Dibble*, 45 Ind. 120. See *Tyler* v. *Yreka Water Co.* 14 Cal. 212, on the necessity of making them parties; *Nashville & D. R. R. Co.* v. *Orr*. 85 U. S. (18 Wall.) 471, 22 L. ed. 810.

and B., for a note given to A. alone, B. was held a necessary party;[83] and where a mortgage is given by one of two joint obligors on a note, it is erroneous to file the bill against the mortgagor alone; the other joint maker of the note is a necessary defendant.[84] The holder of one or more of a number of notes secured by a mortgage, is generally a necessary defendant in an action for foreclosure brought by the holder of any other note, providing he does not join as a co-plaintiff; this is specially true if the holder of the note has any interest in the mortgage.[85] If no interest in the mortgage passes with the transfer of the note, the holder of the note is deemed an unnecessary party in some states.[86]

In the foreclosure of a joint mortgage by the survivor of the mortgagees, the personal representatives of the decedent are not necessary defendants under the doctrine of survivorship in joint tenancy.[87] The rule is otherwise where the mortgage is held by parties in severalty.[88] Where a mortgage was executed to a husband and wife, and the husband died and his administrator assigned it, without the wife joining

[83] *Chrisman* v. *Chenoweth,* 81 Ind. 401.

[84] *Dedrick* v. *Barber,* 44 Mich. 19. See *Fond du Lac Harrow Co.* v. *Haskins,* 51 Wis. 135.

[85] In *Pettibone* v. *Edwards,* 15 Wis. 95, an action was brought on the last of three notes for the foreclosure of a mortgage, and the holder of the second note was held a necessary defendant. See also *Gratton* v. *Wiggins,* 23 Cal. 16; *Lietze* v. *Claybaugh,* 59 Ill. 136; *Preston* v. *Hodgen,* 50 Ill. 56; *Myers* v. *Wright,* 33 Ill. 284; *Murdock* v. *Ford,* 17 Ind. 52. In *Rankin* v. *Major,* 9 Iowa, 297, 300, two notes were made to A. B. & Co. and secured by a mortgage; one was sold to J. W. R.; A. B. & Co. and J. W. R. united as co-plaintiffs to foreclose. The court held that there was a misjoinder of plaintiffs, and that one of them should have been made a defendant. Seemingly *contra,* see *Harris* v. *Harlan,* 14 Ind. 439; *Hensley* v. *Whiffin,* 54 Iowa, 555; *Thayer* v. *Campbell,* 9 Mo. 277. But see *ante,* §§ 101–103, and notes, citing the cases fully and stating the rule in different states.

[86] *Hensley* v. *Whiffin,* 54 Iowa, 555; *Kemerer* v. *Bournes,* 53 Iowa, 172; *Bell* v. *Shrock,* 2 B. Mon. (Ky.) 29; *Pugh* v. *Holt,* 27 Miss. 461; *Archer* v. *Jones,* 26 Miss. 583.

[87] *Lannay* v. *Wilson,* 30 Md. 536. See *ante,* §§ 98, 99, and notes, for a full presentation of this question.

[88] See *ante,* §§ 97, 100, and notes.

in the assignment, she was held a necessary defendant in an action brought by the assignee for foreclosure.[89]

§ 204. Contemporary and equal mortgagees; foreclosure commenced by one, others necessary defendants.—Where two or more mortgages, held by different parties, are contemporary and equal liens upon premises, the commencement of a foreclosure by the owner of any of the mortgages as sole plaintiff, will render the remaining mortgagees necessary defendants in the action.[90] This rule is based upon the fact that the courts regard the owners of such mortgages the same as they would the owners of a single mortgage given to secure in severalty the respective amounts of the different contemporary mortgages.

§ 205. Foreclosure by holder of note—Independent mortgagee necessary party.—Where a mortgage and the note secured thereby are owned independently, the mortgagee is a necessary party to an action brought by the holder of the note to foreclose the mortgage.[91]

§ 206. Ownership of mortgage doubtful or in dispute; action commenced by one claimant, other claimants advisable defendants.—Whenever the ownership of a mortgage is in dispute, or parties other than those to the instrument claim an interest in it, it is the best practice to bring all

[89] *Savings Bank* v. *Freese,* 26 N. J. Eq. (11 C. E. Gr.) 453. See *ante,* §§ 98, 99.

[90] *Decker* v. *Boice,* 83 N. Y. 215; *Cain* v. *Hanna,* 63 Ind. 408; *Cochran* v. *Goodell,* 131 Mass. 464. See *Eleventh Ward Savings Bank* v. *Hay,* 55 How. (N. Y.) Pr. 444. In *Greene* v. *Warnick,* 64 N. Y. 220, reversing 4 Hun (N. Y.) 703, it was also held that, where there was an agreement that two mortgages executed at the same time to different parties should be equal liens, the fact that one was recorded first gave it no priority, even in the hands of a *bona fide* assignee who bought it relying upon the record and believing it to be the first lien. For a full list of cases upon the subject of the section, see *ante,* § 116.

[91] *Sweeney* v. *Hill,* 65 Kan. 826, 70 P. 868.

claimants within the jurisdiction of the court, that all interests may be bound by the decree, and the mortgage completely foreclosed.[92] It often occurs that the legal title to a mortgage is held by one person and the equitable title by another. Thus, where a defendant answers that no valid assignment was made to the plaintiff, he may amend, making his assignor a defendant to determine the question.[93]

§ 207. Trustees and beneficiaries sometimes necessary defendants.—In the foreclosure of a trust mortgage by the trustee as plaintiff, it may be stated as a general rule that the beneficiaries or *cestuis que trust* are necessary defendants, unless they are joined as co-plaintiffs in the action.[94] Likewise, if the action is commenced by a beneficiary, the trustees and other beneficiaries are necessary defendants, unless joined as co-plaintiffs.[95] There are some exceptions to these rules, especially in the case of railroad mortgages and where the beneficiaries are very numerous.[96] In a New York case,

[92] See *Kellogg* v. *Smith,* 26 N. Y. 18; *Hancock* v. *Hancock,* 22 N. Y. 568; *Peck* v. *Mallams,* 10 N. Y. 509; *Lawrence* v. *Lawrence,* 3 Barb. Ch. (N. Y.) 71; *Slee* v. *Manhattan,* 1 Paige Ch. (N. Y.) 48. See *post,* chap. ix. See *Doherty* v. *Doherty,* 131 Wis. 375, 111 N. W. 478.

It is said by the supreme court of Iowa, in the case of *Kennedy* v. *Moore,* 91 Iowa, 39, 58 N. W. 1066, that a mortgagor and maker of a promissory note secured by the mortgage is entitled to have the mortgagee and payee of the note made a party defendant to an action by another for judgment on the note and for the foreclosure of the mortgage, where the plaintiff claims title to the mortgage and the note under an oral assignment, which title is disputed by such mortgagee and payee.

[93] *Burrows* v. *Stryker,* 47 Iowa, 477.

[94] *Large* v. *VanDoren,* 14 N. J. Eq. (1 McCart.) 208; *Davis* v. *Hemingway,* 29 Vt. 438; *Barkley* v. *Reay,* 2 Hare, 306; Fisher on Mortgages, § 375 *et seq.* Contra. in *Maryland,* see *Hays* v. *Dorsey,* 5 Md. 99, 59 Am. Dec. 101, under the act of 1833, chap. 181; *Waring* v. *Turton,* 44 Md. 535. See *ante,* §§ 127–132, where the cases are cited fully.

[95] *Dorsey* v. *Thompson,* 37 Md. 25; *Hackensack Water Co.* v. *DeKay,* 36 N. J. Eq. (9 Stew.) 549; *Hays* v. *Lewis,* 21 Wis. 663. See *ante,* § 132.

[96] *Swift* v. *Stebbins,* 4 Stew. & P. (Ala.) 447. See *ante,* §§ 127–132.

where a mortgage was made to a person in trust for the payment of several bonds of the mortgagor held by different individuals, the bondholders were held necessary parties to an action brought by the trustee as sole plaintiff.[97]

The supreme court of Missouri, in the case of Williams v. Brownlee,[98] say that where, between the giving of a mortgage to a county to secure school moneys borrowed to pay the purchase price of swamp lands purchased from the county, and the execution of a deed of such lands to the purchaser by the county commissioner, the purchaser executed a deed of trust of the land to secure a debt to another, a failure to make the grantee in the trust deed a party to a foreclosure of the mortgage will have no other effect than to allow those claiming under the trust deed to redeem, and constitutes no defence to an action of ejectment brought by the county, which purchased at the foreclosure sale.

[97] *King* v. *The Merchants' Exchange Co.* 5 N. Y. 547, 556. And see *Turner* v. *Midland R. R. Co.* 24 N. Y. Wk. Dig. 239; *The Mercantile Trust Co.* v. *The Rochester & Ont. Belt R. Co.* 20 N. Y. Wk. Dig. 508.

[98] 101 Mo. 309, 13 S. W. 1049.

CHAPTER IX.

PARTIES DEFENDANT—PRIOR MORTGAGEES AND ADVERSE CLAIMANTS.

§ 208. Introductory.
§ 209. When prior mortgagees and lienors cannot be made defendants.
§ 210. Rights of senior and junior mortgagees to maintain a foreclosure.
§ 211. When prior mortgagees and lienors may be made defendants.
§ 212. Parties having a title paramount to the mortgage, neither proper nor necessary defendants.
§ 213. Adverse claimants neither proper nor necessary defendants.
§ 214. Senior mortgagees or incumbrancers, claimed to be junior lienors, proper defendants for litigating questions of priority.

§ 208. Introductory.—It has been repeatedly stated in this work, upon the authority of numerous cases, that the only proper or necessary parties to the foreclosure of a mortgage are the mortgagor and the mortgagee and those persons who have acquired rights under them subsequent to the mortgage. But aside from this general rule, there are cases in which it is proper to make others than such parties defendants to the foreclosure, for the purpose of fully determining the issues involved, or for other purposes which the plaintiff may desire to accomplish. It sometimes happens that it is material to the interests of the mortgagee to make a prior mortgagee or lienor a defendant to the action, for the purpose of ascertaining the exact amount of his incumbrance and of having it paid from the proceeds of the sale; a contest as to priority between mortgages upon the same premises, can be litigated most directly in an action to foreclose, if all the mortgagees are brought within the jurisdiction of the court; and at one time there was a great deal of doubt, as to whether adverse claimants should not be made defendants to a foreclosure for the purpose of settling their claims.

These and other questions as to who can rightly be made parties to a foreclosure for a full determination of all the issues involved are presented to every practicing attorney. It is the design of this chapter to notice briefly these miscellaneous matters.

§ 209. When prior mortgagees and lienors cannot be made defendants.—It may be stated as a general rule that persons holding mortgages or liens prior to the mortgage under foreclosure are neither necessary nor proper parties to the action.[99] A foreclosure is an equitable action *in rem*,

[99] *Adams* v. *McPartlin*, 11 Abb. (N. Y.) N. C. 369; *Hamlin* v. *McCahill*, Clarke Ch. (N. Y.) 249; see the note to this case, citing numerous authorities. See *Emigrant Industrial Savings Bk.* v. *Goldman*, 75 N. Y. 127, 131; *Brown* v. *Volkening*, 64 N. Y. 76, 84; *Frost* v. *Koon*, 30 N. Y. 428, 444; *Hancock* v. *Hancock*, 22 N. Y. 568; *Eagle Fire Ins. Co.* v. *Lent*, 6 Paige Ch. (N. Y.) 635. See *Chapman* v. *West*, 17 N. Y. 125, where the action was to establish a land contract; *Lewis* v. *Smith*, 9 N. Y. 502, 61 Am. Dec. 706, aff'g 11 Barb. (N. Y.) 152; *Bank of Orleans* v. *Flagg*, 3 Barb. Ch. (N. Y.) 316; *Holcomb* v. *Holcomb*, 2 Barb. (N. Y.) 20; *Smith* v. *Roberts*, 62 How. (N. Y.) Pr. 196, 200; aff'd 91 N. Y. 470, 477; *Payne* v. *Grant*, 23 Hun (N. Y.) 134; *Vanderkemp* v. *Shelton*, 11 Paige Ch. (N. Y.) 28; *Western Ins. Co.* v. *Eagle Fire Ins. Co.* 1 Paige Ch. (N. Y.) 284. See also *Koch* v. *Purcell*, 45 N. Y. Supr. Ct. (13 J. & S.) 162, 173; also *Hotchkiss* v. *Clifton Air Cure*, 4 Keyes (N. Y.) 170, explaining the remedy of a bidder at the sale, when the referee varies the terms of sale from the directions of the judgment. In point, *White* v. *Holman*, 32 Ark. 753; *Broward* v. *Hoeg*, 15 Fla. 370; *Pattison* v. *Shaw*, 6 Ind. 377; *Tome* v. *Mer. Loan Co.* 34 Md. 12; *Dawson* v. *Danbury Bank*, 15 Mich 489; *Hudnit* v. *Nash*, 16 N. J. Eq. (1 C. E. Gr.) 550; *Williamson* v. *Probasco*, 5 N. J. Eq. (4 Halst.) 571; *Forrer* v. *Kloke*, 10 Neb. 373, 377; *Warren* v. *Burton*, 9 S. C. 197; *Weed* v. *Beebe*, 21 Vt. 495, 502; *Jerome* v. *McCarter*, 94 U. S. (4 Otto), 734, 736, 24 L. ed. 136, 137; *Hagan* v. *Walker*, 55 U. S. (14 How.) 29, 37, 14 L. ed. 312, 316. See Fisher on Mortgages, §§ 350–353, and the English cases cited. Contra, see *Case* v. *Bartholow*, 21 Kan. 300. *Crawford* v. *Mumford*, 29 Ill. App. 445; *Foster* v. *Johnson*, 44 Minn. 290, 46 N. W. 350; *Stratton* v. *Reisdorph*, 35 Neb. 314, 53 N. W. R. 136; *Lambertville Nat. Bank* v. *McCready Bag & Paper* Co. (N. J. Ch.) 15 Atl. 388, 1 L.R.A. 334; *Scott* v. *Somers* (N. J. Ch.) 9 Atl. 718; *Hague* v. *Jackson*, 7 Tex. 761, 12 S. W. 63; *Foster* v. *Johnson*, 44 Minn. 290, 49 N. W. 390; *Boatmen's Bank of St. Louis* v. *Fritzlen*, 135 Fed.

designed to extinguish the mortgage and to cut off all liens which are subsequent to it upon the premises, and not to affect in any way the title to the premises or the liens upon it prior to the execution of the mortgage. It is the general practice, where persons holding prior mortgages are not made defendants and no provision as to their rights is made in the judgment, to sell the premises subject to such mortgages; no portion of the proceeds of the sale can be applied to their payment.[1] A decree of sale can generally have no effect upon the rights of prior lienors, whether they are made parties to the action or not.[2] The proposition of this section also applies where the prior lien is a judgment[3] or a me-

650, 68 C. C. A. 288; *McClure* v. *Adams,* 76 Fed. 899; *Hibernian Banking Asso.* v. *Law, as adm'r, etc.* 88 Ill. App. 18; *Garza* v. *Howell,* 37 Tex. Civ. App. 585, 85 S. W. 461; *Big Sandy Lumber Co.* v. *Kuteman,* 41 S. W. 172 (Tex. Civ. App.); *Porter* v. *Hamil,* 95 Ark. 97, 128 S. W. 570.

Bondholders under a trust mortgage given to secure their bonds, are not necessary parties to a suit to foreclose a second mortgage, when the holder of the trust mortgage, which is a first lien, is made a party defendant. *Lambertville National Bank* v. *McCready Bag & Paper Co.* 15 Atl. 388 (N. J. Chan.) 1 L.R.A. 334.

In a case in New York where in the foreclosure of a junior mortgage a senior mortgagee was made a party defendant, and the answer set up facts essential to foreclosure its mortgage, and demanded judgment, the deferee directed judgment of foreclosure of both mortgages, with a provision that the property embraced in the junior mortgage be sold as an entirety, subject to said senior mortgage, and that unless the purchaser should pay the amount secured by the latter, with costs, the property covered by it should be sold separately to pay off the amount due, with costs. The court held that the plaintiff was at liberty to make the senior mortgagee a party defendant; that the claim of the senior mortgagee came within the New York Code (Code Civ. Proc. § 501), defining counterclaim; that the practice observed and the judgment rendered did not contravene the statute providing for the foreclosure of mortgages by action and sale of premises pursuant to judgment therein. *Metropolitan Trust Co.* v. *Tonawanda Valley & C. R. Co.* 106 N. Y. 673, 13 N. E. 937.

[1] *Bache* v. *Doscher,* 67 N. Y. 429.

[2] See the cases *supra; Smith* v. *Roberts,* 91 N. Y. 470, 477.

[3] *Frost* v. *Koon,* 30 N. Y. 428, 444; *Kent* v. *Popham,* 6 N. Y. Civ. Proc. 337, holding that complaint should be dismissed as to judgment creditor, with costs.

chanic's lien.[4] A prior lienor cannot properly be made a defendant to an action to foreclose or enforce a mechanic's lien.[5]

Where a prior mortgagee is made a party defendant to an action to foreclose a subsequent mortgage, he may ask to be dismissed with his costs,[6] but should the prior incumbrancer, instead of asking to be dismissed, consent to a sale, and to take his principal and interest out of the receipts, he must, as he thereby adopts the suit and takes the benefit of it, contribute to the costs; and for this reason the costs of all parties will be paid out of the fund, even though there may not be enough left to pay the prior incumbrancer his principal and interest.[7]

§ 210. Rights of senior and junior mortgagees to maintain a foreclosure.—In a recent case it appeared that after a junior mortgagee had commenced an action to foreclose, the prior mortgagee also commenced a foreclosure, making a defendant the junior mortgagee, who answered that an action was pending for the foreclosure of the junior mortgage to which the prior mortgagee had been made a defendant, and asked the foreclosure of the prior mortgage as well as the foreclosure of his own; the court held after reviewing the authorities at length, that the fact that the prior mortgagee was made a defendant to the foreclosure of a junior mortgage did not affect his rights at all, and that he might disregard the foreclosure of the junior mortgage and prosecute his own foreclosure to a sale.[8] If a prior mortgagee who has been

[4] *Emigrant Industrial Savings Bank* v. *Goldman,* 75 N. Y. 127, 132.

[5] *Emigrant Industrial Savings Bank* v. *Goldman,* 75 N. Y. 127, 132; *Holcomb* v. *Holcomb,* 2 Barb. (N. Y.) 20; *Vanderkemp* v. *Shelton,* 11 Paige Ch. (N. Y.) 28; *Smith* v. *Schaffer,* 46 Md. 573.

[6] *Scott* v. *Somers,* 9 Atl. 718, Daniell, Ch. Pl. & Pr. 1390, (N. J. Ch.)

[7] *Scott* v. *Somers,* 9 Atl. 718 (N. J. Ch.); *Scattergood* v. *Keeley,* 40 N. J. Eq. (13 Stew.) 491; Daniell Ch. Pl. & Pr. 1390.

[8] *Adams* v. *McPartlin,* 11 Abb. (N. Y.) N. C. 369. See *Straight* v. *Harris,* 14 Wis. 509; *Strobe* v. *Downer,* 13 Wis. 10, 80 Am. Dec. 709.

made a defendant to the foreclosure of a junior mortgage dies, or his interest devolves on another pending the action, the proceeding may go on without reviving or continuing it against his personal representative or successor, as he was not a necessary party to the foreclosure.[9]

Where in an action to foreclose a mortgage one having a subsequent mortgage is made a party defendant, and such party is also the owner of mortgages prior to that of the plaintiff, he may answer in the action and ask to have such prior mortgages paid out of the proceeds of the sale before applying any portion thereof to the satisfaction of the plaintiff's mortgage.[10] In New York it is the usual practice, where prior incumbrancers are improperly made parties to a foreclosure, to order the action to be dismissed as to such defendants upon their application, without prejudice to their or the plaintiff's rights in any other proceeding.[11] If the action is not dismissed as to them, their rights may be expressly reserved in the decree;[12] or they may disregard the action, as the decree can have no effect whatever upon their rights.[13]

§ 211. When prior mortgagees and lienors may be made defendants.—As an exception to the proposition of the two preceding sections, a prior incumbrancer by mortgage, judgment or otherwise, may be made a defendant to the foreclosure of a junior mortgage for the purpose of having the amount of his claim ascertained and paid out of the proceeds of the sale;[14] but such a purpose must be specifically indi-

[9] *Hancock* v. *Hancock,* 22 N. Y. 568.

[10] *Doctor* v. *Smith,* 16 Hun (N. Y.) 245.

[11] *Corning* v. *Smith,* 6 N. Y. 82; *Kent* v. *Popham,* 6 N. Y. Civ. Proc. 337.

[12] *San Francisco* v. *Lawton,* 18 Cal. 465, 79 Am. Dec. 187. See *Wilkerson* v. *Daniels,* 1 G. Greene (Iowa) 179.

[13] See the cases cited in the first note to § 209 *ante.*

[14] *Guilford* v. *Jacobie,* 69 Hun (N. Y.) 420, 23 N. Y. Supp. 462, 52 N. Y. S. R. 837; *Metropolitan Trust Co.* v. *Tonawanda Valley & C. R. Co.* 43 Hun (N. Y.) 521, aff'd.

cated and the prior claim set forth in full in the complaint;[15] even in such a case it will be impossible to compel the prior lienor to accept payment from the proceeds of the sale unless his lien has matured and is due and payable,[16] and it is

106 N. Y. 673; *Jacobie* v. *Mickle,* 24 N. Y. Supp. 87, 53 N. Y. S. R. 620; *First National Bank of Salem* v. *Salem Capital Flour Mills Co.* 31 Fed. 580.

A second mortgagee may properly make the prior mortgagee a party defendant, where his mortgage is past due, and as to the amount of which there is no controversy, and have the amount of such mortgage determined and paid out of the proceeds of the sale and its lien discharged. *Guilford* v. *Jacobie,* 69 Hun (N. Y.) 420, 52 N. Y. S. R. 837, 23 N. Y. Supp. 462.

Thus it has been said that in an action to foreclose a mortgage given by a railroad company, senior incumbrancers may be made parties defendant; and where their claims embrace a cause of action, both against the plaintiff and against some of their co-defendants, and are connected with the subject of the action, their answers must set up their claims as counterclaims, and demand affirmative relief. *Metropolitan Trust Co.* v. *Tonawanda Valley & C. R. Co.* 43 Hun (N. Y.) 521, affd. 106 N. Y. 673.

When a prior mortgagee is made a party he has a right to file and maintain a cross-bill for the purpose of having the lien of his mortgage enforced, and procuring a determination of any question concerning its priority or validity that can arise and be litigated between himself and any or all of the parties to the original bill. *First National Bank of Salem* v. *Salem Capital Flour Mills Co.* 31 Fed. 580. In those cases where a prior mortgagee is made a party to the foreclosure of a subsequent mortgage, and he does not answer or demur, he is bound by the judgment rendered therein, directing payment of his mortgage out of the first proceeds, and cannot maintain an action for foreclosure of his mortgage. *Jacobie* v. *Mickle,* 53 N. Y. S. R. 620, 24 N. Y. Supp. 87. The New Jersey courts hold that the personal representatives of the deceased assignee of a prior undischarged trust mortgage are proper parties defendant to a suit to foreclose a second mortgage. *Lambertville National Bank* v. *McCready Bag & Paper Co.* 15 Atl. 388 (N. J. Chan.) 1 L.R.A. 334.

[15] *Smith* v. *Davis,* 4 N. Y. Civ. Proc. 158, discussing the point in a note and citing many cases; *Smith* v. *Roberts,* 91 N. Y. 470; *Emigrant Industrial Savings Bank* v. *Goldman,* 75 N. Y. 127, 132; *Metropolitan Trust Co.* v. *Tonawanda R. R. Co.* 18 Abb. (N. Y.) N. C. 368; *Holcomb* v. *Holcomb,* 2 Barb. (N. Y.) 20; *Vanderkemp* v. *Shelton,* 11 Paige Ch. (N. Y.) 28; Fisher on Mortgages, §§ 350–353.

[16] *Frost* v. *Yonkers Savings Bank,* 70 N. Y. 553, 557, 26 Am. Rep. 627; *Hamlin* v. *McCahill,* Clarke Ch. (N. Y.) 249; *Western Reserve*

doubtful whether a court will then decree the payment of a prior lien from the proceeds of the sale, unless the prior lienor has appeared and consented to the decree.[17] It is not advisable to make a prior mortgagee a party to the suit, unless he previously indicates a willingness to have the whole title sold under the foreclosure and to have all incumbrances paid out of the proceeds in the order of their priority.[18]

It is believed that in a proper case the English rule concerning prior mortgages will be followed in our courts. Under this rule, if a subsequent mortgagee desires to sell the whole estate, he can make the prior mortgagee or lienor a party to the suit and require him to consent to such a sale or to refuse it at once. If he consents, a sale of the whole estate will be decreed; otherwise, the decree will be for a sale subject to his prior lien, the exact amount, terms and conditions of which can be ascertained in the suit and made known at the sale, so that a purchaser can know accurately the incumbrances subject to which he is buying the title.[19]

Bank v. *Potter,* Clarke Ch. (N. Y.) 439; *Western Ins. Co.* v. *Eagle Fire Ins. Co.* 1 Paige Ch. (N. Y.) 284.

[17] *White* v. *Holman,* 32 Ark. 753; *Norton* v. *Joy,* 6 Ill. App. 406; *Warner* v. *Dewitt Co. Bank,* 4 Ill. App. 305; *Persons* v. *Alsip,* 2 Ind. 67; *Troth* v. *Hunt,* 8 Blackf. (Ind.) 580; *Clarke* v. *Prentice,* 3 Dana (Ky.) 469; *Champlin* v. *Foster,* 7 B. Mon. (Ky.) 104; *Waters* v. *Bossel,* 58 Miss. 602; *Hudnit* v. *Nash,* 16 N. J. Eq. (1 C. E. Gr.) 550; *Roll* v. *Smalley,* 6 N. J. Eq. (2 Halst.) 464; *Evans* v. *McLucas,* 12 S. C. 56; *Raymond* v. *Holborn,* 23 Wis. 57, 99 Am. Dec. 105; *Jerome* v. *McCarter,* 94 U. S. (4 Otto) 734, 24 L. ed. 136; *Hagan* v. *Walker,* 55 U. S. (14 How.) 29, 37, 14 L. ed. 312, 316; *Finley* v. *Bank of United States,* 24 U. S. (11 Wheat.) 304, 6 L. ed. 480. See *Dunn* v. *Raley,* 58 Mo. 134, as to what allegations must be made in the complaint; *Gargan* v. *Grimes,* 47 Iowa, 180; *Anonymous,* 8 N. J. Eq. (4 Halst.) 174. See also *Tootle* v. *White,* 4 Neb. 401, in point. If the prior mortgagee consents to a sale, he cannot afterward commence a foreclosure of his own mortgage; *Rowley* v. *Williams,* 5 Wis. 151.

[18] *Vanderkemp* v. *Shelton,* 11 Paige Ch. (N. Y.) 28; *Clarke* v. *Prentice,* 3 Dana (Ky.) 469; *Champlin* v. *Foster,* 7 B. Mon. (Ky.) 104; *Ducker* v. *Belt,* 3 Md. Ch. 13; *Rucks* v. *Taylor,* 49 Miss. 552; *Miller* v. *Finn,* 1 Neb. 254.

[19] *Langton* v. *Langton,* 7 DeG., M. & G. 29; *Wickenden* v. *Rayson,* 6 DeG., M. & G. 210; *Parker* v. *Fuller,* 1 Russ & M. 656; *Delabere* v. *Norwood,* 3 Swans, 144 *n.* See *Bigelow* v. *Cassedy,* 26 N. J. Eq.

In Indiana, contrary to the practice in nearly all other states, a prior incumbrancer is held a proper party to the foreclosure of a junior mortgage, and when made a party will be bound by the decree;[20] so also in Nebraska, if the prior mortgage is due.[21]

§ 212. Parties having a title paramount to the mortgage, neither proper nor necessary defendants.—Persons who own an interest in mortgaged premises paramount to the mortgage, are neither necessary nor proper parties to its foreclosure, for the reason that they did not acquire their rights under the mortgagor or the mortgagee, subsequent to the execution of the mortgage.[22] Whether they are made parties or not, the decree in the action will not in any way

(11 C. E. Gr.) 557; *Potts* v. *N. J. Arms Co.* 17 N. J. Eq. (2 C. E. Gr.) 516; *Gihon* v. *Belleville Co.* 7 N. J. Eq. (3 Halst.) 531; *Jerome* v. *McCarter,* 94 U. S. (4 Otto) 734, 736, 24 L. ed. 136, 137, and the cases cited in the opinion. See also *Perdicaris* v. *Wheeler,* 8 N. J. Eq. (4 Halst.) 68; *Persons* v. *Merrick,* 5 Wis. 231.

[20] *Masters* v. *Templeton,* 92 Ind. 447, citing numerous Indiana cases, also holds that claims adverse to the title may be litigated in a foreclosure; *Merritt* v. *Wells,* 18 Ind. 171.

[21] *White* v. *Bartlett,* 14 Neb. 320.

[22] *Lewis* v. *Smith,* 9 N. Y. 502, 514, 61 Am. Dec. 706, affirming 11 Barb. (N. Y.) 153; *Walsh* v. *Rutgers,* 13 Abb. (N. Y.) Pr. 33; *Rathbone* v. *Hooney,* 58 N. Y. 463, 467; *Merchants' Bank* v. *Thompson,* 55 N. Y. 711; *Lee* v. *Parker,* 43 Barb. (N. Y.) 611, 614; *Hamlin* v. *McCahill,* Clarke Ch. (N. Y.) 249, and the note; *Bram* v. *Bram,* 34 Hun (N. Y.) 487, 491; *Gage* v. *Perry,* 93 Ill. 176; *McAlpin* v. *Zitzer,* 119 Ill. 273; *Wilkinson* v. *Green,* 34 Mich. 221; *Comstock* v. *Comstock,* 24 Mich. 39; *Horton* v. *Ingersoll,* 13 Mich. 409; *Wurcherer* v. *Hewett,* 10 Mich. 453; *McClure* v. *Holbrook,* 39 Mich. 42; *Price's Ex'rs* v. *Lawton,* 27 N. J. Eq. (12 C. E. Gr.) 325, citing numerous cases; *Hekla Fire Ins. Co.* v. *Morrison,* 56 Wis. 133, citing numerous cases; *Macloon* v. *Smith,* 49 Wis. 200; *Palmer* v. *Yager,* 20 Wis. 91; *Pelton* v. *Farmin,* 18 Wis. 222. See the cases cited in the following section. See *Tinsley* v. *Atlantic Mines Co.* 20 Colo. App. 61, 77 P. 12.

But it has been held that where the deed under which title is claimed was not recorded until after the mortgage was given, although before foreclosure, those claiming by title paramount are necessary parties. *Goodwin* v. *Tyrrell,* 8 Ariz. 238, 71 P. 906, 72 P. 681.

affect their rights. Thus a widow, who did not sign a mortgage executed by her husband, should not be made a defendant to its foreclosure; and even if she is made a defendant, her rights will not be affected in any way by the decree.[23] This is specially true if the complaint does not contain allegations setting forth her real rights in the property and asking to have them foreclosed; and even with such allegations in the complaint, it was held in one case that the judgment passing upon her rights and foreclosing them was erroneous and void.[24]

A person claiming dower by title paramount to the mortgage cannot be brought into court on a foreclosure and made to contest the validity of her dower. Whether she is made a party or not, her rights will remain unaffected by the action; the sale should be made subject to her dower. This rule also applies to persons holding an estate in remainder or reversion, where the life estate or the intermediate interests of the beneficiary have been mortgaged.[25]

Where the mortgage is on a lease-hold interest, the lessor is neither a necessary nor a proper party defendant, the validity of the lease not being questioned.[26]

It is a well settled rule that the determination of the rights in the property mortgaged, as between adverse legal claimants, is not proper in a foreclosure suit.[27] Hence it has been held that on a bill to foreclose a mortgage, one who claims title

[23] *Lewis* v. *Smith,* 9 N. Y. 502, 514, 61 Am. Dec. 706, affirming 11 Barb. (N. Y.) 153; *Merchants' Bank* v. *Thomson,* 55 N. Y. 7, 11; *Lanier* v. *Smith,* 37 Hun (N. Y.) 529.

[24] *Merchants' Bank* v. *Thomson,* 55 N. Y. 7, 11; *Payn* v. *Grant,* 23 Hun (N. Y.) 134; *Bradley* v. *Parkhurst,* 20 Kan. 462; *Lounsbury* v. *Catron,* 8 Neb. 469; *Shellenbarger* v. *Biser,* 5 Neb. 195; *Wicke* v. *Lake,* 21 Wis. 410, 94 Am. Dec. 552; *Roche* v. *Knight,* 21 Wis. 324. See *Pool* v. *Horton,* 45 Mich. 404.

[25] *Rathbone* v. *Hooney,* 58 N. Y. 463, 467. See *Standish* v. *Dow,* 21 Iowa, 363, a case of trust.

[26] *Davis* v. *Taylor, Lowenstein & Co.* 158 Ala. 227, 47 So. 653.

[27] *Davis* v. *Hamilton,* 53 Ill. App. 94. See *Hambrick* v. *Russell,* 86 Ala. 199, 5 So. 298; *Randall* v. *Duff,* 79 Cal. 115, 21 Pac. 610, 3 L.R.A. 756; *Dickerson* v. *Uhl,* 71 Mich. 398, 39 N. W. 472; *Cromwell* v. *MacLean,* 123 N. Y. 474, 25 N. E. 932, 34 N. Y. S. R. 85.

from a stranger, or even from the mortgagor anterior to the date of the mortgage, cannot be brought in as a party defendant to litigate his title.[28]

It has been said the rule that one claiming mortgaged property by a paramount and hostile title need not be made a party to proceedings to foreclose the mortgage applies only where such title is paramount to the claim of both mortgagor and mortgagee.[29] The general rule is that questions as to whether a defendant in a foreclosure suit has rights paramount and adverse to the plaintiff are not questions of jurisdiction over the parties or subject-matter; and any irregularity in the investigation and adjudication of such questions may be waived by failing to make objection at the proper time, in which case the court has the right to pass upon the questions.[30]

§ 213. Adverse claimants neither proper nor necessary defendants.—It is now an established rule in practice that a foreclosure suit is not a proper action in which to litigate the rights of persons who claim title to mortgaged premises in hostility to the mortgagor.[31] In New York it has been

[28] *Hambrick* v. *Russell,* 86 Ala. 199, 5 So. 298; *Dickerson* v. *Uhl,* 71 Mich. 398, 39 N. W. 472.

Objection against bringing into a foreclosure suit the claimant of an adverse legal title is not one of multifariousness, but of jurisdiction as to the subject-matter, and may be raised at any time, or enforced by the court *sua sponte* without formal suggestion. *Hambrick* v. *Russell,* 86 Ala. 199, 5 So. 298.

[29] *Randall* v. *Duff,* 79 Cal. 115, 21 Pac. 610, 3 L.R.A. 756.

[30] *Cromwell* v. *MacLean,* 123 N. Y. 474, 34 N. Y. S. R. 85, 25 N. E. 932.

[31] *Lewis* v. *Smith,* 9 N. Y. 502, 514, 61 Am. Dec. 706, affirming 11 Barb. (N. Y.) 153; *Frost* v. *Koon,* 30 N. Y. 428, 444; *Corning* v. *Smith,* 6 N. Y. 82; *Bank of Orleans* v. *Flagg,* 3 Barb. Ch. (N. Y.) 316; *Meiggs* v. *Thomson,* 66 How. (N. Y.) Pr. 466; *Payn* v. *Grant,* 23 Hun (N. Y.) 134; *Eagle Fire Co.* v. *Lent,* 6 Paige Ch. (N. Y.) 635, 638. See also *Brown* v. *Volkening,* 64 N. Y. 76, 84; *Marlow* v. *Barlew,* 53 Cal. 456; *Crogan* v. *Minor,* 53 Cal. 15; *San Francisco* v. *Lawton,* 18 Cal. 465, 79 Am. Dec. 187; *Gage* v. *Perry,* 93 Ill. 176; *Gage* v. *Board of Directors,* 8 Ill. App. 410; *Carbine* v. *Sebastian,* 6 Ill. App. 564; *Pancost* v. *Travelers' Ins. Co.* 79 Ind. 172; *Pattison* v. *Shaw,* 6 Ind.

determined that where a party setting up such a claim is made a defendant to the foreclosure of a mortgage, the decree will be held erroneous and will be refused, if it passes upon his rights, though made after a hearing upon the pleadings and proofs.[32] The mortgagee has no right to make one, who claims adversely to the title of the mortgagor and prior to the mortgagee, a party defendant for the purpose of trying the validity of his adverse claim of title.[33]

The bill of foreclosure should be dismissed as to an adverse

377; *Comly* v. *Hendricks,* 8 Blackf. (Ind.) 189; *Wilkinson* v. *Green,* 34 Mich. 221; *Summers* v. *Bromley,* 28 Mich. 125, citing New York cases; *Comstock* v. *Comstock,* 24 Mich. 39; *Wurcherer* v. *Hewitt,* 10 Mich. 453; *Chamberlain* v. *Lyell,* 3 Mich. 448; *Banning* v. *Bradford,* 21 Minn. 308, 18 Am. Rep. 398; *Newman* v. *Home Ins. Co.* 20 Minn. 422; *Bogey* v. *Shute,* 4 Jones (N. C.) Eq. 174; *Lyman* v. *Little,* 15 Vt. 576; *Lange* v. *Jones,* 5 Leigh (Va.) 192; *Peters* v. *Bowman,* 98 U. S. (8 Otto) 56, 25 L. ed. 91; *Dial* v. *Reynolds,* 96 U. S. (6 Otto) 340, 24 L. ed. 644. See *Chicago Theological Seminary* v. *Gage,* 103 Ill. 175; *Shellenbarger* v. *Biser,* 5 Neb. 195; *Coe* v. *N. J. Midland Ry.* 31 N. J. Eq. (4 Stew.) 105. See the cases cited in the preceding section. *Joslin* v. *Williams,* 61 Neb. 859, 86 N. W. 473. See *Ennis* v. *Wolff,* 194 Ill. 420, 62 N. E. 842; *Smith* v. *Redmond,* 134 Iowa, 70, 108 N. W. 461; Contra *Fisher* v. *Cowles,* 41 Kan. 418, 21 Pac. 228; *Busenbark* v. *Park,* 6 Kan. App. 1, 49 P. 682.

The supreme court of South Carolina, in the case of *Hunt* v. *Nolen,* 40 S. C. 284, 18 S. E. 798, say the rule that adverse claimants are not to be made parties to a foreclosure suit for the purpose of litigating their title, as between defendants, does not apply where the interest of the claimant to a portion of the mortgaged premises is not certainly known to any party to the proceedings, and it is assumed only that he has no more than a life estate in the lands, from the fact that a trust deed conveyed only a life estate to the persons under whom he is supposed to have derived title, and the mortgage was given by the defendant for the purchase price of the premises, and such claimant has been in possession of a portion thereof ever since the purchase.

[32] *Lewis* v. *Smith,* 9 N. Y. 502, 514, 61 Am. Dec. 706; *Corning* v. *Smith,* 6 N. Y. 82; *Eagle Fire Co.* v. *Lent,* 6 Paige Ch. (N. Y.) 635.

[33] *Eagle Fire Co.* v. *Lent,* 6 Paige Ch. (N. Y.) 635. See the English authorities cited in this case.

Joslin v. *Williams,* 61 Neb. 859, 86 N. W. 473; *Wolf* v. *Harris,* 20 Tex. Civil App. 99, 48 S. W. 529. See also *Piot, as adm'r, etc.* v. *Davis,* 241 Ill. 434, 89 N. E. 676. Contra *Busenbark* v. *Park,* 6 Kan. App. 1, 49 P. 682.

claimant, unless the plaintiff alleges in his complaint and is prepared to prove, that the facts upon which he relies arose subsequently to the execution of the mortgage.[34] Disputes involving the title to the mortgaged premises, arising out of circumstances ante-dating the execution of the mortgage, cannot be litigated in a foreclosure, but must be tried by ejectment or other suitable action apart from the foreclosure;[35] but where the title was acquired at a tax sale subsequent to the mortgage, the purchaser was held a proper party.[36] It is not right that the mortgagee, in pursuing his remedies, should be delayed or hindered by litigation upon a question of title which does not affect his rights in any way. In Indiana and Kansas, however, adverse claims may be litigated in a foreclosure.[37]

§ 214. Senior mortgagees or incumbrancers, claimed to be junior lienors, proper defendants for litigating questions of priority.—As has been stated in the two preceding sections, parties who claim adversely or paramount to the mortgagor are not even proper defendants in the foreclosure of a mortgage; but parties who claim subsequently to the mortgagor, but adversely and paramountly to the mortgagee, are proper, if not necessary, defendants to a foreclosure for the purpose of litigating questions of priority in lien between the mortgage under foreclosure and their claims.

[34] *Corning* v. *Smith*, 6 N. Y. 82; *Meigs* v. *Thomson*, 66 How. (N. Y.) Pr. 466, 5 N. Y. Civ. Proc. 106, containing an exhaustive note on parties defendant to foreclosures; *Keeler* v. *McNeirney*, 6 N. Y. Civ. Proc. 363.

[35] *Eagle Fire Co.* v. *Lent*, 6 Paige Ch. (N. Y.) 635; *Brundage* v. *Domestic and Foreign Missionary Society*, 60 Barb. (N. Y.) 204, 213; *Keeler* v. *McNeirney*, 6 N. Y. Civ. Proc. 363. See *Price's Ex'rs* v. *Lawton*, 27 N. J. Eq. (12 C. E. Gr.) 325. See *Cady* v. *Purser*, 131 Cal. 552, 82 Am. St. Rep. 391, 63 P. 844.

[36] *Horton* v. *Ingersoll*, 13 Mich. 409; *Carbine* v. *Sebastian*, 6 Ill. App. 564. See *Chicago Theological Sem.* v. *Gage*, 103 Ill. 175. Contra *Adair* v. *Mergentheim*, 114 Ind. 303, 16 N. E. 603; *Roberts* v. *Wood*, 38 Wis. 60.

[37] *Masters* v. *Templeton*, 92 Ind. 447, 451; *Bradley* v. *Parkhurst*, 20 Kan. 462; *Nooner* v. *Short*, 20 Kan. 624.

This rule allows such questions only as affect the rights of the mortgagee to be brought into the action for litigation.[38] "Whether a defendant's equities are prior and superior to the rights of the plaintiff under his mortgage, or junior and subordinate thereto, must necessarily be determined in the judgment for a foreclosure of the plaintiff's mortgage. The defendant is not contesting the title of the mortgagor, but simply asserts a right under him prior in point of time to the mortgage. The question of the priority between the two is necessarily involved in the action and proper to be determined in it." [39]

If a mortgagee or incumbrancer claiming priority is not made a defendant, his rights will be in no way affected by the action. It is often necessary to bring additional parties into the action for a complete determination of the questions involved in the issue; in such cases the application may be made by the plaintiff or the defendant, or the court on its own motion may order such parties as it deems necessary to be brought within its jurisdiction, but it must be a fact in each case that the party who is brought into court claims some right or interest that is adverse to the claims of the mortgagee foreclosing The practice of making a defendant to a foreclosure every party who claims an interest in the mortgage or in the premises, in order to make a complete

[38] *Brown* v. *Volkening,* 64 N. Y. 76, 84; *Bank of Orleans* v. *Flagg,* 3 Barb. Ch. (N. Y.) 316; *Payn* v. *Grant,* 23 Hun (N. Y.) 134; *Krutsinger* v. *Brown,* 72 Ind. 466; *Cochran* v. *Goodell,* 131 Mass. 464; *Dawson* v. *Danbury* Bank, 15 Mich. 489, 495; *Hoppock* v. *Ramsey,* 28 N. J. Eq. (1 Stew.)414; *Board of Supervisors* v. *Mineral Point R. R.* 24 Wis. 93. See also *Timmerman* v. *Cohn,* 70 Misc. 327, 128 N. Y. Supp. 770.

The Illinois court of appeals, in the case of *Foval* v. *Benton,* 48 Ill. App. 638, say that a mortgagee of lands who is made a party defendant in an action to foreclose a subsequent mortgage, under an allegation that her interest, if any, has accrued subsequent to the lien of plaintiff's mortgage, is not bound to set up her prior incumbrance under such action, for the reason that her rights are not affected by a decree therein.

[39] *Brown* v. *Volkening,* 64 N. Y. 76, 84, *per* Allen, J.

determination or settlement of all questions affecting the mortgage or the premises, is broadening and increasing in its application by the courts of all our states.

In New York it is provided that "any person may be made a defendant, who has or claims an interest in the controversy, adverse to the plaintiff, or who is a necessary party defendant, for the complete determination or settlement of a question involved therein." [40]

Whenever the plaintiff desires to litigate questions of priority which may affect his mortgage, he must state his claims specifically in his complaint and demand separately the judgment of priority to which he believes himself entitled. Likewise, the defendant must raise by answer all of his claims to priority, or he will be deemed to have waived them in the foreclosure. His silence, however, will not necessarily prevent his maintaining an action as plaintiff for affirmative relief.

[40] N. Y. Code Civ. Proc. §§ 447, 448. The same principle has been enacted in the codes of some other states.

CHAPTER X.

PARTIES DEFENDANT—LIABLE FOR THE MORTGAGE DEBT—GENERAL PRINCIPLES—POINTS IN PRACTICE.

§ 215. Introductory.
§ 216. General principles—At common-law.
§ 217. General principles—Statutory.
§ 218. Theory of the English and common-law practice.
§ 219. Common-law and chancery practice opposed to judgments for deficiency.
§ 220. General principles—Statutory provisions modifying the common-law rule.
§ 221. Points in practice—The complaint.
§ 222. Points in practice—The decree of foreclosure.
§ 223. Decree should fix order of liability.
§ 224. Decree must follow prayer of the complaint.
§ 225. Points in practice—The judgment for deficiency.

PARTIES ORIGINALLY LIABLE.

§ 226. Introductory.
§ 227. Mortgagor, signing the bond or note or covenanting in the mortgage payment of the debt, liable.
§ 228. All persons signing the bond or note which the mortgage accompanies liable.
§ 229. All persons guaranteeing the bond and mortgage at its inception liable.
§ 230. A married woman signing the bond or other obligation liable—General principles.
§ 231. A married woman signing the bond or other obligation liable—Act of 1884 in New York.
§ 232. A married woman signing the bond or other obligation liable—Rule in New York prior to 1884, and in most states at present.
§ 233. Personal liability of married woman mortgaging her separate estate.
§ 234. Persons originally liable, deceased, their estates liable—Personal representatives proper parties.

§ 235. Persons originally liable, deceased, their heirs and devisees not proper parties.
§ 236. Remedies against heirs and devisee
§ 237. Person originally liable, making an assignment in bankruptcy or voluntarily, assignee proper.

§ 215. Introductory.—In the consideration of parties defendant to an action to foreclose a mortgage, attention has been given in the foregoing pages to those parties alone who were necessary to enable the plaintiff to exhaust his entire remedy against the land in a perfect manner,—that is, to those parties who were necessary, in order to wipe out the entire interest of the mortgagee and the mortgagor in the premises at the time of the execution of the mortgage, and to offer a perfect title to a purchaser at the sale, or such a title as the courts would compel a purchaser to accept.

The examination of questions affecting such parties has been completed; but now, after the plaintiff's remedy against the mortgaged premises has been entirely exhausted, there remains for investigation the interesting question, whether he has any other remedy for the collection of his mortgage debt, and if so, what and against whom. The statutes and decisions affecting these questions are in their growth a splendid historical illustration of the expansive and liberal tendencies of our equity system. There was a time in the law of mortgages when the mortgagee had no remedy for the collection of his debt, except an action *in rem* against the land; even to-day, the general principle underlying that old English law is preserved in part of our courts, in making the land the primary fund for the payment of the debt.

At present, however, both in England and in America, the plaintiff has generally a personal remedy by action at law against all persons who have, in any way, made themselves liable for the payment of the mortgage debt; and most of the states have made provisions for the enforcement of that remedy in the action of foreclosure, obtaining as a result, if the proceeds of the sale of the premises are insufficient to pay

the debt, what is commonly known as a judgment for deficiency.

It is proposed in this chapter and in the following chapter to consider those parties who may be made defendants in an action to foreclose a mortgage, for the purpose of obtaining a judgment for deficiency against them; no particular consideration need be given to parties against whom this personal remedy may be enforced in a separate action at law. No person who has merely become liable for the mortgage debt and who has no interest in the mortgaged premises can, in any sense, be said to be a necessary party to a foreclosure, except for the purpose of exhausting in the same action every remedy for collecting the debt. The use of the word "necessary," with this meaning, is not common in the reported cases; the word "proper" is more often used by the courts, as it indicates an option on the part of the plaintiff to make such a person a defendant. In the following pages, then, clearness and accuracy will be better obtained, if parties are considered as *liable* or *not liable* for the mortgage debt, instead of being considered as "necessary" or "proper" to the action; for if it is once determined that a party is liable, the plaintiff may make him a party or not, according to his intention of pursuing his personal remedy against him, due regard being had always to the relation of principal and surety which the defendant may sustain to any other person who is liable.

§ 216. **General principles—At common-law.**—The pursuit of a remedy against the land for the collection of a mortgage debt has always been equitable in its nature. In early English law the land was the only source from which payment could be enforced. As the law of mortgages was developed, and it became thoroughly established that a mortgage was only a security, there grew up the use of a bond or note as the instrument of indebtedness, which the mortgage accompanied merely as a collateral security; a covenant of

payment of the debt was sometimes incorporated into the mortgage and used instead of a bond.

With the introduction of the covenant of payment and the use of a bond or note, there grew up a line of cases [41] in English and in American law which sustained an action at law for the recovery of the debt, independently of the mortgaged premises, and also for the recovery of any balance which might remain unpaid after applying the proceeds of a sale of the land to the payment of the debt. In an early action at law, brought on a bond to recover a deficiency arising on a foreclosure and sale, the defense was interposed that the bond and mortgage had been extinguished by the foreclosure. The court said, "The question presented is, whether a foreclosure and sale of the premises mortgaged as a collateral security is an extinguishment of the debt due on the bond. It most clearly is not, any further than to the extent of the money produced by the sale of the mortgaged premises." [42]

§ 217. **General principles—Statutory.**—The practice at law and in equity for the collection of a mortgage debt has been modified and assisted, from time to time, in England and in the various states, by statutory provisions. Under the common-law foreclosure of a mortgage, the distinguishing characteristic of the practice with reference to persons liable for the mortgage debt was, that they could not be made parties defendant for the purpose of obtaining a judg-

[41] *Dunkley* v. *VanBuren,* 3 Johns. Ch. (N. Y.) 330, citing English authorities; *Globe Ins. Co.* v. *Lansing,* 5 Cow. (N. Y.) 380, 15 Am. Dec. 474; 3 Powell on Mortgages, 1003.

[42] *Globe Ins. Co.* v. *Lansing,* 5 Cow. (N. Y.) 381, 15 Am. Dec. 474, *per* Savage, Ch. J. As early as 1799, Lord Thurlow held in *Aylet* v. *Hill,* 2 Dick. 551, that "a mortgagee might proceed on his bond, notwithstanding he had obtained a decree of foreclosure." See *Dunkley* v. *VanBuren,* 3 Johns. Ch. (N. Y.) 330; also *Southworth* v. *Scofield,* 51 N. Y. 513, where an action was maintained for an unpaid balance.

ment for deficiency against them; a judgment for deficiency could not be recovered against the mortgagor, even where he was the sole defendant to the action.[43] The universal and only practice was for the plaintiff to sue at law on the bond or other instrument of indebtedness, which made the defendants liable for any deficiency which might remain unpaid.[44] An action to foreclose under that practice was in no sense *in personam,* but rather *in rem.*[45] In those states where statutory provisions have not been made for obtaining a judgment of deficiency in an action to foreclose a mortgage, this same common-law practice of a separate action at law on the instrument of indebtedness, remains the only precedure that the plaintiff has.

In most of the states statutory provision is now made, however, for joining all persons liable for the debt in the action to foreclose, and for decreeing a personal judgment of deficiency therein against them; but even in those states the common-law practice is not abolished but remains in force, with the single condition that to exercise it, permission to sue at law must first be obtained of the court in which the mortgage was foreclosed.[46] But if the mortgagee com-

[43] *Dunkley* v. *VanBuren,* 3 Johns. Ch. (N. Y.) 330; *Fleming* v. *Sitton,* 1 Dev. & B. (N. C.) Eq. 621.

[44] *Globe Ins. Co.* v. *Lansing,* 5 Cow. (N. Y.) 381, 15 Am. Dec. 474; *Dunkley* v. *VanBuren,* 3 Johns. Ch. (N. Y.) 330; *Hunt* v. *Lewin,* 4 Stew. & P. (Ala.) 138; *Taylor* v. *Townsend,* 6 Mass. 264; *Amory* v. *Fairbanks,* 3 Mass. 562.

[45] *White* v. *Williams,* 3 N. J. Eq. (2 H. W. Gr.) 376. The *scire facias* practice of foreclosure in Illinois gives only a judgment *in rem;* see *Osgood* v. *Stevens,* 25 Ill. 89, for an illustration. Statutory foreclosures by advertisement in New York accomplish only the same result.

[46] N. Y. Code Civ. Proc. § 1628; *Equitable Life Ins. Co.* v. *Stevens,* 63 N. Y. 341; *Matter of Collins,* 17 Hun (N. Y.) 289. See *post,* § 221. This permission is not required in Ohio; *Avery* v. *Vansickle,* 35 Ohio St. 270; nor in Iowa, but an action at law on the debt and one to foreclose the mortgage cannot be maintained at the same time; *Brown* v. *Cascaden,* 43 Iowa, 103; *County of Dubuque* v. *Koch,* 17 Iowa, 229. The N. Y. Code Civ. Proc. § 1628 is prohibitory only to parties foreclosing, and does not apply to a

mences his action without first obtaining permission of the court, he can afterwards without prejudice procure an order *ex parte, nunc pro tunc,* granting permission.[47] The court is not bound to grant the permission as a matter of right; and it seems that where the mortgagee has voluntarily refrained from asking a decree for any deficiency, some satisfactory reason must be assigned for permitting him to institute a separate action at law for its recovery.[48]

§ 218. Theory of the English and common-law practice.—When, in 1786, it was first decided that the mortgagee after a foreclosure sale in chancery could bring an action at law for the balance of the debt unpaid, it was a universal principle of practice, and one which still remains in force in some states, that relief in equity and also at law could not be decreed in the same action.[49] It was for this reason that Chancellor Kent decided in an early case, that on a bill to foreclose a mortgage the mortgagee was confined to his remedy on the mortgaged premises, and that the suit could not be extended to the mortgagor's other property nor against his person, in case the property mortgaged was not sufficient to pay the debt for which it was pledged, and that the mortgagee's further remedy was at law.[50]

A court of equity could not ordinarily decree the payment

grantor who sues his grantee on a contract of assumption of payment of the mortgage debt; *Scofield* v. *Doscher,* 72 N. Y. 494, aff'g 10 Hun (N. Y.) 582; *Campbell* v. *Smith,* 71 N. Y. 26, 27 Am. Rep. 5, aff'g 8 Hun (N. Y.) 6.

[47] *McKernan* v. *Robinson,* 84 N. Y. 105, aff'g 23 Hun (N. Y.) 289; a *nunc pro tunc* order to bring and continue an action was granted and sustained in *Earl* v. *David,* 20 Hun (N. Y.) 527, aff'd 86 N. Y. 634.

[48] *Equitable Life Ins. Co.* v. *Stevens,* 63 N. Y. 341, *per* Rapallo, J.

[49] 2 Hilliard on Mortgages, 293; 4 Kent, 183, and English cases cited.

[50] *Dunkley* v. *VanBuren,* 3 Johns. Ch. (N. Y.) 330. See *Stevens* v. *Dufour,* 1 Blackf. (Ind.) 387; also the statute of 1824, and *Youse* v. *M'Creary,* 2 Blackf. (Ind.) 243; *Markle* v. *Rapp,* 2 Blackf. (Ind.) 268, holding that suit should first be brought on the bond.

of the balance remaining unpaid after the foreclosure, unless the debt, apart from the mortgage, was such as a court of chancery would have jurisdiction of and could enforce. But the courts in some states have departed from this rule so far as to render a judgment for deficiency in an action to foreclose, where the mortgagor is the sole defendant,[51] on the ground that an action against him, in which a decree is sought for the foreclosure of the title, as well as for a judgment against him for deficiency, would not embrace different causes of action, but different remedies for the same cause.[52]

§ 219. Common-law and chancery practice opposed to judgments for deficiency.—When, however, a judgment for deficiency is sought against a third person who is liable for the debt, another principle of law interferes and prevents his being made a party to the foreclosure. It has always been a rule of practice in chancery and in common-law, as well as under most codes, that though actions arising out of the same transactions or connected with the same subject-matter may be united and different remedies demanded therein, yet the causes of action must be so united and the remedies so demanded as to affect all parties to the action in the same manner, and to bind them all to the performance of the same judgment.[53] This rule is so fundamental and essential that no system of law or practice can do without it; it can be departed from only with the sanction of statutory provisions in special cases.

§ 220. General principles—Statutory provisions modifying the common-law rule.—The common-law rule of procedure for the collection of an unpaid balance in a fore-

[51] In *Wightman* v. *Gray*, 10 Rich. (S. C.) Eq. 518, 531, Chancellor Wardlaw reviews the history of this question in South Carolina, referring to the act of 1840.

[52] In point, *Fithian* v. *Monks*, 43 Mo. 502, 515, *per* Wagner, J., collating and reviewing the authorities at length.

[53] Jones on Mortgages (3d ed.) § 1710.

closure, as above explained, has been modified in most of our states, as will be observed by reference to their statutory provisions respecting foreclosures conducted by equitable actions. The general result is, that in an action to foreclose a mortgage a judgment *in personam* [54] against the mortgagor and all parties liable for the mortgage debt may be decreed for any residue of the debt remaining unsatisfied, after a sale of the mortgaged property and the application of the proceeds pursuant to the directions contained in the decree.

This rule differs from the common-law rule in the two points of allowing a remedy at law and in equity to be pursued in the same action, and of allowing the joinder of parties who are not interested equally or in the same manner in the subject-matter. This innovation was first made in New York

[54] N. Y. Code Civ. Proc. § 1627; *Hunt* v. *Lewin,* 4 Stew. & P. (Ala.) 138; Ala. Rev. Code, § 3479; *Hunt* v. *Dohrs,* 39 Cal. 304; *Englund* v. *Lewis,* 25 Cal. 337; *Cormerais* v. *Genella,* 22 Cal. 116, citing the statutes of 1860 and 1861; *Rowland* v. *Leiby,* 14 Cal. 156; *Rollins* v. *Forbes,* 10 Cal. 299; *Stevens* v. *Campbell,* 21 Ind. 471; *Duck* v. *Wilson,* 19 Ind. 190; *Grimmell* v. *Warner,* 21 Iowa, 11; *Cooley* v. *Hobart,* 8 Iowa, 358, distinguishing *Sands* v. *Wood,* 1 Iowa, 263, and *Wilkerson* v. *Daniels,* 1 G. Green (Iowa) 179, 188; Code of Iowa, § 2084; Kentucky Code, § 376; formerly otherwise, *Crutchfield* v. *Coke,* 6 J. J. Marsh, (Ky.) 89; *Morgan* v. *Wilkins,* 6 J. J. Marsh. (Ky.) 28; *Johnson* v. *Shepard,* 35 Mich. 115; *Fredman S. & T. Co.* v. *Dodge,* 3 McAr. C. C. 529. See also *Fleming* v. *Kerkendall,* 31 Ohio St. 568; *Larimer* v. *Clemmer,* 31 Ohio St. 499; *Conn* v. *Rhodes,* 26 Ohio St. 644; *King* v. *Safford,* 19 Ohio St. 587; see the act of February 19, 1864. In Missouri a personal judgment for a deficiency may be recovered against the mortgagor, but not against third parties who are liable for the mortgage debt, as a foreclosure in that state is strictly an *action at law,* and not in equity; *Fithian* v. *Monks,* 43 Mo. 502, citing the statute. In Wisconsin such a decree was not allowable under the Revised Statutes of 1858; *Faesi* v. *Goetz,* 15 Wis. 231, stated the ground of the objection to such a decree as a misjoinder of causes of action; *Borden* v. *Gilbert,* 13 Wis. 670; *Walton* v. *Goodnow,* 13 Wis. 661. But the Laws of 1862, chap. 243, made provisions for judgments of deficiency similar to those of the New York statute; *Bishop* v. *Douglass,* 25 Wis. 696; *Baird* v. *McConkey,* 20 Wis. 297; *Burdick* v. *Burdick,* 20 Wis. 348. In New Jersey the rule was for many years the same as it now is in New York; *Jarman* v. *Wiswall,* 24 N. J. Eq. (9 C. E. Gr.) 267, a leading case;

by the adoption of the Revised Statutes;[55] the original statute was subsequently incorporated into the first Code, and reads as follows, as amended in the Code of Civil Procedure: "Any person who is liable to the plaintiff for the payment of the debt secured by the mortgage, may be made a defendant in the action; and if he has appeared, or has been personally served with the summons, the final judgment may award payment by him of the residue of the debt remaining unsatisfied, after a sale of the mortgaged property, and the application of the proceeds, pursuant to the directions contained therein."[56] The statutory provisions of Wisconsin, Nebraska, North Carolina, South Carolina,[57] Florida, and many other states, are substantially the same.

The Supreme Court of the United States in 1864, in order to assimilate the practice in the circuit courts to the general practice in the state courts, adopted the rule that in all suits in equity for the foreclosure of mortgages in the circuit courts, or in any of the courts of the territories, a judgment may be rendered for any deficiency found due after applying the proceeds of the sale to the satisfaction of the mortgage debt.[57a] This rule applies also to the courts of the District of Columbia.[58]

but by the act of 1880, chap. 255, it was provided that a decree for a deficiency should not be entered in a foreclosure against parties who were personally liable for the mortgage debt. The common-law practice of a separate action at law is now the only procedure in that state; *Allen* v. *Allen,* 34 N. J. Eq. (7 Stew.) 493; *Naar* v. *Union and Essex Land Co.* 34 N. J. Eq. (7 Stew.) 111; *Newark Savings Inst.* v. *Forman,* 33 N. J. Eq. (6 Stew.) 436.

[55] 2 N. Y. Rev. Stat. 191.

[56] N. Y. Code Civ. Proc. § 1627. See *Schwinger* v. *Hickok,* 53 N. Y. 283; *Bank of Rochester* v. *Emerson,* 10 Paige Ch. (N. Y.) 359; *McCarthy* v. *Graham,* 8 Paige Ch. (N. Y.) 480.

[57] *Gray* v. *Toomer,* 5 Rich. (S. C.) L. 261, 266.

[57a] Rule 10 of Rules of Practice for the Courts of Equity of the United States.

[58] *Cross* v. *DeValle,* 68 U. S. (1 Wall.) 5, 17 L. ed. 515; 7 Wash. Law Rep. 2.

§ 221. Points in practice—The complaint.—When statutory provisions first allowed a judgment for deficiency to be rendered against all persons liable for the mortgage debt in an action to foreclose, the courts, to protect persons so liable, adopted a rule requiring the plaintiff to state his cause of action fully in his complaint, and also to make a specific demand that the decree of foreclosure adjudge that the persons so liable pay any deficiency which might arise,[59] and the order in which they should be severally liable. It often occurs among practicing attorneys, that the demand for a judgment of deficiency is made in the most general way against the parties personally liable, but this practice is not commendable; it is much better and safer to make the demand specifically, according to the order of liability of the several persons who are holden for the mortgage debt.

If no demand is made against a person who is liable for the unpaid balance, judgment cannot be taken against him.[60] but the plaintiff may still have a separate action at law; not, however, without the leave of the court in which the action to foreclose was brought. If the plaintiff intends to exercise his right of action against any person so liable, it is best to do so in the action to foreclose,—for, when application is made for leave to bring a separate action at law, the tendency of the courts is to require a good cause for the same to be shown.[61] An action at law can also be maintained on the note

[59] *Equitable Life Ins. Co.* v. *Stevens*, 1 N. Y. Wk. Dig. 465; *Luce* v. *Hinds*, Clarke Ch. (N. Y.) 453, 457; *Leonard* v. *Morris*, 9 Paige Ch. (N. Y.) 90. In point, *Simonson* v. *Blake*, 20 How. (N. Y.) Pr. 484; 12 Abb. (N. Y.) Pr. 331, citing the old Code, § 275. See *Tucker* v. *Leland*, 75 N. Y. 186; *Manhattan Life Ins. Co.* v. *Glover*, 14 Hun (N. Y.) 153; *Foote* v. *Sprague*, 13 Kan. 155; *Giddings* v. *Barney*, 31 Ohio St. 80. Whenever a judgment for a deficiency is demanded against a married woman, facts must be alleged showing the liability of her separate estate; *McGlaughlin* v. *O'Rourke*, 12 Iowa, 459.

[60] *Giddings* v. *Barney*, 31 Ohio St. 80.

[61] See *ante*, §§ 216, 217, and the cases cited on this point; *McKernan* v. *Robinson*, 84 N. Y. 105; *Scofield* v. *Doscher*, 72 N. Y. 491, citing *Suydam* v. *Bartle*, 9 Paige Ch. (N. Y.) 294.

or bond, or the covenant in the mortgage, without resorting to an equitable foreclosure, in order to obtain a personal judgment against those liable for the payment of the mortgage debt.[62] In some states actions at law on the bond, and for foreclosure in equity, can be maintained at the same time.[63]

§ 222. Points in practice—The decree of foreclosure.—The judgment of foreclosure should provide in the first place, if the proceeds of the sale are insufficient to pay the amount reported due to the plaintiff, with the interest and expenses of the sale and the costs of the action, that the referee specify the amount of such deficiency in his report of sale, and that the defendants personally liable for the mortgage debt pay the same to the plaintiff.[64] Under the New York Code of Civil Procedure direction is also made for the payment of taxes, assessments and water rates, which are liens upon the property sold;[65] and in ascertaining the amount of the deficiency the taxes, assessments, etc., are to be deducted as though they were part of the original debt.[66]

§ 223. Decree should fix order of liability.—The judgment should provide in the second place, when it is rendered

[62] *Burr* v. *Beers,* 24 N. Y. 178, 80 Am. Dec. 327; *Rosevelt* v. *Carpenter,* 28 Barb. (N. Y.) 426; *Brown* v. *Cascaden,* 43 Iowa, 103; *Banta* v. *Wood,* 32 Iowa, 469, 474; *Stephens* v. *Greene Co. Iron Co.* 11 Heisk (Tenn.) 71; *Ober* v. *Gallagher,* 93 U. S. (3 Otto) 199, 23 L. ed. 829. The action can also be maintained against any person who has guaranteed the payment of the bond and mortgage; *Hand v. Kennedy,* 45 N. Y. Supr. Ct. (13 J. & S.) 385.

[63] *Very v. Watkins,* 18 Ark. 546: *Fairman* v. *Farmer,* 4 Ind. 436, based upon the statute of 1831; *Ely* v. *Ely,* 72 Mass. (6 Gray) 439; *Wilhelm* v. *Lee,* 2 Md. Ch. Dec. 322; *Brown* v. *Stewart,* 1 Md. Ch. Dec. 87. See *Mayer* v. *Farmers' Bk.* 44 Iowa, 212, 214, and Code, §§ 3163, 3164, holding that a personal judgment recovered on the bond will be a lien on the mortgaged premises from the date of the recording of the mortgage, and that the premises can be sold under execution on the judgment.

[64] N. Y. Code Civ. Proc. §§ 1626, 1627; Supreme Court Rule 61.

[65] N. Y. Code Civ. Proc. § 1676.

[66] See *post,* § 225.

against several persons, some of whom are primarily liable as principals, and others are liable only secondarily as sureties, that it be enforced first against the principal debtors, and then, so far as it remains unsatisfied only, against the sureties in the order of their liability, which should also be fixed;[67] upon the decree of foreclosure, as it fixes the order of the liability of the sureties, will be based the judgment for deficiency.

In a case where a mortgagee had assigned a bond and mortgage, guaranteeing their payment, and an action was brought against the mortgagor and guarantor, and the usual decree of foreclosure and sale was demanded with a judgment for deficiency against both, Chancellor Walworth held, as to the proper form of decree, that "the proper decree, where the mortgagor is himself a party to the suit, and is primarily liable for the payment of the deficiency, and a third person is made a party defendant who is only secondarily liable, is to decree the payment of the deficiency by the principal debtor in the first instance; and to decree payment of the amount of such deficiency against his co-defendant who stands in the situation of his surety merely, only in case it cannot be collected of the principal debtor, after the return of an execution against such principal debtor unsatisfied. The decree in such cases should also direct that, in case the amount of the deficiency is paid by the defendant who is only secondarily liable for such deficiency, he shall have the benefit of the decree, for the purpose of obtaining satisfaction for the same amount, with the interest thereon, from the defendant who is primarily liable. * * *

[11] After the usual decree for the foreclosure and sale of the mortgaged premises, and the payment of the debt and costs out of the proceeds of such sale, and a decree over against the mortgagor personally for the deficiency, if any, the decree must further direct, that if the complainant is not able to

[67] In point, *Hand* v. *Kennedy*, 45 N. Y. Supr. Ct. (13 J. & S.) 385; *Youngs* v. *Trustees*, 31 N. J. Eq. (4 Stew.) 290.

collect the amount of such deficiency out of the estate of the mortgagor, upon the issuing of an execution, against his property, to the sheriff of the county in which he resides, or of the county where he last resided in this state, the defendants (assignors), upon the return of such execution unsatisfied, pay so much of such deficiency as remains unpaid. * * * The decree must further direct that, if they pay the amount thus decreed against them personally, or if the same is collected out of their property, they shall have the benefit of the decree against the mortgagor, for the purpose of enabling them to obtain remuneration from him, to the same extent." [68]

§ 224. Decree must follow prayer of the complaint.— The judgment for foreclosure, in fixing the order of liability, must follow the demand in the complaint, if judgment is taken by default or upon the report of a referee. This judgment is not a personal one in any sense, but is more in the nature of a judgment *in rem;* the plaintiff cannot, therefore, have a contingent personal judgment in the decree of foreclosure against any of the defendants.[69] Judgments of foreclosure are too often entered without decreeing the respective liabilities of the different parties to the action. This may not render the judgment itself defective in any way, but it

[68] *Jones* v. *Steinberg,* 1 Barb. Ch. (N. Y.) 252. In *Luce* v. *Hinds,* Clarke Ch. (N. Y.) 456, a case similar in all respects to *Jones* v. *Steinberg,* Vice-Chancellor Whittlesey says, "I shall be, therefore, compelled to decree against the defendant, according to the prayer of the complainant's bill. The order must be a reference to a master to compute the amount due,—the final order will be for the sale of the mortgaged premises, and a personal decree against the obligor, Hinds, for the deficiency, and in case an execution against Hinds does not realize the money, and execution must afterwards go against Stow (guarantor) for any balance due after sale of the premises, and execution unsatisfied against the obligor Hinds."

[69] *Cobb* v. *Thornton,* 8 How. (N. Y.) Pr. 66. See *Welp* v. *Gunther,* 48 Wis. 543.

often causes litigation among the defendants in order to determine their respective liabilities.

A judgment for deficiency cannot be rendered against a person liable for the debt, "unless he has appeared or has been personally served with the summons" or has submitted himself to the jurisdiction of the court.[70] Jurisdiction over the person is a prior requisite in New York practice, and doubtless is in the practice of other states. Consequently a personal judgment for deficiency cannot be obtained against a non-resident, unless he appears in the action; and though such a judgment be docketed against a non-resident after service by publication or otherwise, it will be irregular and void.[71]

§ 225. Points in practice—The judgment for deficiency.—The judgment for deficiency, which courts are now generally authorized to decree against parties personally liable for the mortgage debt, is a judgment for the balance of the debt remaining unsatisfied after a sale of the mortgaged premises, and the application of the proceeds of the sale to its payment.[72] If part of the debt is due and part not due, the judgment for deficiency can be rendered only for what is due; a personal judgment cannot be legally rendered for a debt which has not matured.[73] The first step is to ascertain the amount of the unpaid balance. The judgment consequently cannot be rendered even contingently, until after the master in chancery or the referee appointed to sell has made and filed his report.[74] It is the usual practice for the

[70] N. Y. Code Civ. Proc. § 1627. The same rule prevails in Ohio; publication of the summons does not give jurisdiction for a personal judgment against a defendant; *Wood* v. *Stanberry,* 21 Ohio St. 142.

[71] *Gibbs* v. *Queen Ins. Co.* 63 N. Y. 131, 20 Am. Rep. 513; *Schwinger* v. *Hickok,* 53 N. Y. 280.

[72] See *Mutual Life Ins. Co.* v. *Southard,* 25 N. J. Eq. (10 C. E. Gr.) 337, for the practice in New Jersey, which is very similar to that in New York. See the cases cited below.

[73] *Skelton* v. *Ward,* 51 Ind. 46; *Smith* v. *Osborn,* 33 Mich. 410.

[74] *Cobb* v. *Thornton,* 8 How. (N.

referee to state the amount of deficiency in his report of sale, and upon the confirmation of the report judgment for the deficiency may be docketed.[75] It seems from recent decisions that a confirmation of the referee's report of sale is not necessary prior to issuing execution.[76]

The sum paid for the premises at the foreclosure sale must be taken as a conclusive determination of their value as between the parties to the suit.[77] In determining the amount of the judgment for deficiency, there must be deducted from the proceeds of the sale the costs and expenses of the plaintiff's attorney in conducting the action, the expenses and fees of the referee making the sale, and all taxes,[78] assessments and water rates[79] which are liens upon the property sold; the amount of the proceeds then remaining is to be de-

Y.) Pr. 66. See *Lipperd* v. *Edwards,* 39 Ind. 165.

[75] *Bank of Rochester* v. *Emerson,* 10 Paige Ch. (N. Y.) 359; *McCarthy* v. *Graham,* 8 Paige Ch. (N. Y.) 480; *Bache* v. *Doscher,* 41 N. Y. Supr. Ct. (9 J. & S.) 150; aff'd 67 N. Y. 429. In California there can be no judgment for a deficiency, till the referee has made his return that a balance remains unpaid after the sale; *Hunt* v. *Dohrs,* 39 Cal. 304, citing the Practice Act, § 246. See also *Culver* v. *Rogers,* 28 Cal. 520; *Englund* v. *Lewis,* 25 Cal. 337; *Cormerais* v. *Genella,* 22 Cal. 116; *Rowland* v. *Leiby,* 14 Cal. 156.

[76] *Bache* v. *Doscher,* 41 N. Y. Supr. Ct. (9 J. & S.) 150; aff'd 67 N. Y. 429; *Bicknell* v. *Byrnes,* 23 How. (N. Y.) Pr. 486; *Cobb* v. *Thornton,* 8 How. (N. Y.) Pr. 66; *Springsteen* v. *Gillett,* 30 Hun (N. Y.) 260; *Moore* v. *Shaw,* 15 Hun (N. Y.) 428; aff'd 77 N. Y. 513. In Wisconsin a prior order of confirmation is necessary; Laws of 1862, chap. 243; *Tormey* v. *Gerhart,* 41 Wis. 54; also in Nebraska, *Clapp* v. *Maxwell,* 13 Neb. 542. See *White* v. *Zust,* 28 N. J. Eq. (1 Stew.) 107. In Michigan a special application must be made to the court, before execution can issue on a judgment of deficiency; *McCricket* v. *Wilson,* 50 Mich. 513; *Gies* v. *Green,* 42 Mich. 107. In *Leviston* v. *Swan,* 33 Cal. 480, it was held that the clerk should enter up judgment for the deficiency on the filing of the referee's report of sale without the further order of the court.

[77] In point, *Snyder* v. *Blair,* 33 N. J. Eq. (6 Stew.) 208, collating and reviewing the cases.

[78] N. Y. Code Civ. Proc. § 1676; *Cornell* v. *Woodruff,* 77 N. Y. 203; *Fleishauer* v. *Doellner,* 60 How. (N. Y.) Pr. 438.

[79] *Marshall* v. *Davis,* 78 N. Y. 414, 422, reversing 16 Hun (N. Y.) 606; *Argald* v. *Pitts,* 78 N. Y. 239; *Cornell* v. *Woodruff,* 77 N. Y. 205.

ducted from the amount of the debt and interest as stated in the decree of foreclosure, and the balance will furnish the amount for the judgment of deficiency.

It has been held erroneous to enter a judgment for deficiency for a portion of the mortgage debt which has become due, although, because the premises were so situated that they could not be sold in parcels, the entire proceeds of the foreclosure sale were applied to pay the debt due and to become due.[80]

PARTIES ORIGINALLY LIABLE.

§ 226. Introductory.—For the purpose of a logical analysis, the subject-matter of this chapter and the following chapter will be considered under the sub-divisions, *Parties Originally Liable* and *Parties Subsequently Liable*. Some writers have considered the following subject-matter under the headings, Parties Primarily Liable and Parties Secondarily Liable; but this division is not logical except as primary means original, and secondary means subsequent; furthermore, the words "primary" and "secondary" are too suggestive of the relation of principal and surety, which would certainly not be a logical division of this subject, as the relation is so variable and subject to change, whenever a new party becomes related to a bond and mortgage in such a way as to make himself personally liable for the debt.

The logical division, Original and Subsequent, also furnishes an opportunity to consider the parties liable in chronological order. In the following part of this chapter, then, attention is to be given to parties who originally became liable for the mortgage debt,—that is, to those who became liable at the inception of the bond and mortgage. It is to be remarked again, that parties are not considered with refer-

[80] *Taggert* v. *San Antonio, etc.* 18 Cal. 460; *Skelton* v. *Ward,* 51 Ind. 46; *Darrow* v. *Scullin,* 19 Kan. 57; *Smith* v. *Osborn,* 33 Mich. 410; *Danforth* v. *Coleman,* 23 Wis. 528.

ence to their being "necessary" or "proper," but with reference to their *liability,* it remaining at the option of the plaintiff whether he will make them parties or not, due regard being had always to the relation of principal and surety.

§ 227. **Mortgagor, signing the bond or note or covenanting in the mortgage for payment of the debt, liable.**— The fact that a mortgagor who signs a bond or note, which is accompanied by a mortgage, for the payment of a sum of money, or who covenants in the mortgage without a bond or note to pay the same, is liable for the payment of that sum, rests upon the fundamental principle of law, that every man must perform his contracts and is liable for any breach of them.[81] There is scarcely a case in which the question of deficiency is considered that does not give an *obiter dictum,* that the mortgagor is the first person to become liable for the payment of the debt.[82] That his relation as principal may be changed to that of surety, will be seen hereafter; but his name once subscribed to the contract of indebtedness, he will always remain liable.

[81] *Schwinger* v. *Hickok,* 53 N. Y. 280; *Hunt* v. *Chapman,* 51 N. Y. 555; *Curtiss* v. *Tripp,* Clarke Ch. (N. Y.) 317; *Marsh* v. *Pike,* 10 Paige Ch. (N. Y.) 595; *Bank of Rochester* v. *Emerson,* 10 Paige Ch. (N. Y.) 359; *Leonard* v. *Morris,* 9 Paige Ch. (N. Y.) 90. See *National Fire Ins. Co.* v. *McKay,* 21 N. Y. 191, 193, where Comstock, Ch. J., says *obiter,* "S. was the mortgagor and was personally bound for the payment of the debt." See *Wadsworth* v. *Lyon,* 93 N. Y. 201, 45 Am. Rep. 190; *Price* v. *State Bank,* 14 Ark. 50; *Snell* v. *Stanley,* 58 Ill. 31; *Stevens* v. *Campbell,* 21 Ind. 471; *Darrow* v. *Scullin,* 19 Kan. 57; *Foote* v. *Sprague,* 13 Kan. 155, where the notes were all due by the terms of an interest clause and judgment for the whole amount was held proper; *Conn. Mut. Life Ins. Co.* v. *Tyler,* 8 Biss. C. C. 369, holding that the fact that a mortgagor has conveyed his equity of redemption in the premises does not release him from his personal liability on the bond. See *contra* in New Jersey since the act of 1880, which provides that a judgment for deficiency shall not be decreed in a foreclosure; *Allen* v. *Allen,* 34 N. J. Eq. (7 Stew.) 493; *Naar* v. *Union & E. L. Co.* 34 N. J. Eq. (7 Stew.) 111.

[82] *Calvo* v. *Davies,* 73 N. Y. 211, 215, 29 Am. Rep. 130; *Birnie* v. *Main,* 29 Ark. 591.

If no note, bond or other legal obligation was given with the mortgage, the plaintiff will be confined to the mortgaged premsies for his remedy,[83] unless the claim on which the mortgage is founded was an equitable one, or there was a debt existing independent of the mortgage.[84] The same is true where the debt is barred by the statute of limitations, or the obligor has been discharged in bankruptcy proceedings.[85]

§ 228. All persons signing the bond or note which the mortgage accompanies liable.—In an action to foreclose a bond and mortgage, where the bond has been executed by persons other than the mortgagors, as well as by the mortgagors, it is proper to make such obligors parties to the action and to demand against any or all of them a judgment for deficiency, as they are all liable upon the bond for the debt.[86] This is also true if the instrument of indebtedness is a note[87] or other form of obligation.[88] The authority to join such obligors in an action to foreclose a mortgage and to demand a personal judgment for deficiency against them, is derived from the codes and statutes of the several states.[89]

[83] *Coleman* v. *Van Rensselaer,* 44 How. (N. Y.) Pr. 368; *Hunt* v. *Lewin,* 4 Stew. & P. (Ala.) 138; *Fletcher* v. *Holmes,* 25 Ind. 458; *VanBrunt* v. *Mismer,* 8 Minn. 232.

[84] *Gaylord* v. *Knapp,* 15 Hun (N. Y.) 87. "Every mortgage implies a loan and every loan a debt;" *Critcher* v. *Walker,* 1 Murph. (N. C.) 488, 4 Am. Dec. 576.

[85] *Kinloch* v. *Mordecai,* 1 Speer's (S. C.) Eq. 464.

[86] *Scofield* v. *Doscher,* 72 N. Y. 491; *Bathgate* v. *Haskin,* 59 N. Y. 533; *Thorne* v. *Newby,* 59 How. (N. Y.) Pr. 120. In point, *Suydam* v. *Bartle,* 9 Paige Ch. (N. Y.) 294, 295.

[87] *Davenport Plow Co.* v. *Mewis,* 10 Neb. 317; *Black, as adm'r etc.* v. *Thomson, as adm'r etc.* 120 Ill. App. 424; *Sarasota Ice, Fish & Power Co.* v. *Lyle & Co.* 53 Fla. 1069, 43 So. 602. See *Breed* v. *Higgenbotham Bros. & Co.* 141 S. W. 164 (Tex. Civ. App.)

[88] *Fond du Lac Harrow Co.* v. *Haskins,* 51 Wis. 135. But see *Owen* v. *Potter,* 115 Mich. 556, 73 N. W. 977.

[89] N. Y. Code Civ. Proc. § 1627; see California Civ. Code, § 2117; Code Civ. Proc. § 383; *Hubbard* v. *University Bank of Los Angeles,* 125 Cal. 684, 58 P. 297.

In a recent foreclosure in New

If a husband executes with his wife a bond, to secure which a mortgage is given on her separate real estate, he will be liable for a personal judgment in a foreclosure.[90] A person who has signed the bond or note, but not the mortgage, is not an indispensable party to maintain the action or to perfect the title, as he has no interest in the premises.[91]

Where statutory provision has not been made for judgments of deficiency, the obligation upon the bond can be enforced only by a separate action at law.[92]

§ 229. All persons guaranteeing the bond and mortgage at its inception liable.—All persons who guarantee the payment or collection of a bond and mortgage by a separate instrument, at the time of their execution or before their transfer, are liable for the mortgage debt and may be made parties to an action to foreclose, for the purpose of recovering a

York, where the bond had been signed by others than the mortgagors, the court held: "The Revised Statutes provide that if the mortgage debt be secured by the obligation or other evidence of debt, of any other person besides the mortgagor, the complainant may make such person a party to the bill, and the court may decree payment of the balance of such debt remaining unsatisfied after a sale of the mortgaged premises, as well against such other person as the mortgagor, and may enforce such decree as in other cases. The same provision is, in substance, continued in the Code. These authorities justify the plaintiff in joining in this action all the parties to the bond, the payment of which is secured by the mortgage sought to be foreclosed, and in demanding a judgment against all the obligors for any deficiency which may arise." *Thorne* v. *Newby,* 59 How. (N. Y.) v. *Jones,* 9 Paige Ch. (N. Y.) 395, was very similar, in that the bond was signed by two persons and the mortgage by only one; both obligors on the bond were held liable for a judgment of deficiency.

[90] *Conde* v. *Shepard,* 4 How. (N. Y.) Pr. 75.

[91] *Deland* v. *Mershon,* 7 Clarke (Iowa) 70. In *Milroy* v. *Stockwell,* 1 Cart. (Ind.) 35, it was held that such an obligor was a necessary party, and that upon his death the action should be revived against his personal representatives.

[92] Folger, J., has said, in considering this question, that the statute "was enacted to give the court in which the foreclosure of the mortgage was had full jurisdiction over the whole subject, and to save the necessity of actions at law, and to

judgment for deficiency against them as stated in the preceding section.[93]

There are almost no cases ruling directly upon this question, but from analogous cases[94] and the general principles of law applicable to guarantors and sureties, the proposition of this section is unquestionably true. In an action where it appeared that the mortgagee had assigned his mortgage, guaranteeing its payment, and subsequently taken the bond of a third person as a further security for the payment of such mortgage, Chancellor Walworth held that the third person was liable for a judgment of deficiency in the foreclosure, saying, "It is well settled, however, that where a surety, or a person standing in the situation of a surety, for the payment of a debt, receives a security for his indemnity and to discharge such indebtedness, the principal creditor is, in equity, entitled to the full benefit of that security." [95] Indorsers before delivery of a promissory note may be joined as co-defendants with the maker in foreclosing the mortgage security.[96]

§ 230. A married woman signing the bond or other obligation liable—General principles.—With the general

allow one court to dispose of the whole subject, instead of compelling parties to resort to other tribunals; * * * and is applicable to every case where the owner of the mortgage has any personal security for the mortgage debt, whether it be the bond of the mortgagor or the covenant of another person." *Scofield* v. *Doscher,* 72 N. Y. 491, 493.

[93] *Mathews* v. *Aikin,* 1 N. Y. 595; *Curtis* v. *Tyler,* 9 Paige Ch. (N. Y.) 435; *Guion* v. *Knapp,* 6 Paige Ch. (N. Y.) 43; *Burdick* v. *Burdick,* 20 Wis. 348. See *Grant* v. *Griswold,* 82 N. Y. 569; *Hunt* v. *Purdy,* 82 N. Y. 486, 37 Am. Rep. 587.

[94] *Jones* v. *Steinbergh,* 1 Barb. Ch. (N. Y.) 250; *Luce v. Hinds,* Clarke Ch. (N. Y.) 453; *Bristol* v. *Morgan,* 3 Edw. Ch. (N. Y.) 142; *Curtis* v. *Tyler,* 9 Paige Ch. (N. Y.) 435.

[95] *Curtis* v. *Tyler,* 9 Paige Ch. (N. Y.) 435, giving citations in point. In *Maure* v. *Harrison,* 1 Eq. Ca. Abr. 93, it was held that in equity a bond creditor was entitled to the benefit of all counter-bonds or collateral security given by the principal debtor to his surety.

[96] *Hubbard* v. *University Bank of Los Angeles,* 125 Cal. 684, 58 P. 297.

growth during the past century in England and in America of legislation and decisions, enlarging the powers of married women over the disposition of their property, there has been developed a corresponding or correlative line of decisions in the courts, holding them and their separate estates responsible for any breach of their contracts. It is not within the scope of this work to discuss the history or principles of this very interesting branch of the law.[97] Our attention must be confined simply to a general statement of the latest rulings of the courts upon the question of a married woman's liability for the payment of a mortgage debt, and to showing that she is a proper party to a foreclosure, if a judgment for deficiency is desired against her. The common-law doctrine, which rendered a married woman totally incapable of making contracts, practically remains in force in no state, but has been modified by legislation or innovations of the courts, until, at present, it is a universal rule that a married woman can bind her separate estate for all purposes that may be necessary to enable her to hold and enjoy the same.

§ 231. A married woman signing the bond or other obligation liable—Act of 1884 in New York.—The New York act of 1884 in relation to the rights and liabilities of married women, has rendered obsolete a great majority of the decisions adjudicating the liabilities of married women and their separate estates for the performance of their contracts under the acts of 1848–49 and 1860–62. That act provides that "A married woman may contract to the same extent,

[97] The history of the law affecting married women's contracts and their control of their separate property is ably discussed by Leonard A. Jones in his Treatise on Mortgages (3d ed.) §§ 106–118. The history and principles of the same law in the state of New York are given in greater detail by Abner C. Thomas in his Treatise on the Law of Mortgages (2d ed.) §§ 605–619. To the student of equity jurisprudence, the development of this branch of the law in England and America is very interesting, as its different stages can be so accurately traced in the legislation and decisions of the two countries.

with like effect and in the same form as if unmarried, and she and her separate estate shall be liable thereon, whether such contract relates to her separate business or estate or otherwise, and in no case shall a charge upon her separate estate be necessary." [98]

This law can, of course, have no *ex post facto* application and for a time, at least, the decisions under the old statutes will be of importance, and must be applied to cases arising on contracts made prior to 1884. All decisions which have been

[98] Laws of 1884, chap. 381. This act was passed May 28, 1884, and by its provisions took effect immediately, so that all contracts made prior to May 28, 1884, are to be adjudicated according to the statutes and decisions in force prior to that date. It is also provided, "that this act shall not affect nor apply to any contract that shall be made between husband and wife."

The position of Sanford E. Church, Chief Judge of the New York Court of Appeals, in relation to questions affecting a married woman's liability for her contracts, must be recognized here; his opinions have, undoubtedly had a strong influence in effecting the passage of this act. His decisions have, at least, been almost prophetic. In the leading case of the *Manhattan B. & M. Co.* v. *Thompson,* 58 N. Y. 84, he said: "If, when the legislature changed the common law in essential particulars in regarding the interests in property of the husband and wife to a considerable extent as distinct and independent, and in recognizing the capacity of the wife to judge and provide for what her own welfare requires in acquiring and holding the legal title to property, and managing and disposing of the same as if unmarried and without subjection to the control of her husband, the courts had adopted as a reasonable and legitimate sequence, the correlative rule of capacity to contract debts as if unmarried, restricted only to their collection from separate property, it might well be claimed that the rights of married women would have been as well if not better protected practically, sound public policy, and business morality more promoted, and a flood of expensive and vexatious litigation prevented.

"Courts of equity in England have uniformly exercised a power of enforcing contracts of married women against their separate estates which has practically produced this result (2 P. Wms. 144; 1 Cr. & Ph. 48). But our courts have adopted more conservative principles, and it is better to adhere to them *until the legislature in its wisdom and power shall see fit to change them.*" To the same effect is his opinion in *Yale* v. *Dederer,* 68 N .Y. 334; this case was three times before the Court of Appeals: 18 N. Y. 265, 72 Am. Dec. 503; 22 N. Y. 450, 78 Am. Dec. 216; 68 N. Y. 334.

rendered in New York upon the liability of a person obligated for a mortgage debt, to have a judgment for deficiency rendered against him, will, hereafter, apply with equal force to a married woman. In Massachusetts[99] and some other states, substantially the same law is in force, while in England the courts of equity have never held otherwise than that a married woman's separate estate was liable for every debt she might contract in any way. Regarding her separate estate she can contract as freely as a man; and her estate is equally liable for all her obligations, whatever their form or nature.[1] At law, however, she and her separate estate are not liable.

§ 232. A married woman signing the bond or other obligation liable—Rule in New York prior to 1884, and in most states at present.—The decisions which make a married woman who has signed a bond or other obligation, to which a mortgage is collateral, liable for a judgment of deficiency in an action to foreclose a mortgage, are, under the same state of facts, precisely the same in their reasoning and conclusions as those which establish her liability for the performance of her other contracts. The cases are numerous in fixing her liability upon ordinary contracts, and by analogy are applicable to her liability in mortgage foreclosures where a judgment for deficiency is sought against her.[2]

[99] *Nourse* v. *Henshaw*, 123 Mass. 96.

[1] *Manhattan B. & M. Co.* v. *Thompson*, 58 N. Y. 80, 85; *Yale* v. *Dederer*, 22 N. Y. 450, 78 Am. Dec. 216.

[2] If the wife has signed the mortgage alone and not the bond, it will be erroneous to demand a personal judgment against her; *Gebhart* v. *Hadley*, 19 Ind. 270; in *Buell* v. *Shuman*, 28 Ind. 464, she had signed the note also, but was held not personally liable. In *Brick* v. *Scott*, 47 Ind. 299, the court went so far as to hold void a mortgage given on her separate estate, the proceeds of which went to the husband; apparently overruled, however, in *Herron* v. *Herron*, 91 Ind. 278. See also *McCarty* v. *Tarr*, 83 Ind. 444; *Moffitt* v. *Roche*, 77 Ind. 48; *Martin* v. *Cauble*, 72 Ind. 67. In *Sperry* v. *Dickinson*, 82 Ind. 132, the wife covenanted in the mortgage to pay a note, and she was

Church, Ch. J., who made a careful study of the liability of the separate estate of a married woman for her contracts, concluded that such liability may be enforced,—1. When created in or about carrying on a separate trade or business of the wife;[3] 2. When the contract relates to, or is made for the benefit of, her separate estate;[4] 3. When the intention to charge her separate estate is expressed in the instrument or contract by which the liability is created.[5] These three propositions substantially embody the law as it exists in most of the states; some states follow the rule of the English courts of equity as stated in the preceding section, and a few have gone as far as New York in the act of 1884. "The general principles applicable to this subject have been too firmly settled by repeated adjudications, to justify a reconsideration of the grounds upon which they were arrived at. The most important of these principles is, that the statutes of 1848–49 and 1860–62 did not operate to remove the general disability of married women to bind themselves by their contracts, not even to the extent of their separate estates. This made it necessary to define specifically, in what cases and under what circumstances such contracts could or ought to be enforced against their separate property, and the difficulty of accomplishing this purpose has led to most of the litigation on the subject."[6]

held liable. See *Merchants' Nat. Bk.* v. *Raymond,* 27 Wis. 567, where no question seems raised but that a *feme covert* is bound as much by her contracts as a *feme sole*. *Rogers* v. *Weil,* 12 Wis. 664. The statute of Indiana is peculiar in that it provides that a married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract, as to her, shall be void. Rev. Stat. chap. 71. § 5119.

[3] *Frecking* v. *Rolland,* 53 N. Y. 422; *Barton* v. *Beer,* 35 Barb. (N. Y.) 78.

[4] *Ballin* v. *Dillaye,* 37 N. Y. 35; *Owen* v. *Cawley,* 36 N. Y. 600.

[5] *Yale* v. *Dederer,* 22 N. Y. 450, 78 Am. Dec. 216; *Yale* v. *Dederer,* 18 N. Y. 265, 72 Am. Dec. 503; *Mack* v. *Austin,* 29 Hun (N. Y.) 534. See *Penn. Coal Co.* v. *Blake,* 85 N. Y. 226; *Layman* v. *Shultz,* 60 Ind. 541; *Brick* v. *Scott,* 47 Ind. 299; *McGlaughlin* v. *O'Rourke,* 12 Iowa, 459.

[6] *Manhattan B. & M. Co.* v.

§ 233. Personal liability of married woman mortgaging her separate estate.—To the above must be added a fourth proposition that a mortgage given by a married woman on her separate estate is always valid against her to the extent of the value of the mortgaged lands, the reason for this being that the mortgage is a specific charge upon a specific part of her separate estate,—"an appropriation only of so much of her estate as the mortgage covers."[7] This proposition is universally sustained in the English and American courts, and for its reason relates back to the broad principle that a married woman can mortgage her real estate.[8]

Payne v. Burnham,[9] in which also the opinion was written by Church, Ch. J., is a leading case upon the question of a married woman's liability for a judgment of deficiency in the foreclosure of a bond and mortgage which she executed jointly with her husband. The mortgage in that case was executed on her separate estate, but she received no part of the loan, the entire amount going to her husband; she was held not liable for a judgment of deficiency. If, however, she had received a part only of the consideration for which the bond

Thompson, 58 N. Y. 80, 82, *per* Church, Ch. J.; *Corn E. Ins. Co.* v. *Babcock,* 42 N. Y. 613, 1 Am. Rep. 601; 35 How. (N. Y.) Pr. 216; *Ballin* v. *Dillaye,* 37 N. Y. 35; *Owen* v. *Cawley,* 36 N. Y. 600; *Yale* v. *Dederer,* 18 N. Y. 282, 72 Am. Dec. 503, 22 N. Y. 460, 78 Am. Dec. 216, 68 N. Y. 329; *Vrooman* v. *Turner,* 8 Hun (N. Y.) 78; reversed in part, 69 N. Y. 280, 25 Am. Rep. 195. Contra, *Brown* v. *Herman,* 14 Abb. (N. Y.) Pr. 394.

[7] *Payne* v. *Burnham,* 62 N. Y. 74; *Corn E. Ins. Co.* v. *Babcock,* 42 N. Y. 613, 1 Am. Rep. 601; *Kidd* v. *Conway,* 65 Barb. (N. Y.) 158; *Manhattan L. Ins. Co.* v. *Glover,* 14 Hun (N. Y.) 154. See *Spear* v. *Ward,* 20 Cal. 660; *Eaton* v. *Nason,* 47 Me. 132; *Black* v. *Galway,* 24 Pa. St. 18; *Voorhies* v. *Granberry,* 5 Baxt. (Tenn.) 704; *Hollis* v. *Francois,* 5 Tex. 195, 51 Am. Dec. 760. See Penn act of 1848.

[8] See *ante,* § 154.

[9] 62 N. Y. 69, reversing 2 Hun (N. Y.) 143; 4 T. & C. (N. Y.) 678. See *Williamson* v. *Duffy,* 19 Hun (N. Y.) 312; *McKeon* v. *Hagan,* 18 Hun (N. Y.) 65; *Manhattan Life Ins. Co.* v. *Glover,* 14 Hun (N. Y.) 153. In *Rourk* v. *Murphy,* 12 Abb. (N. Y.) N. C. 402, she bound her separate estate expressly.

signed by her was given, she would have been held liable for the deficiency.[10] In a case where a married woman received the consideration of a mortgage upon her promise to repay it, it was held that it was borrowed for the benefit of her separate estate. She answered that she was a married woman not carrying on any separate business; a demurrer to the answer by the complainant was sustained.[11] The complaint must state specifically the grounds on which a judgment for deficiency is demanded against a married woman; otherwise, a personal judgment taken upon default will be held void.[12]

A bond and mortgage executed by a married woman to secure part of the purchase money for premises conveyed to her, will render her liable for a judgment of deficiency in an action to foreclose, on the theory that the transaction is for the benefit of here separate estate.[13] In an action to foreclose a purchase money mortgage, Park, J., said, "I do not understand how it can be said that a debt, contracted on the purchase of property which the purchaser takes into possession and enjoys, is not a debt contracted for the benefit of the purchaser's estate." [14]

§ 234. Persons originally liable, deceased, their estates liable—Personal representatives proper parties.—Where mortgagor or other person who was personally liable for a deficiency on the foreclosure of a mortgage is dead, his per-

[10] *Jones* v. *Merritt,* 23 Hun (N. Y.) 184.

[11] *Williamson* v. *Duffy,* 19 Hun (N. Y.) 312.

[12] *Manhattan Life Ins. Co.* v. *Glover,* 14 Hun (N. Y.) 153.

[13] *Ballin* v. *Dillaye,* 37 N. Y. 35, 35 How. (N. Y.) Pr. 216; *Flynn* v. *Powers,* 35 How. (N. Y.) Pr. 279; *Vrooman* v. *Turner,* 8 Hun (N. Y.) 78, reversed in part, 69 N. Y. 280, 25 Am. Rep. 195; *Chase* v. *Hubbard,* 99 Pa. St. 226; *Shnyder* v. *Noble,* 94 Pa. St. 286; *Brunner's Appeal,* 57 Pa. St. 46.

[14] *Ballin* v. *Dillaye,* 37 N. Y. 35; *Rogers* v. *Ward,* 90 Mass. (8 Allen) 387, 85 Am. Dec. 710; *Basford* v. *Pearson,* 89 Mass. (7 Allen) 505; *Stewart* v. *Jenkins,* 88 Mass. (6 Allen) 300; *Ames* v. *Foster,* 85 Mass. (3 Allen) 541. But in *Pemberton* v. *Johnson,* 46 Mo. 342, she was held not personally liable.

sonal representatives may be made parties to an action to foreclose the mortgage, and a decree may be rendered therein that the deficiency be paid out of the estate in their hands in the due course of its administration.[15]

[15] *Fliess* v. *Buckley,* 90 N. Y. 286; *Glacius* v. *Fogel,* 88 N. Y. 439; *Lockwood* v. *Fawcett,* 17 Hun (N. Y.) 147; *Scofield* v. *Doscher,* 10 Hun (N. Y.) 582, aff'd 72 N. Y. 491. For the practice in South Carolina, see *Gray* v. *Toomer,* 5 Rich. (S. C.) L. 261. In *Drayton* v. *Marshall,* Rice's (S. C.) Eq. 373, 33 Am. Dec. 84, personal representatives were held proper parties; and it was further held that the balance of a mortgage debt was entitled to priority of payment out of the general estate over simple contract debts. See *Edwards* v. *Sanders,* 6 S. C. 316. See *Rodman* v. *Rodman,* 64 Ind. 65, supporting the text, and holding that there can be no decree over for a deficiency unless the personal representatives are made parties. See the earlier case of *Newkirk* v. *Burson,* 21 Ind. 129, to the contrary. In *Prieto* v. *Duncan,* 22 Ill. 26, a decree for deficiency was taken against the estate of a deceased mortgagor, none of his personal representatives having been made parties; on appeal it was held error, and the court followed the New York rule in *Leonard* v. *Morris,* 9 Paige Ch. (N. Y.) 90. In *Bennett* v. *Spillars,* 7 Tex. 600, the New York rule was established for Texas, though no authorities are cited in the opinion, per Hemphill, Ch. J. Contra to the text is *Pechaud* v. *Rinquet,* 21 Cal. 76, and *Fallon* v. *Butler,* 21 Cal. 24, 81 Am. Dec. 140, holding that a judgment for deficiency cannot be rendered against personal representatives, but that the actual deficiency can be presented to them for payment in the due course of administration.

The court of chancery of New Jersey, in the case of *United Security Life Insurance and Trust Company of Pennsylvania* v. *Vandergift's Administrator,* 51 N. J. Eq. 400, 26 Atl. 985, hold that while an administrator is not a necessary party to a suit to foreclose a mortgage on the lands of his intestate, yet according to the general current of authority in that State, he is a proper party. Vice-Chancellor Van Fleet, in writing the opinion of the court, says: "In *Vreeland* v. *Loubat,* 2 N. J. Eq. (1 H. W. Gr.) 104, and in *Chester* v. *King,* 2 N. J. Eq. (1 H. W. Gr.) 405, Governor Pennington held that, while a mortgagor, who had conveyed his equity of redemption in the mortgaged premises, was not a necessary party to a suit to foreclose the mortgage on the land, he was nevertheless a proper party. And in *Andrews* v. *Stelle,* 22 N. J. Eq. (7 C. E. Gr.) 478, it was held by the court of errors and appeals, speaking by Mr. Justice Van Syckel, that while a mortgagor, whose equity of redemption had been sold away from him, was not a necessary party to a suit to foreclose the mortgage on the land, yet, if the complainant made him a party, and he claimed that the mortgage was usurious, to avail

This proposition was first advanced by Chancellor Walworth in Leonard v. Morris,[16] and has never been seriously questioned. He held, "Where the person who is thus secondarily liable for such deficiency is dead, I can at present see no legal objection to making his personal representatives parties to the suit for the purpose of obtaining a decree against them for the payment of such deficiency out of the estate of the decedent in their hands, to be paid in a due course of administration. * * * No decree can be made for the payment of the deficiency out of the estate of the decedent, so as to entitle the complainant to an execution thereof in this court, until a full account of the administration of the estate has been taken; except in those cases where the executors

himself of that defense he must make it in the foreclosure suit, otherwise he would be concluded by the decree made in that suit, and, if a suit should subsequently be brought on his land, he would be held to be estopped by the decree in the foreclosure suit from setting up that defense. In *Somerset County Building and Loan Association* v. *Vandevere,* 11 N. J. Eq. (3 Stock.) 382, 383, Chancellor Williamson intimated quite plainly that he thought to a suit to foreclose a mortgage against the heir of the deceased mortgagor, the personal representative of the deceased mortgagor was a necessary party, because he is interested in taking an account of what is due on his intestate's land; and it is quite apparent that the Chancellor would so have declared if the question had been a new one, and not settled, in principle at least, by the decision in *Vreeland* v. *Loubat,* 2 N. J. Eq. (1 H. W. Gr.) 104. But no doubt can be entertained that the interest which such personal representative has in being present when the account is taken of the amount remaining due on his intestate bond, in order that he may see that all proper credits are given, and the sum remaining due is fairly and correctly ascertained, is quite sufficient to make him a proper party. And there is this advantage to the complainants in making him a party: While no direct or active relief can be awarded against him, he will nevertheless be concluded by the decree as to the amount due; and, if a suit at law or other proceeding should afterwards be necessary to recover the whole amount due on the bond, the amount so recoverable will be considered, after the proceeds of sale of the mortgaged premises have been credited, as having been unalterably determined by the decree in the foreclosure suit. *Dorsheimer* v. *Rorback,* 23 N. J. Eq. (8 C. E. Gr.), 46, 48, 25 N. J. Eq. (10 C. E. Gr.) 516, 519, and *Andrews* v. *Stelle,* 22 N. J. Eq. (7 C. E. Gr.) 478."

[16] 9 Paige Ch. (N. Y.) 90, 92.

and administrators admit assets sufficient to pay the complainant's debt, and all other debts of an equal and of a higher class which were due by the decedent." [17]

In an action to foreclose, where judgment was demanded against the survivor of two obligors, and further that on the return of an execution against him unsatisfied the balance be adjudged to be a debt against the estate of the deceased obligor, to be paid by his administrator in the due course of administration, the court held that a decree could not be made against the estate of the decedent in the same action.[18] But it

[17] Judge Miller of the New York Court of Appeals cited this case with approval in 1882, saying, "If the mortgaged premises were inadequate and the security thus failed, the debt was still existing for what was unpaid, and the remedy was perfect against the mortgagor under the statute, which was evidently designed for the purpose of avoiding the necessity of two separate actions. If the mortgagor was alive, the judgment would have been against him personally, and upon his decease his estate would have been liable to pay the same, and his executors or administrators could have been compelled to apply funds in their hands in liquidation of the judgment. That the action was brought after the mortgagor's death, and against the executors, can make no difference, and does not relieve them from the liability which the testator had incurred, and which they would be obliged to meet, had the judgment preceded his death. The foreclosure of the mortgage was in fact against the executors, who were standing in the place of the mortgagor, and the judgment was against his representatives, who were liable to satisfy the same out of any assets of the mortgagor in their hands. It is very clear upon principle that the representatives are liable to pay the debt of a deceased party in any event. But if any doubt can properly arise, it is settled by the statute which authorizes actions to be maintained by and against executors in all cases in which the same might have been maintained by or against their respective testators. The case of *Leonard* v. *Morris* holds distinctly that when the mortgagor or other party personally liable for the deficiency in a foreclosure case is dead, his personal representatives may be parties to the suit, to enable the complainant to obtain a decree that the deficiency be paid out of the estate in their hands in a due course of administration. The rule stated is well settled, and if any different one was adopted, the execution of a bond would be an idle ceremony in case of the maker's death. *Glacius* v. *Fogel,* 88 N. Y. 439."

[18] Vice-Chancellor Whittlesey, in writing the opinion in *Rhoades* v. *Evans,* Clarke Ch. (N. Y.) 170, says: "These provisions would au-

is doubtful whether this is good law under the more recent decisions.[19] If the plaintiff fails to make the representatives of a deceased person, who was liable for the mortgage debt, parties to the action or does not demand a judgment of de-

thorize a personal decree against Evans, and against Rochester if he was living, for any such balance; but will it authorize such decree against Rochester's administrator, he being dead? Such decree is authorized only when such *balance is recoverable at law.* This bill is filed against Evans and the administrator, widow and heirs of Rochester. For the purpose of obtaining a sale of the land, all these are rightly made parties; but can they be joined for the purpose of a personal decree against them jointly? This question is answered by an answer to the question whether they could be jointly sued upon the bond at law. The decisions and well settled principles of our courts clearly and decidedly answer this question in the negative. Evans and the administrator of Rochester could not be joined as defendants in a suit at law upon the bond. Evans must be sued as survivor. Then, this is not a debt which is recoverable at law, in the mode which the complainant has sought to recover it in this court; and, consequently, there can be no decree against the administrator of Rochester in this court. But the complainant asks this court to determine the amount due from Rochester's estate upon this demand, after the premises are sold, and after an execution has been returned unsatisfied against Evans. It seems to me that this is a matter which does not belong to the jurisdiction of this court, at least in the present shape of the cause. The surrogate has jurisdiction to marshal Rochester's assets, and direct how they shall be paid. Other creditors have an interest in the amount of this debt, and in settling this amount, and they are not before the court to contest this claim; and I doubt whether a decision of this court would be binding upon them in any manner whatever. If they had notice of this proceeding, they might possibly contest this claim, or they might see that the mortgaged premises produced enough to pay the mortgage debt, so as to relieve the personal fund; but they are not here, and I cannot make a decree which shall bind them in any manner." This case is cited in no decision, and it is plainly overruled in substance by *Glacius* v. *Fogel,* 88 N. Y. 439; *Lockwood* v. *Fawcett,* 17 Hun (N. Y.) 147; *Leonard* v. *Morris,* 9 Paige Ch. (N. Y.) 90, 92.

[19] See the cases, *supra.* In *Trimmier* v. *Thomson,* 10 Rich. (S. C.) N. S. 164, 178, an exhaustive opinion was written by Haskells, A. J., who held, in an action upon a joint and several bond, where one of the obligors had died and the verdict was generally for money, that separate judgments could be rendered against the survivor and the executors of the deceased obligor. See *Daniels* v. *Moses,* 12 S. C. 130.

ficiency against them, he can present his claim for an unpaid balance to the personal representatives, and if payment is refused, an action can be maintained against them to recover the deficiency,—only, however, by leave of the court in which the mortgage was foreclosed.[20]

§ 235. Persons originally liable, deceased, their heirs and devisees not proper parties.—As has been seen from the decisions cited in the preceding section, the personal representatives of a deceased obligor are proper parties to an action to foreclose a mortgage, for the purpose of determining the amount of any deficiency that may arise, and of establishing a claim to be presented and paid in the due course of the administration of the estate of the decedent. Another line of decisions holds distinctly that the heirs of a deceased person, who was liable for the mortgaged debt, are not proper parties to an action to foreclose a mortgage, where a judgment for deficiency is sought against his estate.[21] If the decedent owned the equity of redemption and was at the time liable for the payment of the mortgage debt, his heirs and devisees are, of course, necessary parties for cutting off the equity of redemption which descended to them; but a judgment for deficiency can, in no event, be demanded against them in the same action.[22]

However, in a recent New York case the court held that the mortgagee may pursue the estate of the mortgagor into the hands of heirs and devisees for the purpose of making a deficiency judgment. It follows as a necessary consequence that if heirs and devisees of a mortgagor are liable to the amount of the property and money received on any judgment for deficiency rendered or a mortgage foreclosure, they are

[20] *Glacius* v. *Fogel*, 88 N. Y. 440; *Scofield* v. *Doscher*, 72 N. Y. 491. See *ante*, §§ 216, 217, and the notes.

[21] See *Alexander* v. *Frary*, 9 Ind. 481.

[22] *Cundiff* v. *Brokaw*, 7 Ill. App. 147. See *ante*, §§ 161–164.

not only proper but necessary parties in such foreclosure. It is said in the case of Colgan v. Dunne,[23] that "the right to pursue the legatee for the debt of the testator, exists independent of statute. Courts of law and courts of equity have, from the earliest times, sustained the creditor's right to satisfaction of his debt from the assets of the testator in the hands of the legatee.[24] The theory is that the testator cannot cut off the right of his creditor to satisfaction of the debt from the testator's estate. In form the action is against the legatee; in substance it is against the property of the testator in the defendant's hands. The statute regulates the procedure, but does not create the right." [25]

§ 236. Remedies against heirs and devisees.—The remedy against the heirs and devisees must be exhausted in a subsequent action to charge lands which have descended to them with the payment of the decedent's debts.[26]

In the case of Leonard v. Morris,[27] quoted in the preceding section, this proposition was pointedly presented to Chancellor Walworth, who said: "Admitting that it may be proper to make the personal representatives of a deceased mortgagor or guarantor parties to a bill of foreclosure, where it is probable there may be a deficiency, there is no case in which it is allowable to make heirs or devisees who have no interest in the mortgaged premises parties to a bill of foreclosure, with a view to reach the estate descended or devised to them, to satisfy an anticipated deficiency upon the sale of

[23] 50 Hun (N. Y.) 443, 3 N. Y. Supp. 309; 21 N. Y. S. R. 315.

[24] Citing: Bract, 2, c. 26, f. 61; 2 Bl. Com. c. 36; 6 Bac. Abr. "Legacies," h; 2 Redf. on Wills § 56; 1 Wash. Real. Prop. c. 3, § 73; *Walkins* v. *Holmann,* 41 U. S. (16 Pet.) 25; 10 L. ed. 873; *Nelthrop* v. *Hill,* 1 Ch. Cas. 135; *Newman* v. *Barton,* 2 Vern. 205; *Noel.* v. *Robinson,* 1 Vern., 90, 94.

[25] *Colgan* v. *Dunne,* 50 Hun (N. Y.) 443, 3 N. Y. Supp. 309, 21 N. Y. S. R. 315.

[26] *Sutherland* v. *Rose,* 47 Barb. (N. Y.) 144; *Merchants' Ins. Co.* v. *Hinman,* 15 How. (N. Y.) Pr. 182.

[27] 9 Paige Ch. (N. Y.) 92.

the mortgaged premises. To authorize the filing of a bill against heirs or devisees, to obtain satisfaction of a debt which is not a specific lien upon the estate descended or devised to them, the complainant must show by his bill that the personal estate of the decedent was not sufficient to pay the debt, or that the complainant has actually exhausted his remedy against the personal estate and the personal representatives and next of kin, etc. And it is impossible to do this as to the deficiency in a mortgage case where, at the time of filing the bill to foreclose the mortgage, it cannot be known that there will be any deficiency whatever.

In proceedings against heirs or devisees, the statute also requires the complainant to state in his bill, with convenient certainty, the real estate descended or devised. Again, the Revised Statutes have prohibited the bringing of any suit against heirs of devisees of real estates, in order to charge them with a debt of a testator or intestate, within three years from the time of granting letters testamentary or of administration upon his estate. * * * The guardian *ad litem* of the infant defendant, therefore, instead of putting in a general answer, and consenting to a decree against such infant, should have raised objection, either in his answer or by demurrer, that the bill was improperly filed against the heirs and devisees. The bill must be dismissed as to the heirs and devisees of the obligor, but without prejudice to the complainant's rights to proceed against them by a new suit to charge them with the payment of any deficiency which may exist after the sale of the mortgaged premises, and which cannot be collected from the estate of the mortgagor, nor from the personal estate of the obligor, after due proceedings had before the surrogate." [28]

[28] *Leonard* v. *Morris,* 9 Paige Ch. (N. Y.) 90, 92; *Fliess* v. *Buckley,* 22 Hun (N. Y.) 551. In *Fliess* v. *Buckley,* 24 Hun (N. Y.) 515, aff'd 90 N. Y. 286, Dykman, J., said: "The plaintiffs must first resort to the decedent's personal estate; that failing, they have their remedy against the heirs and devisees."

§ 237. Person originally liable, making an assignment in bankruptcy or voluntarily, assignee proper.—It is advanced here as an original proposition that an assignee in bankruptcy, or by general assignment, of a person who was, at the time of the assignment, liable for the mortgage debt, is a proper party to an action to foreclose a mortgage, and one against whom a judgment for deficiency can be demanded and decreed, to be paid in the due course of his administration upon the estate of the bankrupt. This proposition has been presented to no court, as far as can be ascertained, but it is believed that it would be sustained, as the cases cited in the four preceding sections strongly support it by analogy. An assignee is only a representative of the bankrupt, and a creature of the law, the same as a personal representative is of a decedent. The distinction should be made, however, that the demand against an assignee must be made before the final settlement of his accounts and his discharge, for after his trust is performed his relations to and his duties with the property of the bankrupt are completely ended.

CHAPTER XI.

PARTIES DEFENDANT—LIABLE FOR THE MORTGAGE DEBT—PARTIES SUBSEQUENTLY LIABLE.

§ 238. Introductory.
§ 239. Purchaser of mortgaged premises subject to the mortgage not liable.
§ 240. Rule in New Jersey fixing liability of purchaser subject to mortgage.
§ 241. Rule in New York.
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§ 244. What words and acts of assumption held binding.
§ 245. Usury or defective title no defense to contract of assumption.
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§ 247. Purchaser not personally liable when his grantor is not personally liable, though he assumes payment of the mortgage.
§ 248. Assumption of mortgage by subsequent mortgagee does not make him personally liable to prior mortgagee.
§ 249. New York cases reviewed.
§ 250. Grantor cannot release his grantee, assuming a mortgage, from his liability to the mortgagee in New York.
§ 251. Contrary ruling in New Jersey.
§ 252. Intermediate purchaser, having assumed payment of the mortgage, liable.
§ 253. Assignor of a mortgage guaranteeing payment or collection liable.
§ 254. Intermediate assignors of a mortgage guaranteeing payment liable.
§ 255. Assignors of a mortgage, covenanting as to title and against defenses, liable.
§ 256. All persons guaranteeing payment or collection of a bond and mortgage by a separate instrument liable.
§ 257. Married women obligating themselves in any of the preceding ways generally liable.
§ 258. Persons subsequently liable in any of preceding ways, deceased, their estates liable—Personal representatives proper parties; heirs and devisees not proper parties.

§ 238. **Introductory.**—Subsequent to the execution of a bond and mortgage, and consequent upon the establishment

of the relation of mortgagor and mortgagee, with their respective benefits and liabilities, the title of the mortgagor to his lands, and of the mortgagee to his bond and mortgage, may be so transferred as to change their respective relations; and to bring persons who were strangers to the execution of the mortgage into such a relation to it, or to the equity of redemption, as to make them liable for the mortgage debt.[29]

In this chapter consideration will be given to such praties as were strangers to the original transaction between the mortgagee and the mortgagor, but who have subsequently become liable for the payment of the indebtedness secured. The subject-matter of this chapter has been of constantly increasing importance in the law, owing to the increased number of conveyances in the Eastern States, and to the facility with which mortgages and real estate titles are now transferred. The whole general subject is intimately connected with the law of principal and surety; but it is without the province of this work to give any attention to that branch of the law, except indirectly, and reference must be had to special treatises on that subject.

There are two principal ways in which this subsequent liability for a mortgage debt may be created. The *mortgagor* may create it, by conveying his equity of redemption in the mortgaged premises, and binding his grantee to assume the payment of the mortgage; or the *mortgagee* may create it in an assignment, by guaranteeing the payment or collection of the mortgage, or by making other covenants in respect to it. Questions affecting the contract of assumption of the payment of a mortgage have grown into such importance from their frequency and variety, that they might well be made the subject of a legal monograph; but for the purposes of this work, only the general and well established principles of law

[29] The court of appeals of Illinois say that it is only by virtue of an express provision of the statute, or facts giving equitable jurisdiction, that a third person liable for the mortgage debt can be joined as a party defendant in a foreclosure proceeding. *Walsh* v. *Van Horn*, 22 Ill. App. 170.

affecting the subject need be stated. The decisions in New York, however, are fully given in the following pages.

§ 239. Purchaser of mortgaged premises subject to the mortgage not liable.—It is now well settled in all courts, where a mortgagor conveys his equity of redemption to a purchaser, without mentioning the mortgage in the instrument of conveyance, or by stating therein that the deed is made subject to the mortgage,[30] or by merely reciting the mortgage, that the grantee is not thereby made liable for the mortgage debt; and a judgment for deficiency cannot be demanded against him in an action to foreclose the mortgage.[31] A grantee who takes "subject" to a mortgage simply contracts that the debt shall be paid out of the mortgaged land.[32] The phrase "under and subject" is binding between the parties as a covenant of indemnity, but it gives the mortgagee no rights against the purchaser.

A purchaser at a judicial sale, which is made subject to a mortgage,[33] does not become personally obligated for the

[30] *Stebbins* v. *Hall,* 29 Barb. (N. Y.) 524, collating and reviewing the cases; *Binsse* v. *Paige,* 1 Keyes (N. Y.) 87; *Collins* v. *Rowe,* 1 Abb. (N. Y.) N. C. 97, and the note to the case, in which are collated and analyzed the cases interpreting and fixing the meaning of the language employed in various deeds to express and to refer to the existence of a mortgage on the premises. See *Wadsworth* v. *Lyon,* 93 N. Y. 201, 45 Am. Rep. 190; *Carter* v. *Holahan,* 92 N. Y. 498; *Post* v. *Tradesmen's Bank,* 28 Conn. 430, 432; *Rapp* v. *Stoner,* 104 Ill. 618; *Lewis* v. *Day,* 53 Iowa, 575, 579, collating and reviewing the cases; *Canfield* v. *Shear,* 49 Mich. 313; *Strohauer* v. *Voltz,* 42 Mich. 444; *Slater* v. *Breese,* 36 Mich. 77; *Woodbury* v. *Swan,* 58 N. H. 380; *Merriman* v. *Moore,* 90 Pa. St. 78; *Samuel* v. *Peyton,* 88 Pa. St. 465; *Moore's Appeal,* 88 Pa. St. 450, 32 Am. Rep. 469; *Girard Trust Co.* v. *Stewart,* 86 Pa. St. 89; *Ins Co.* v. *Addicks,* 12 Phila. (Pa.) 490; *Moore's Estate,* 12 Phila (Pa.) 104; *Weber* v. *Zeiment,* 30 Wis. 283; *Tanguay* v. *Felthousen,* 45 Wis. 30; *Cleveland* v. *Southard,* 25 Wis. 479.

[31] *Belmont* v. *Coman,* 22 N. Y. 438, 78 Am. Dec. 213, a leading case; *Hull* v. *Alexander,* 26 Iowa, 569, 572; *Carleton* v. *Byington,* 24 Iowa, 173; *McLenahan* v. *McLenahan,* 18 N. J. Eq. (3 C. E. Gr.) 101, collating the English authorities.

[32] *Ludington* v. *Harris,* 21 Wis. 239.

[33] *Taylor* v. *Mayer,* 93 Pa. St. 42.

mortgage debt.[34] There is no implied promise or covenant of a personal obligation; the premises are the primary fund for the payment of the debt; but beyond their value, the purchaser is in no way liable. Even where a deed recited that the mortgage had been estimated as a part of the consideration money, and had been deducted therefrom, it has been decided that the grantee assumed no personal liability for its payment.[35] Where the language was, "subject * * * to a mortgage * * * which forms the consideration money of this deed," the grantee was held not liable.[36]

§ 240. Rule in New Jersey fixing liability of purchaser subject to mortgage.—In New Jersey the rule is quite different, and the courts have held that equity raises upon the conscience of the purchaser an obligation to indemnify the mortgagor against the mortgage debt.[37] Vice-Chancellor VanFleet[38] very clearly distinguishes the rules in New York and in New Jersey in reviewing Belmont v. Coman.[39] "It was there held," he says, "that where lands are conveyed subject to a mortgage, and the amount of the mortgage is deducted from the purchase money agreed upon, no personal liability is thereby created against the purchaser, but that the true exposition of the intent of the parties under such an arrangement is, that so much of the purchase money as is represented by the mortgage is not to be paid by the purchaser to any-

[34] *Lening's Estate,* 52 Pa. St. 135; *Wager* v. *Chew,* 15 Pa. St. 323; *Price* v. *Cole,* 35 Tex. 461. In *Porter* v. *Parmley,* 52 N. Y. 185, no mention was made of a mortgage.

[35] *Belmont* v. *Coman,* 22 N. Y. 438, 78 Am. Dec. 213. See *Dingeldein* v. *Third Ave. R. R. Co.* 37 N. Y. 575, distinguishing *Belmont* v. *Coman, supra.* In point, *Fiske* v. *Tolman,* 124 Mass. 254, 26 Am. Rep. 659, where the language was, "subject to a mortgage * * * which is part of the above-named consideration."

[36] *Trotter* v. *Hughes,* 12 N. Y. 74, 78, 62 Am. Dec. 137.

[37] *Tichenor* v. *Dodd,* 4 N. J. Eq. (3 H. W. Gr.) 454, 455; *Twichell* v. *Mears,* 8 Biss. C. C. 211.

[38] *Heid* v. *Vreeland,* 30 N. J. Eq. (3 Stew.) 591, 593; *Belmont* v. *Coman, 22* N. Y. 438, 78 Am. Dec. 213.

[39] 22 N. Y. 438, 78 Am. Dec. 213.

body, but shall be paid out of the land, and in that manner only. Such interpretation would undoubtedly carry into effect the intention of the parties where the interest sold is merely the equity of redemption, and the purchase money agreed upon represents simply the value of the mortgagor's interest in the mortgaged premises over the mortgage debt; but where the purchase money agreed upon represents the whole value of the premises free from the mortgage, and one of the mortgagor's objects in selling is to relieve himself from the mortgage debt, the vendor would seem, according to the plain meaning of the arrangement, to have a clear right to the whole sum agreed to be paid, or, if part is kept back to pay the mortgage, that the purchaser shall be required either so to apply it, or to indemnify the mortgagor against the mortgage debt; such I understand to be the principle established by the adjudications of this state, and in my view there can be no doubt it is founded on justice and reason."

§ 241. Rule in New York.—In the case of Smith v. Truslow,[40] the court cited Belmont v. Coman [41] with approval, but seemed to limit it by saying, "It would be otherwise, and the contention of the appellant should prevail if, as he assumes, the mortgage debt formed part of the consideration of the purchase and was to be paid by the purchasers, or if he retained its amount." This would seem to indicate that the New York courts incline toward the New Jersey rule as more equitable and just. Much depends in each case upon the real intention of the parties. If it could be shown that it was the intention of the grantee to assume payment, then such language as has been given above would be construed to bind him personally.[42] Again, although a deed may expressly

[40] 84 N. Y. 660, 661, *per* Danforth, J. But see *Bennett* v. *Bates*, 94 N. Y. 354, *per* Ruger, Ch. J., in point

[41] 22 N. Y. 438, 78 Am. Dec. 213.

[42] *Andrews* v. *Wolcott*, 16 Barb. (N. Y.) 21.

bind a purchaser with the assumption and payment of prior mortgages, he would not be holden if it could be shown that such contract of assumption was inserted without his knowledge, and that he had no intention of binding himself personally.[43]

§ 242. Purchaser of mortgaged premises, assuming payment of the mortgage, liable—General principles.—If the purchaser of an equity of redemption assumes the payment of an existing mortgage on the premises, he thereby becomes personally liable for its payment, and may be made a defendant for the purpose of obtaining a judgment for deficiency against him.[44] But he is not a necessary party unless the mortgagee had notice of the assumption.[45]

[43] *Smith* v. *Truslow,* 84 N. Y. 660; *Kilmer* v. *Smith,* 77 N. Y. 226, 33 Am. Rep. 613. See the following sections and notes.

[44] *Calvo* v. *Davies,* 73 N. Y. 212, 29 Am. Rep. 130; *Trotter* v. *Hughes,* 12 N. Y. 74, 62 Am. Dec. 137; *Russell* v. *Pistor,* 7 N. Y. 171, 174, 57 Am. Dec. 509; *Mutual Life Ins. Co.* v. *Davies,* 44 N. Y. Supr. Ct. (12 J. & S.) 172, and the cases cited; *Wales* v. *Sherwood,* 52 How. (N. Y.) Pr. 413; *Drury* v. *Clark,* 16 How. (N. Y.) Pr. 424; *Mills* v. *Watson,* 1 Sween. (N. Y.) 374. See *Bache* v. *Doscher,* 67 N. Y. 429; *Rapp* v. *Stoner,* 104 Ill. 618; *Rogers* v. *Herron,* 92 Ill. 583; *Scarry* v. *Eldridge,* 63 Ind. 44; *Price* v. *Pollock,* 47 Ind. 362; *Ross* v. *Kennison,* 38 Iowa, 396; *Thompson* v. *Bertram,* 14 Iowa, 476, citing *Burr* v. *Beers,* 24 N. Y. 178, 80 Am. Dec. 327, and relying upon *Moses* v. *The Clerk,* 12 Iowa, 140, and *Corbett* v. *Waterman,* 11 Iowa, 87; *Schmucker* v. *Sibert,* 18 Kan. 104, 26 Am. Rep. 765; *Unger* v. *Smith,* 44 Mich. 22; *Booth* v. *Conn. Mut. Life Ins. Co.* 43 Mich. 299; *Miller* v. *Thompson,* 34 Mich. 10; *Follansbee* v. *Johnson,* 28 Minn. 311; *Vreeland* v. *VanBlarcom,* 35 N. J. Eq. (8 Stew.) 530; *Brewer* v. *Maurer,* 38 Ohio St. 543, 43 Am. Rep. 436, an important case; *Bishop* v. *Douglas,* 25 Wis. 696. In the early cases of Missouri a purchaser assuming payment was held not liable under the statute; Code of 1855, chap. 113, § 11; *Fithian* v. *Monks,* 43 Mo. 502, 515; but under a later statute a purchaser has been held liable; *Heim* v. *Vogel,* 69 Mo. 529. The liability must, however, be enforced in an action apart from the foreclosure; *Fitzgerald* v. *Barker,* 70 Mo. 685. In *Hand* v. *Kennedy,* 83 N. Y. 149, W. purchased certain premises in his own name, but in fact for himself, K. and H. jointly, giving a purchase money mortgage signed by himself alone as part payment; subsequently W. conveyed to K. and H. undivided interests in the property, they as-

If a purchaser assumes only a portion of the mortgage debt, he will be obligated for the payment of no more than he assumes.[46] And where the conveyance is to two or more tenants in common, they will be held jointly and not severally liable, though their interests in the property may not be proportionally the same.[47] If the grantee purchases only a portion of the premises and assumes the entire mortgage, he will be liable for the whole debt.[48]

After the contract of assumption is made, the grantor becomes a mere surety for the debt. It is queried whether he can require the mortgagee to foreclose when the mortgage becomes due, and whether he has any remedy by which he can protect himself except that of paying his bond and mortgage, and becoming thereby subrogated to the rights of the mortgagee.[49] The bargain to assume payment being made between the mortgagor and his grantee, the mortgagee is a stranger to it; he is at first in privity with neither of the parties to the contract; yet he was, at an early day, held to be entitled to seize its benefits and to compel the grantee to perform his covenant. The debt becomes the grantee's own debt, and constitutes a portion of the consideration for the conveyance; and the right to enforce the obligation is not changed by the fact

suming to pay specified proportional parts of the mortgage; in an action to recover a judgment for deficiency, Earl, J., held K. and H. liable to the mortgagee, and that there was a sufficient consideration to sustain their contract of assumption. See *Williams* v. *Gillies*, 28 Hun (N. Y.) 175, where the agreement to assume a part was oral, and the court excluded evidence of the oral agreement.

See *Fanning* v. *Murphy*, 117 Wis. 408, 94 N. W. 335. See also *Baker* v. *Potts*, 73 App. Div. 29, 76 N. Y. Supp. 406.

[45] *Title Guarantee & Trust Co.* v. *Weiher*, 30 Misc. 250, 63 N. Y. Supp. 224.

[46] *Bowne* v. *Lynde*, 91 N. Y. 92; *Harlem Savings Bank* v. *Mickelsburgh*, 57 How. (N. Y.) Pr. 106; *Logan* v. *Smith*, 70 Ind. 597; *Snyder* v. *Robinson*, 35 Ind. 311, 9 Am. Rep. 738; *Logan* v. *Smith*, 62 Mo. 455.

[47] *Fenton* v. *Lord*, 128 Mass. 466.

[48] *Wilcox* v. *Campbell*, 106 N. Y. 325. See *Higham* v. *Harris*, 108 Ind. 246.

[49] *Marshall* v. *Davies*, 78 N. Y. 415, *per* Rapallo, J.; *Mills* v. *Watson*, 1 Sween. (N. Y.) 374.

that payment is to be made to the mortgagee, instead of to the vendor of the property. The theories of law, on which this proposition has at different times rested, will be mentioned in a following section.

The form of remedy in New York, New Jersey[50] and most other states, is that the grantee is liable upon his covenant; while in Connecticut,[51] Massachusetts,[52] and Rhode Island,[53] assumpsit is held to be the proper remedy. In an action by the grantor against his grantee, on a contract of assumption, the measure of damages is the unpaid amount of the mortgage.[54] It is said by the New York court of appeals, in the case of Gifford v. Corrigan,[55] that the acceptance of a deed containing an express assumption by the grantee of a mortgage, creates an obligation which the grantor cannot release;[56] and the mortgagee may maintain a personal action against such a grantee, and he may also pursue this remedy without foreclosing the mortgage and without joining the mortgagor as a

[50] *Klapworth* v. *Dressler*, 13 N. J. Eq. (2 Beas.) 62, 78 Am. Dec. 69, *per* Green, Chancellor, relying upon New York cases, and citing *Green* v. *Crockett*, 2 Dev. & B. (N. C.) Eq. 390. See *Stiger* v. *Mahone*, 24 N. J. Eq. (9 C. E. Gr.) 426, *per* Runyon, Chancellor; limited in *Crowell* v. *Currier*, 27 N. J. Eq. (12 C. E. Gr.) 152. See *Crowell* v. *Hospital*, 27 N. J. Eq. (12 C. E. Gr.) 650. The above cases were superseded in part by chap. 255 of the laws of 1880, providing that a judgment for deficiency cannot be recovered in an action to foreclose. The contract of assumption remains valid to the mortgagee, but it can be enforced only in a separate action at law; *Naar* v. *Union & E. L. Co.* 34 N. J. Eq. (7 Stew.) 111; *Allen v. Allen*, 34 N. J. Eq. (7 Stew.) 493; *Newark Savings Inst.* v. *Forman*, 33 N. J. Eq. (6 Stew.) 436.

[51] *Chapman* v. *Beardsley*, 31 Conn. 116.

[52] *Williams* v. *Fowle*, 132 Mass. 385. *Lappen* v. *Gill*, 129 Mass. 349; *Fenton* v. *Lord*, 128 Mass. 466. See *Drury v. Tremont Imp. Co.* 95 Mass. (13 Allen) 168; *Braman* v. *Dowse*, 66 Mass. (12 Cush.) 227.

[53] *Urquhart* v. *Brayton*, 12 R. I. 169.

[54] *Reed* v. *Paul*, 131 Mass. 129; *Locke* v. *Homer*, 131 Mass. 93, 41 Am. Rep. 199; *Furnas* v. *Durgin*, 119 Mass. 500, 20 Am. Rep. 341.

[55] 117 N. Y. 257, 6 L.R.A. 610, 15 Am. St. Rep. 508, 22 N. E. 756.

[56] As to the binding obligation of the assumption by the mortgagee.

See *Atlantic Dry Dock Co.* v. *Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556; *Ricard* v. *Sanderson*, 41 N. Y.

defendant in the proceedings.[57] In such a case, it is simply a question of a promise on the part of one person to another to pay a debt due to a third; and the right of the third person to recover from the promisor for such debt is well settled;[58] and this is true whether the promise is verbal or in writing.[59] But it has been said that, in order to constitute a personal obligation upon a party taking a conveyance of land incumbered by a mortgage binding him to the absolute payment thereof, something more is requisite than a mere statement in the deed that the conveyance is made subject to such mortgage;[60] thus, it has been held that a recital in a deed to the effect that the land is subject to a mortgage, the amount due thereon being part thereof and deducted from the consideration, without stating that the grantee assumes payment of the mortgage, does not render such grantee personally liable for a deficiency on foreclosure.[61] Yet it is held by some cases that where, by the terms of the deed, the vendee is to pay the mortgage, and the amount thereof is deducted from the consideration money, as between the vendee and the mortgagor, in equity, the vendee is personally liable for any deficiency that may arise on a foreclosure sale.[62]

179; *Spaulding* v. *Hallenbeck,* 35 N. Y. 204; *Trotter* v. *Hughes,* 12 N. Y. 74, 62 Am. Dec. 137; *Halsey* v. *Reed,* 9 Paige Ch. (N. Y.) 446; *Converse* v. *Cook,* 8 Vt. 164.

[57] *Burr* v. *Beers,* 24 N. Y. 178, 179, 80 Am. Dec. 327; *Belmont* v. *Coman,* 22 N. Y. 438, 78 Am. Dec. 213; *Vail* v. *Foster,* 4 N. Y. 312; *Marsh* v. *Pike,* 10 Paige Ch. (N. Y.) 595; *King* v. *Whitley,* 10 Paige Ch. (N. Y.) 465, 469; *Blyer* v. *Monholland,* 2 Sandf. Ch. (N. Y.) 478.

[58] *Rogers L. & M. Works* v. *Kelley,* 88 N. Y. 234; *Lawrence* v. *Fox,* 20 N. Y. 268; *Knowles* v. *Erwin,* 43 Hun (N. Y.) 150, 152.

[59] *Bowen* v. *Kurtz,* 37 Iowa, 239; *Drury* v. *Tremont Improvement Co.* 95 Mass. (13 Allen) 168; *Strohauer* v. *Voltz,* 42 Mich. 444, 4 N. W. 161; *Bolles* v. *Beach,* 22 N. J. L. 680, 53 Am. Dec. 263.

[60] *Stebbins* v. *Hall,* 29 Barb. (N. Y.) 524, 530.

[61] *Equitable Loan and Assurance Soc.* v. *Bostwick,* 100 N. Y. 628, 3 N. E. 296.

[62] *Gilbert* v. *Averill,* 15 Barb. (N. Y.) 20, 23; *Ferris* v. *Crawford,* 2 Den. (N. Y.) 595; *Tice* v. *Annin,* 2 John. Ch. (N. Y.) 125, 128; *Vanderkemp* v. *Shelton,* 11 Paige Ch. (N. Y.) 28; *King* v. *Whitely,* 10 Paige Ch. (N. Y.) 465; *Jumel* v. *Jumel,* 7 Paige Ch. (N. Y.) 591;

§ 243. Purchaser becomes principal debtor and mortgagor only a surety.—As between the mortgagor and his grantee who assumes payment, the grantee becomes the primary debtor while the mortgagor occupies the new relation of a surety responsible to the mortgagee alone.[63] The land stands as the primary fund out of which the debt must be satisfied in the first instance; if that is insufficient, it will rest upon the purchaser to redeem his promise made to the mortgagor to pay the obligation. Both the purchaser and the mortgagor are, of course, proper parties to the action to foreclose, as both are debtors liable to the plaintiff, although they sustain to each other the relation of principal and surety.[64] As a general rule the grantor as a surety will be discharged from his liability by any alteration of the obligation under which he is holden, according to the rules which govern the relation of principal and surety.

Thus, a change of the terms of a bond and mortgage, by agreement between the grantee assuming payment and the mortgagee, made without the knowledge or consent of the mortgagor, canceling a stipulation in the original mortgage providing for releases of part of the mortgaged premises when required, will discharge the mortgagor of all liability for a judgment of deficiency.[65] "That an agreement by the creditor

Heyer v. *Pruyn,* 7 Paige Ch. (N. Y.) 465; *Bigelow* v. *Bush,* 6 Paige Ch. (N. Y.) 343.

[63] *Drury* v. *Clark,* 16 How. (N. Y.) Pr. 424; *Mills* v. *Watson,* 1 Sween. (N. Y.) 374; *Wait* v. *Getman,* 32 App. Div. 168, 52 N. Y. Supp. 965.

[64] *Wadsworth* v. *Lyon,* 93 N. Y. 201, 45 Am. Rep. 190; *Flagg* v. *Thurber,* 14 Barb. (N. Y.) 196; modified in 9 N. Y. 483; *Crawford* v. *Edwards,* 33 Mich. 354; *Huyler* v. *Atwood,* 26 N. J. Eq. (11 C. E. Gr.) 504.

[65] *Paine* v. *Jones,* 76 N. Y. 274, aff'g 14 Hun (N. Y.) 577, relying upon *Calvo* v. *Davies,* 73 N. Y. 211, 29 Am. Rep. 130. See *Marshall* v. *Davies,* 78 N. Y. 414, reversing 16 Hun (N. Y.) 606. But in *Woodruff* v. *Stickle,* 28 N. J. Eq. (1 Stew.) 549, it was stipulated in the mortgage that the mortgagee should release lands at the mortgagor's request when at least $300 per acre was paid; the fact that the mortgagor's grantee released at a less price, was held not to discharge or relieve the mortgagor from his personal liability on the bond.

with the principal debtor, extending the time for the payment of the debt, without the consent of the surety, discharges the latter, is established by numerous authorities."[66]

§ 244. **What words and acts of assumption held binding.**—Specific words are not necessary to bind the purchaser, but the intent to assume the mortgage must be clear and certain. The expression "subject to the payment" of a mortgage has been repeatedly held to bind the purchaser;[67] so also "subject, however, to the assumption as part of the consideration" of a mortgage, bound the grantee personally.[68] And the expression "which the grantee assumes and agrees to hold the grantor harmless from," was held to render the grantee liable to the mortgagee.[69] In a mortgage where the

[66] *Spencer* v. *Spencer,* 95 N. Y. 353; *Murray* v. *Marshall,* 94 N. Y. 611; *Calvo* v. *Davies,* 73 N. Y. 211, 216, 29 Am. Rep. 130, aff'g 8 Hun (N. Y.) 222, *per* Andrews, J.; *Jester* v. *Sterling,* 25 Hun (N. Y.) 344. See *Meyer* v. *Lathrop,* 10 Hun (N. Y.) 66, to the contrary; but overruled in *Paine* v. *Jones,* 14 Hun (N. Y.) 577, 580. See *Penfield* v. *Goodrich,* 10 Hun (N. Y.) 41, where there was no contract of assumption and the mortgagor was held not discharged from his liability on the bond by an extension of time by the mortgagee to the purchaser. See *Corbett* v. *Waterman,* 11 Iowa, 86, holding the mortgagor not discharged by an extension of time.

[67] *Carley* v. *Fox,* 38 Mich. 387; *Samuel* v. *Peyton,* 88 Pa. St. 465; *Burke* v. *Gummey,* 49 Pa. St. 518; *Woodward's Appeal,* 38 Pa. St. 322, 88 Am. Dec. 503. See *Davis' Appeal,* 89 Pa. St. 272, which seems to overrule *Burke* v. *Gummey,* 49 Pa. St. 518, on this language. See *Merriman* v. *Moore,* 90 Pa. St. 78; in point, *Dingeldein* v. *Third Ave. R. R. Co.* 37 N. Y. 575, 578, *per* Hunt, Ch. J., considering the question at length; *Collins* v. *Rowe,* 1 Abb. (N. Y.) N. C. 97, and the note, exhaustively collating the cases on this point and distinguishing them. See *Bennett* v. *Bates,* 94 N. Y. 354.

[68] *Douglass* v. *Cross,* 56 How. (N. Y.) Pr. 330, *per* VanVorst, J., distinguishing *Collins* v. *Rowe,* 1 Abb. (N. Y.) N. C. 97, where the language was, "subject, nevertheless, to the payment of one-eighth of a certain mortgage now on the premises," which was held not to bind the grantee. And in *Hoy* v. *Bramhall,* 19 N. J. Eq. (4 C. E. Gr.) 74, 78, 563, 568, Chancellor Zabriskie says, "The clause in the deed 'subject to the payment of all liens now on said premises' cannot be construed into a covenant to pay the liens. It is only a limitation of the covenants of warranty and against incumbrances."

[69] *Muhlig* v. *Fiske,* 131 Mass. 110;

assumption clause read, "which the party of the *first* part hereby agrees to pay," it was construed to mean the party of the *second* part.[70] An agreement to assume payment of the interest cannot be construed so as to impose a liability for the principal sum.[71] Even a parol promise by the purchaser to assume a mortgage may be enforced, as the contract of assumption is held to exist independent of and apart from the deed, though nearly always engrossed upon it.[72]

It is not necessary for the grantee to sign the deed in order to bind himself with the payment of the mortgage debt which he assumes; his acceptance of the deed, with knowledge of its terms, imposes the obligation upon him as effectually as though he signed it;[73] if, however, there is no actual acceptance or intention to assume the mortgage, the grantee will not be holden for the debt, for the reason that there has been no meeting of minds, and consequently no contract.

Thus, if an assumption clause is inserted in an unusual place in the deed, so that it escapes the notice of the grantee, and he had no intention to assume payment, he will not be held

Locke v. *Homer,* 131 Mass. 93, 41 Am. Rep. 199.

[70] *Fairchild* v. *Lynch,* 42 N. Y. Supr. Ct. (10 J. & S.) 265.

[71] *Manhattan Life Ins. Co.* v. *Crawford,* 9 Abb. (N. Y.) N. C. 365.

[72] *Taintor* v. *Hemingway,* 18 Hun (N. Y.) 458; aff'd 83 N. Y. 610, where the deed was made subject to the mortgage, and an oral agreement to pay it was held to be valid. See *Harlem Sav. Bank* v. *Mickelsburgh,* 57 How. (N. Y.) Pr. 106. In point, *Ely* v. *McNight,* 30 How. (N. Y.) Pr. 97, where the question of parol assumption is considered at length. *Slauson* v. *Watkins,* 44 N. Y. Supr. Ct. (12 J. & S.) 73. In *Pike* v. *Seiter,* 15 Hun (N. Y.) 402, a husband in a land contract, and subsequently orally, assumed the payment of a mortgage, but he caused the deed to be made in his wife's name; he, instead of his wife, was held personally liable. See *Merriman* v. *Moore,* 90 Pa. St. 78; *McDill* v. *Gunn,* 43 Ind. 315; *Ream* v. *Jack,* 44 Iowa, 325; *Lamb* v. *Tucker,* 42 Iowa, 118; *Bowen* v. *Kurtz,* 37 Iowa, 239; *Miller* v. *Thompson,* 34 Mich. 10; *Crowell* v. *Hospital,* 27 N. J. Eq. (12 C. E. Gr.) 650; *Ketcham* v. *Brooks,* 27 N. J. Eq. (12 C. E. Gr.) 347. See *Wilson* v. *King,* 27 N. J. Eq. (12 C. E. Gr.) 374, where the proof was held insufficient, and the case failed for that reason.

[73] *Bowen* v. *Beck,* 94 N. Y. 86, 46 Am. Rep. 124; *Ricard* v. *Sanderson,* 41 N. Y. 179, 181; *Wales* v. *Sherwood,* 52 How. (N. Y.) Pr. 413, and the cases cited.

responsible to the mortgagee;[74] so also if the scrivener inserts an assumption clause without the knowledge of either party, or if it be fraudulently inserted.[75] In a case where a deed, containing an assumption clause, was executed merely for the purpose of transferring the title, the grantee was held not liable.[76] But as against a *bona fide* purchaser of a mortgage and notes before maturity, who relied in part upon the contract of assumption, such mistakes and frauds could not be pleaded in defense, and the grantee would be held personally liable.[77] It is not necessary for the mortgagee to be notified of the conveyance; the purchaser becomes, at once, liable to him for the debt. It is necessary that the conveyance be absolute in its terms,[78] and that it transfer the whole, or an undivided part, of the premises.

§ 245. Usury or defective title no defense to contract of assumption.—A failure of title is held to be a good defense for a purchaser, who assumed the payment of a mort-

[74] *Deyermand* v. *Chamberlain,* 88 N. Y. 658; *Kilmer* v. *Smith,* 77 N. Y. 226; *Trustees of Dispensary of N. Y.* v. *Merriman,* 59 How. (N. Y.) Pr. 226; *Parker* v. *Jenks,* 36 N. J. Eq. (9 Stew.) 398; *Culver* v. *Badger,* 29 N. J. Eq. (2 Stew.) 74; *Bull* v. *Titsworth,* 29 N. J. Eq. (2 Stew.) 73. In *VanHorn* v. *Powers,* 26 N. J. Eq. (11 C. E. Gr.) 257, a husband caused a deed containing an assumption clause to be executed to his wife without her knowledge; she was held not personally liable. Precisely the same facts and ruling appear in *Munson* v. *Dyett,* 56 How. (N. Y.) Pr. 333. See *Albany City S. Inst.* v. *Burdick,* 87 N. Y. 40. In *Best* v. *Brown,* 25 Hun (N. Y.) 223, the grantee refused acceptance of a deed containing an assumption clause, yet the grantor recorded the deed; the grantee was held not personally liable.

[75] *Fuller* v. *Lamar,* 53 Iowa, 477. See *Albany City S. Inst.* v. *Burdick,* 87 N. Y. 40, reversing 20 Hun (N. Y.) 104, 56 How. (N. Y.) Pr. 500, as to the amount of evidence of fraud that is necessary.

[76] *Deyermand* v. *Chamberlain,* 22 Hun (N. Y.) 110, aff'd 88 N. Y. 658. See *Best* v. *Brown,* 25 Hun (N. Y.) 223.

[77] *Hayden* v. *Snow,* 9 Biss. C. C. 511.

[78] *Garnsey* v. *Rogers,* 47 N. Y. 233, 7 Am. Rep. 440. See *Flagg* v. *Munger,* 9 N. Y. 483–499, where there was an acceptance of the deed conditionally at first, but subsequently made absolute on the giving by the vendor of a conditional bond; a breach of this was held to discharge the purchaser from any

gage, aganist his personal liability, for the reason that there is a failure of the consideration upon which the contract of assumption was based.[79] Judge Miller, of the New York Court of Appeals, limited this rule in 1878, by saying: "It it held that where a grantee of mortgaged premises takes a deed of the same subject to the mortgage, and thereby assumes to pay the mortgage, he is estopped from contesting the consideration and validity of the mortgage. * * * The general rule is, that there must be an *eviction* before any relief can be granted, on the ground of a failure of title or consideration. So long as he remains in the peaceful and quiet possession of the premises, or until he surrenders possession of the same to a paramount title, the mortgagor or the purchaser who assumes the payment of the mortgage, has no defense to the same."[80] After the contract of assumption has been made the grantee cannot plead the defense of usury;[81] nor can he ordinarily question the consideration or validity of the mortgage.[82]

§ 246. Theories of law upon which a mortgagee is allowed the benefit of the contract of assumption.— There are two theories of law upon which a mortgagee may base his right to hold a purchaser, who has assumed the payment of his mortgage, personally liable for the mortgage

personal liability on the contract of assumption, *per* Denio and Edwards, JJ.

[79] *Dunning* v. *Leavitt,* 85 N. Y. 30, 39 Am. Rep. 617, reversing 20 Hun (N. Y.) 178; *Thorp* v. *Keokuk Coal Co.* 48 N. Y. 253, 47 Barb. (N. Y.) 439; *Garnsey* v. *Rogers,* 47 N. Y. 233, 7 Am. Rep. 440; *Curtiss* v. *Bush,* 39 Barb. (N. Y.) 661. In point, *Benedict* v. *Hunt,* 32 Iowa, 27, 30; *Hulfish* v. *O'Brien,* 20 N. J. Eq. (5 C. E. Gr.) 230; *Hile* v. *Davidson,* 20 N. J. Eq. (5 C. E. Gr.) 228.

[80] *Parkinson* v. *Sherman,* 74 N. Y. 88, 92, 30 Am. Rep. 268; *Ritter* v. *Phillips,* 53 N. Y. 586; *Thorp* v. *Keokuk Coal Co.* 48 N. Y. 253; *Freeman* v. *Auld,* 44 N. Y. 50; *Shadbolt* v. *Bassett,* 1 Lans. (N. Y.) 121. On the question of eviction, see *Dunning* v. *Leavitt,* 85 N. Y. 30, 39 Am. Rep. 617.

[81] *Hartley* v. *Harrison,* 24 N. Y. 170.

[82] *Freeman* v. *Auld,* 44 N. Y. 50. See *Hartley* v. *Tatham,* 1 Robt. (N. Y.) 246, on estoppel.

debt; first, the theory of equitable subrogation, by which a creditor is entitled to all the collateral securities which his debtor has obtained to reinforce the primary obligation;[83] and second, the theory that if one person makes a promise to another for the benefit of a third person, that third person may maintain an action on the promise.[84] The first of these is as old as English law itself, and was the earliest of the two theories to be applied to mortgage foreclosures, when the statute was passed authorizing the recovery of a personal judgment for deficiency in an action to foreclose a mortgage.[85] The doctrine of subrogation is still, in many states, the only one upon which the mortgagee's right to hold the purchaser responsible for the debt rests.[86]

But in New York Judge Denio of the Court of Appeals, about 1861,[87] advanced the second theory in application to mortgage foreclosures, in a case where the doctrine of subrogation would not sustain the conclusions which he desired to reach. This second theory has grown in strong favor with New York courts wherever it has been possible to apply it; and there are only two cases (presented in the next two sections) in which the doctrine of the right of a third party to enforce such a promise made for his benefit, cannot be applied to mortgage foreclosures.[88] In Vrooman v. Turner,[89]

[83] *Trotter* v. *Hughes,* 12 N. Y. 74, 79, 62 Am. Dec. 137. See *post,* § 250.

[84] *Ross* v. *Kennison,* 38 Iowa, 396. For an exhaustive collection and explanation of cases in all the English and American courts, applying this principal, see the note to *Cocker's Case,* 17 Eng. Rep. 757, 768, Moak's notes.

[85] *Garnsey* v. *Rogers,* 47 N. Y. 233, 7 Am. Rep. 440; *Trotter* v. *Hughes,* 12 N. Y. 74, 62 Am. Dec. 137; *Marsh* v. *Pike,* 10 Paige Ch. (N. Y.) 595; *Dias* v. *Bouchaud,* 10 Paige Ch. (N. Y.) 446; *Curtis* v. *Tyler,* 9 Paige Ch. (N. Y.) 432.

[86] See *Crowell* v. *Hospital,* 27 N. J. Eq. (12 C. E. Gr.) 650, 657, where the question is fully discussed.

[87] *Burr* v. *Beers,* 24 N. Y. 178. 80 Am. Dec. 327; *Lawrence* v. *Fox,* 20 N. Y. 268. The courts of Iowa have adopted the second theory; *Ross* v. *Kennison,* 38 Iowa, 396.

[88] *Dunning* v. *Leavitt,* 85 N. Y. 39, 39 Am. Rep. 617; *Hand* v. *Kennedy,* 83 N. Y. 149, 154; *Pardee* v. *Treat,* 82 N. Y. 385; *Thorp* v. *Keokuk Coal Co.* 48 N. Y. 253.

[89] 69 N. Y. 282, 25 Am. Rep. 195.

Judge Allen distinguished and harmonized the cases based upon these two theories, and showed that both were still in force and applied by New York courts to mortgage cases. The second theory, however, seems to be the favorite.

Under the theory of subrogation, a mortgagee could enforce his rights against a purchaser only in the equitable action of foreclosure and not in a separate action at law;[90] but with the adoption of the second theory, it was held that a mortgagee could exercise his rights against a purchaser in an action at law, and without foreclosure;[91] the practice of enforcing this right in an action at law is not, however, encouraged by the courts.

§ 247. Purchaser not personally liable when his grantor is not personally liable, though he assumes payment of the mortgage.—A grantee of mortgaged premises, who purchases subject to a mortgage which he assumes and agrees to pay, will not be held liable for a deficiency arising on a foreclosure and sale, unless his grantor was also personally liable, legally or equitably, for the payment of the mortgage.[92] "It is well settled that to make a promise of this nature ef-

[90] *King* v. *Whiteley,* 10 Paige Ch. (N. Y.) 465.

[91] *Thorp* v. *Keokuk Coal Co.* 48 N. Y. 253; *Burr* v. *Beers,* 24 N. Y. 178, 80 Am. Dec. 327; *Mechanics' Savings Bank* v. *Goff,* 13 R. I. 516. In point, *Fitzgerald* v. *Barker,* 70 Mo. 685; *Sparkman* v. *Gove,* 44 N. J. L. (15 Vr.) 252; the grantor may also sue the purchaser, *Figart* v. *Halderman,* 75 Ind. 564. See also *Meech* v. *Ensign,* 49 Conn. 191, 44 Am. Rep. 225. In New Jersey, since the passage of chap. 255, laws of 1880, this right can be exercised only in an action at law; *Naar* v *Union & E. L. Co.* 34 N. J. Eq. (7 Stew.) 111; *Allen* v. *Allen,* 34 N. J. Eq. (7 Stew.) 493.

[92] *Dunning* v. *Leavitt,* 85 N. Y. 30, 39 Am. Rep. 617; *Cashman* v. *Henry,* 75 N. Y. 103, 31 Am. Rep. 437, 55 How. (N. Y.) 234, 44 N. Y. Supr. Ct. (12 J. & S.) 93 *Vrooman* v. *Turner,* 69 N. Y. 280, 25 Am. Rep. 195; *Thorp* v. *Keokuk Coal Co.* 48 N. Y. 253; *Trotter* v. *Hughes,* 12 N. Y. 74, 62 Am. Dec. 137; *Munson* v. *Dyett,* 56 How. (N. Y.) Pr. 333; *King* v. *Whitely,* 10 Paige Ch. (N. Y.) 465. In point, *Brewer* v. *Maurer,* 38 Ohio St. 543, 550, 43 Am. Rep. 436, citing the leading cases in New York and other states.

fective, it must be made by a person personally liable, legally or equitably, for the mortgage debt, and if there is a break anywhere in the chain of liability, all the subsequent promises are without obligation." [93]

This proposition has been three times squarely before the court of last resort in the state of New York,[94] and the result has always been a judgment of affirmance. The rule was first based, by Chancellor Walworth,[95] in 1843, upon the doctrine of subrogation. Judge Denio applied the same doctrine in 1854; but in 1861, in the leading case of Burr v. Beers,[96] he preferred the second doctrine, that if one person makes a promise to another for the benefit of a third person, that third person may maintain an action on the promise. In 1872 [97] and in 1881 [98] he sustained and applied the same doctrine.

But Vrooman v. Turner [99] is the leading case upon the proposition of this section and harmonizes the two doctrines, showing that the proposition can be based on either, and stating as the fundamental reason of the rule, that there is no consideration to support the contract of assumption. If the promise of the grantee to the grantor is void for want of consideration, a third party can, of course, claim no advantage from it. "To give a third party who may derive a benefit from the performance of the promise, an action, there must be first, an intent by the promisee (purchaser) to secure some

[93] *Wise* v. *Fuller,* 29 N. J. Eq. (2 Stew.) 257, 266, in which the Chancellor relies upon the New York cases. See *Crowell* v. *Currier,* 27 N. J. Eq. (12 C. E. Gr.) 152, 155; reviewed on appeal in 27 N. J. Eq. (12 C. E. Gr.) 650; *Norwood* v. *DeHart,* 30 N. J. Eq. (3 Stew.) 412; *Arnaud* v. *Grigg,* 29 N. J. Eq. (2 Stew.) 482.

[94] *Vrooman* v. *Turner,* 69 N. Y. 280, 25 Am. Rep. 195; *Trotter* v. *Hughes,* 12 N. Y. 74, 62 Am. Dec. 137; *King* v. *Whitley,* 10 Paige Ch. (N. Y.) 465.

[95] *King* v. *Whitely,* 10 Paige Ch. (N. Y.) 465.

[96] 24 N. Y. 179, 80 Am. Dec. 327.

[97] *Thorp* v. *Keokuk Coal Co.* 48 N. Y. 253.

[98] *Dunning* v. *Leavitt,* 85 N. Y. 37, 39 Am. Rep. 617.

[99] 69 N. Y. 283, 25 Am. Rep. 195, *per* Allen, J., reversing 8 Hun (N. Y.) 78.

benefit to the third party, and second, some privity between the two, the promisee (purchaser) and the party to be benefited, and some obligation or duty owing from the former to the latter, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally."[1]

In Pennsylvania it has been held that the purchaser is liable upon his assumption of a mortgage, although the agreement to assume be contained in a deed from a grantor who was under no personal liability to pay the mortgage; and contrary to the New York cases, it has been held that the agreement could not be said to be without consideration inasmuch as the price of the land was a consideration.[2]

§ 248. Assumption of mortgage by subsequent mortgagee does not make him personally liable to prior mortgagee.—A stipulation in a mortgage, whereby the mortgagee assumes and agrees to pay a prior mortgage on the premises, does not impose upon him such a personal liability for the prior mortgage debt, as can be enforced against him by the prior mortgagee.[3] The stipulation in such cases is not a promise made by the mortgagee to the mortgagor for the benefit of the prior mortgagee, but is a promise for the benefit of the mortgagor alone; it is to protect his property by advancing money to pay his debt.[4] But where a senior mortgagee, in consideration of the conveyance to him of the

[1] *Vrooman* v. *Turner*, 69 N. Y. 280, 283, 25 Am. Rep. 195.

[2] *Merriman* v. *Moore*, 90 Pa. St. 78, 81, distinguishing *Samuel* v. *Peyton*, 88 Pa. St. 465, which is seemingly contrary to the text.

[3] *Pardee* v. *Treat*, 82 N. Y. 385, reversing 18 Hun (N. Y.) 298; in point, *Root* v. *Wright*, 84 N. Y. 72, 38 Am. Rep. 495; *Campbell* v. *Smith*, 71 N. Y. 26, 27 Am. Rep. 5, affirming 8 Hun (N. Y.) 6. But see *Babcock* v. *Jordan*, 24 Ind. 14, and *Racouillat* v. *SanSevian*, 32 Cal. 376, where the opposite view seems to be held.

[4] In point, *Arnaud* v. *Grigg*, 29 N. J. Eq. (2 Stew.) 482, 486, *per* Chancellor Runyon, distinguishing *Campbell* v. *Smith*, 71 N. Y. 26, 27 Am. Rep. 5, and relying upon *Garnsey* v. *Rogers*, 47 N. Y. 233, 7 Am. Rep. 440, saying that the contract of assumption is not for the benefit of the mortgagee.

equity of redemption, assumes the payment of a junior mortgage, he is personally bound to pay it and to relieve the grantor and mortgagor from his liability.[5] The question presented in this section first came before the Court of Appeals in New York in 1869 in Ricard v. Sanderson,[6] when the reverse of the above proposition was sustained, and a person, who had taken a deed as a security merely and assumed payment of the prior mortgage, was held personally liable.

§ 249. New York cases reviewed.—The proposition of the preceding section was, however, pointedly sustained by Judge Rapallo, in 1872, in the leading case of Garnsey v. Rogers,[7] where a subsequent mortgagee, who had assumed the payment of a prior mortgage, was held not liable to the prior mortgagee, but to the mortgagor alone. Judge Rapallo explains this conflict of opinion by the fact that in Garnsey v. Rogers the subsequent mortgage, containing the stipulation, was canceled and the mortgaged premises were restored to the mortgagor, the stipulation becoming, as to the parties to it, extinguished, while in Ricard v. Sanderson it does not appear that the debt for which the deed was given as a security had been extinguished at the time of the foreclosure, or that the premises had been reconveyed in pursuance of any condition or defeasance on which the deed was given.[8] But Judge Andrews, who has written a majority of the opinions in the Court of Appeals concerning questions affecting the assumption of a mortgage, pointedly overruled Ricard v. Sanderson, in 1880 in Pardee v. Treat,[9] although he did not refer to the case in his opinion.

The distinguishing question as to whether a person, who

[5] *Huebsch* v. *Scheel,* 81 Ill. 281.

[6] 41 N. Y. 179.

[7] 47 N. Y. 233, 7 Am. Rep. 440.

[8] See *Campbell* v. *Smith,* 71 N. Y. 26, 28, 27 Am. Rep. 5, aff'g 8 Hun (N. Y.) 6, *per* Church, Ch. J., distinguishing *Garnsey* v. *Rogers,* 47 N. Y. 233, 7 Am. Rep. 440, on the question of deeds being merely a creditor's security.

[9] 82 N. Y. 385.

assumes the payment of a mortgage in a subsequent deed or mortgage, is personally liable to a prior mortgagee, is, was the contract of assumption in aid of the grantor alone; or was it also for the benefit of the mortgagee? Judge Andrews says in the above case, "We think the true result of the decisions upon the effect of an assumption clause in a deed is, that it can only be enforced by a lienor, where in equity the debt of the grantor secured by the lien becomes, by the agreement between him and his grantee, who assumes the payment, the debt of the latter. On the other hand, if the assumption is in aid of the grantor, upon the security of the land, and not as between them, a substitution of the liability of the grantee for that of the grantor, or in other words, if, in equity as at law, the grantor remains the principal debtor, then the assumption clause is a contract between the parties to the deed alone, and the liability of the grantee for any breach of his obligation, is to the grantor only." [10]

[10] In further reviewing and distinguishing *Garnsey* v. *Rogers,* Judge Andrews says, at page 388, "In that case the covenant was contained in a deed from Hermance to the defendant, Rogers, absolute in form, which was in equity a mortgage, the deed having been given to secure a debt owing by the grantor to Rogers, upon a parol defeasance that upon payment of the debt Rogers should reconvey the premises. The plaintiff was the owner of mortgages which were liens on the premises when the conveyance to Rogers was made. The question decided in *King* v. *Whitely,* 10 Paige Ch. (N. Y.) 465 did not arise. The grantor of Rogers was himself liable to pay the mortgage, and if Rogers had stood in the position of an absolute purchaser of the land, his liability to the plaintiff, either in an equitable or legal action, could not upon the authorities, have been questioned. But the court held that the deed, being in equity a mortgage, the covenant by Rogers to pay the incumbrances was, in legal effect, a covenant to make advances for the benefit of his grantor upon the security of the land. The promise was not, therefore, a promise made for the benefit of the plaintiff, although he might be benefited by its performance. It was not a case for equitable subrogation, because the mortgage debts remained the debts of the grantor who continued, in equity at least, the owner of the land. The refusal to enforce the covenant did not proceed upon the ground of want of consideration."

§ 250. Grantor cannot release his grantee, assuming a mortgage, from his liability to the mortgagee in New York.—It is now settled in New York, that where a grantee in an absolute conveyance of lands assumes and agrees to pay a mortgage thereon, an absolute and irrevocable obligation is created in favor of the mortgagee, which cannot be released or affected by any act or agreement of the grantor to which the mortgagee does not assent.[11]

[11] *Douglas* v. *Wells,* 18 Hun (N. Y.) 88. In point, *Ranney* v. *McMullen,* 5 Abb. (N. Y.) N. C. 246. See the opinion of the referee in Ranney v. Peyser, 5 Abb. (N. Y.) N. C. 259, collating and reviewing the authorities. In *Fairchilds* v. *Lynch,* 46 N. Y. Supr. Ct. (14 J. & S.) 1, the grantor (mortgagor) by mesne assignments became the owner of the bond and mortgage; on the doctrine of merger this was held to release the grantee from his personal covenant, though the mortgage had been assigned to a third person. See also *Talburt* v. *Berkshire,* 80 Ind. 434. The court of appeals of New York say, in the case of *Clifford* v. *Corrigan,* 117 N. Y. 257, 6 L.R.A. 610, 15 Am. St. Rep. 508, 22 N. E. 756, that a release of a grantee by the grantor from a covenant in the deed assuming an outstanding mortgage on the premises, cannot prejudice the mortgagee's rights to hold the grantee as a debtor, particularly in those cases where the creditor has already learned of the grantee's promise and has assented to and adopted it. In the course of the opinion, Judge Finch says: "Is this release, thus executed, a defense to this action? I shall not undertake to decide, if, indeed, the question is open, *Knickerbocker Ins. Co.* v. *Nelson,* 78 N. Y. 137; *Comely* v. *Dazian,* 114 N. Y. 167, whether in the interval between the making of the contract and the acceptance and adoption of it by the mortgagee, it was or was not revocable, without his assent. However that may be, the only inquiry now presented is whether it is so revocable after it has come to the knowledge of the creditor, and he has assented to it, and adopted it as a security for his own benefit. My judgment leads me to answer that question in the negative. Of course, it is difficult, if not impossible, to reason about it without recurring to *Lawrence* v. *Fox,* 20 N. Y. 268, and ascertaining the principle upon which its doctrine is founded. That is a difficult task, especially for one whose doubts are only dissipated by its authority, and becomes more difficult when the number and variety of its alleged foundations are considered. But whichever of them may ultimately prevail, I am convinced that they all involve, as a logical consequence, the irrevocable character of the contract after the creditor has accepted it, and adopted it, and in some manner acted upon it. The prevailing opinion in that case rested the creditor's right upon the broad proposition that the promise

If conditions are in any way connected with the contract of assumption, the grantor may, sometimes, release his gran-

was made for his benefit, and therefore he might sue upon it, although privy neither to the contract nor its consideration. That view of it necessarily involves an acquisition at some moment of time of the right of action which he is permitted to enforce. If it be possible to say that he does not acquire it at the moment when the promise for his benefit is made, it must be that he obtains it when it has come to his knowledge, and that he has assented to and acted upon it; for he may sue. That is decided, and is conceded. If he may sue he must at that moment have a vested right of action. If it was not obtained earlier, it must have vested in him at the moment when his action was commenced; so that the right and the remedy were born at the same instant. But there is no especial magic in a lawsuit. If it serves for the first time to originate the right which it seeks to enforce, it can only be because the act of bringing it shows unequivocally that the promise of the grantee has come to the knowledge of the plaintiff; that the latter has accepted and adopted it; that he intends to enforce it for his own benefit, and gives notice of that intention to the adversary. From that moment he must be assumed to act or omit to act, in reliance upon it. But, if all these things occur before a suit commenced, why do they not equally vest the right of action in the assignee? What more does the mere lawsuit accomplish? And so the contract between grantor and grantee, if revocable earlier, ceases to be so when by his assent to it and adoption of it the creditor brings himself into privity with it, and elects to avail himself of it, and must be assumed to have governed his conduct accordingly. I see no escape from that conclusion. "But two of the judges who concurred in the decision of *Lawrence* v. *Fox* stood upon a different proposition. They held that the mortgagor granting the land accepted the grantee's covenant as agent of the mortgagee, who might ratify the act with the same effect as if he had originally authorized it. While I think the idea of such an agency is a legal fiction, having no warrant in the facts, yet the same result as to the power of revocation follows. While the agency remained unauthorized it might be possible to change the transaction, but after the ratification the promise necessarily becomes one made to the mortgagee through his agent, the mortgagor, acting lawfully in his behalf, and from that moment cannot be altered or released without his sanction and consent.

"But another basis for the action has been asserted, applicable, however, only to cases like the present, where, on foreclosure of the mortgage, its owner seeks a judgment for a deficiency against the new covenantor.

In *Burr* v. *Beers*, 24 N. Y. 178, 179, 80 Am. Dec. 327, and again in *Garnsey* v. *Rogers*, 47 N. Y. 233, 242, 7 Am. Rep. 440, it was pointed out that the liability of the grantee

tee. Thus, where an oral agreement was made contemporaneous with the deed and contract of assumption, that the grantor would take the land back at any time, should the grantee become dissatisfied with the purchase, and release the grantee from his covenant in the original deed, a release by the grantor was held to discharge the grantee from all

to the mortgagee rested upon the equitable right of subrogation, and had been recognized and enforced long before *Lawrence* v. *Fox* made its appearance. It was held that where the mortgagor acquired a new security for his indemnity against the debt which he owed to the mortgagee, the latter might in equity be subrogated to the right of his debtor, and, under the statute permitting any person liable for the mortgage debt to be made defendant, and charged with a deficiency in the foreclosure, the new covenant became available to the mortgagee. It was so held in *Halsey* v. *Reed,* 9 Paige Ch. (N. Y.) 446, and the right of the mortgagee was put upon the equity of the statute. That, if a sound proposition, was all very well, so long as there was supposed to be no equivalent remedy at law; but after the decision of *Lawrence* v. *Fox,* that remedy existed. "And so, in *Thorp* v. *Keokuk Coal Co.* 48 N. Y. 253, 258, the court said that it saw no reason for invoking the doctrine of equitable subrogation, or resting upon it in such a case. When the law has absorbed in a broader equity the narrow one enforced in chancery, the form and measure of the latter ceases to be of consequence. One does not seek to trace the river after it has lost itself in the lake. And so, I think, the suggestion is well founded. But if I am wrong about that, as perhaps I may prove to be, and the right of the present plaintiff against the cardinal's estate does stand upon the doctrine of equitable subrogation, still I think the same result follows. When does that equitable right arise, and become vested in the creditors? It would seem that it must be when the situation is created out of which the equity is born. If it be possible to adjourn it to a later period, it must certainly attach when the creditor asserts his right to it, and notifies the other party of his intention to rely upon it. As a right founded upon the equity of the statute, it must have come into being before the foreclosure suit was commenced; for the permission reads: 'Any person who is liable to the plaintiff for the payment of the debt secured by the mortgage may be made a defendant in the action.' His liability must precede the commencement of the action. It must exist as a condtion of his being sued at all. And so, assuming that this action can be maintained against him upon his promise, the right of action must have arisen at once upon the delivery of the deed, or at the latest, when the promise came to the knowledge of the creditor, and he assented to and adopted it."

liability to the mortgagee for a judgment of deficiency.[12] It has been intimated that, if the mortgagee had received no knowledge of the contract of assumption, the grantor might then release his grantee.[13] But Bockes, J., has set aside that intimation as being without authority.[14] A grantor cannot release his grantee from his contract of assumption as against a purchaser of the mortgage, who has relied upon the contract of assumption as it appeared on the record.[15] The proposition of this section is best sustained upon the second of the foregoing theories, that if one person makes a promise to another, upon a valuable consideration for the benefit of a third person, that third person can maintain an action on the promise.[16]

§ 251. Contrary ruling in New Jersey.—In New Jersey, however, the right of a mortgagee to take advantage of the contract of assumption against a purchaser is based upon the doctrine of subrogation; and contrary to the New York decisions, it is held that the grantor may release his purchaser from his personal liability to the mortgagee, even after the commencement of a foreclosure, and though the contract be absolute and unconditional. Thus where a release of an assumption was orally agreed upon before suit was brought to foreclose the mortgage, but was not executed in writing

[12] *Devlin* v. *Murphy,* 56 How. (N. Y.) Pr. 326, 5 Abb. (N. Y.) N. C. 242, *per* Van Vorst, J., reviewing *Stephens* v. *Casbacker,* 8 Hun (N. Y.) 116. See *Fleischauer* v. *Doellner,* 58 How. (N. Y.) Pr. 190, *per* Van Vorst, J., distinguishing *Devlin* v. *Murphy, supra,* under nearly the same state of facts. In *Laing* v. *Byrne,* 34 N. J. Eq. (7 Stew.) 52, the grantor took a reconveyance of the land, reassuming the mortgage, and the grantee was held thereby discharged from any liability.

[13] *Paine* v. *Jones,* 14 Hun (N. Y.) 577, aff'd 76 N. Y. 274; *Whiting* v. *Geary,* 14 Hun (N. Y.) 498, 500. In point, *Gilbert* v. *Sanderson,* 56 Iowa, 349, 41 Am. Rep. 103; *Brewer* v. *Maurer,* 38 Ohio St. 543, 43 Am. Rep. 436.

[14] *Douglass* v. *Wells,* 18 Hun (N. Y.) 88.

[15] *Hayden* v. *Drury,* 3 Fed. 782, 789.

[16] *Douglass* v. *Wells,* 18 Hun (N. Y.) 88, 92. See *ante,* § 246.

till after suit was brought, but was for a valuable consideration and without the grantor's knowledge of the suit, it was held to relieve the grantee from all liability to the mortgagee.[17]

But where the release was executed by an insolvent grantor without consideration and after notice or foreclosure, for the sole and admitted purpose of defeating the mortgagee's claim in equity for a deficiency, it was held void. "This act of release or discharge, to be effectual, must be done *bona fide,* and not merely for the purpose of thwarting the mortgagee and depriving him of an equity to which he is entitled. Where a person in consideration of a debt due from him agrees with his creditor that he will, in discharge of it, pay the amount to the creditors of the latter, in discharge or on account of a debt due from the latter to him, though the agreement may be *bona fide* rescinded by the parties to it for consideration or reasons satisfactory to themselves and without account or liability to the creditor, who is not a party to it, yet if the promisee be insolvent, and the rescission be merely a forgiving of the debt for the mere purpose of defrauding the creditor of the promisee, or protecting the promisor against his liability, the rescission will not avail in equity." [18] In another case, where a mortgagor re-purchased of his grantee, who had assumed payment, he in turn assuming payment, the grantee of the mortgagor was held discharged from all liability, for the reason that the mortgage had not become due and that the mortgagee had suffered no injury.[19]

[17] *O'Neill* v. *Clarke,* 33 N. J. Eq. (6 Stew.) 444.

[18] *Trustees for Public Schools* v. *Anderson,* 30 N. J. Eq. (3 Stew.) 366, 368. See also the same case reported on appeal *sub nom. Young* v. *Trustees,* 31 N. J. Eq. (4 Stew.) 290, 297, *per* Depue, J., collating and reviewing the cases in a long opinion, and holding that a *bona fide* release by the grantor will discharge the grantee from all liability to the mortgagee.

[19] *Crowell* v. *Currier, 27* N. J. Eq. (12 C. E. Gr.) 152. See *Laing* v. *Byrne,* 34 N. J. Eq. (7 Stew.) 52 where nearly the same facts are stated. See also *Crowell* v. *Hospital, etc. 27* N. J. Eq. (12 C. E. Gr.) 650, *per* Depue, J., who at

It is thus seen what an important part these two doctrines of subrogation and of a contract for the benefit of a third person, have played in the development of the law adjudging the rights of parties interested in the contract of assumption of a mortgage. Even to-day there is a lack of agreement among the courts as to which doctrine should prevail in the interpretation of the contract. But the theory of a benefit for a third person is the broadest, most equitable and most susceptible of application to the various cases that have arisen, and it is in growing favor with the courts.

§ 252. Intermediate purchaser, having assumed payment of the mortgage, liable.—It may be stated as a general rule, that all intermediate purchasers who have in succession from the original obligor, through mesne conveyances, assumed the payment of a bond and mortgage, are personally liable as sureties for a judgment of deficiency in an action to foreclose the mortgage brought by the mortgagee or his assignee.[20] No reason presents itself why, if the first purchaser from the mortgagor is liable, the succeeding purchases from the mortgagor's grantee should not also be held personally liable for the mortgage debt, either on the doctrine of subrogation or of liability for a contract made for the benefit of a third person. This proposition has been squarely before a court in New York only once, when Vice-Chancellor McCoon,[21] in 1841, held the contrary, that inter-

page 657 quotes the language of Rapallo, J., as given above, calls it an *obiter dictum,* and rules contrary to it.

[20] *Cashman* v. *Henry,* 75 N. Y. 103, 31 Am. Rep. 437; *Flagg* v. *Geltmacher,* 98 Ill. 293; *Scarry* v. *Eldridge,* 63 Ind. 44. In point, *Smith* v. *Ostermeyer,* 68 Ind. 432; *Young* v. *Trustees Pub. Schools,* 31 N. J. Eq. (4 Stew.) 290; *Pruden* v. *Williams,* 26 N. J. Eq. (11 C. E. Gr.) 210; *Jarman* v. *Wiswall,* 24 N. J. Eq. (9 C. E. Gr.) 267, *per* Chancellor Runyon, collating the cases and discussing the legal reasons upon which the practice rests, and stating that the decree should be the same as that directed in *Luce* v. *Hinds,* Clarke Ch. (N. Y.) 453, *per* Vice-Chancellor Whittlesey; *Brewer* v. *Maurer,* 38 Ohio St. 543, 43 Am. Rep. 436. See the following section.

[21] *Lockwood* v. *Benedict,* 3 Edw. Ch. (N. Y.) 472.

mediate purchasers were not liable; but this case is nowhere referred to or cited, and from the *obiter dicta* in later cases [22] it is believed that it is not good law, and will be overruled. Furthermore, it is not consonant with the general principles of the law of principal and surety. It is well settled that the successive assignors of a mortgage, all of whom have guaranteed its payment, are personally liable for the mortgage debt to the plaintiff foreclosing. By analogy the same cases support the proposition of this section.[23]

Intermediate purchasers, who have not assumed the payment of the mortgage, are, of course, not liable; neither are intermediate purchasers liable, though they may have assumed the payment of the mortgage, if there is, prior to their purchase, a break in the line of the several contracts of assumption in the successive mesne conveyances.[24]

§ 253. Assignor of a mortgage guaranteeing payment or collection liable.—An assignor of a mortgage, who, in the assignment or by a separate instrument, guarantees the payment or collection of the mortgage, is personally liable to his assignee, and may be made a defendant to an action for foreclosure, for the purpose of recovering against him a judgment of deficiency.[25] In those states where no provision

[22] In *Dunning* v. *Leavitt*, 85 N. Y. 30, 39 Am. Rep. 617, intermediate purchasers who had assumed the payment of a mortgage were made parties in an action to foreclose, and a personal judgment for deficiency demanded against them. No objection was raised by them, and Andrews, J., throughout his opinion, speaks of them as though they were personally liable.

[23] See the following section.

[24] *Vrooman* v. *Turner*, 69 N. Y. 280, 25 Am. Rep. 195.

[25] *Hunt* v. *Purdy*, 82 N. Y. 486, 37 Am. Rep. 587; *Craig* v. *Parkis*, 40 N. Y. 181, 100 Am. Dec. 469; *Officer* v. *Burchell*, 44 N. Y. Supr. Ct. (12 J. & S.) 575; *Jones* v. *Steinbergh*, 1 Barb. Ch. (N. Y.) 250; *Luce* v. *Hinds*, Clarke Ch. (N. (N. Y.) 453; *Bristol* v. *Morgan*, 3 Edw. Ch. (N. Y.) 142; *Curtis* v. *Tyler*, 9 Paige Ch. (N. Y.) 432; *Leonard* v. *Morris*, 9 Paige Ch. (N. Y.) 90; *North American Fire Ins. Co.* v. *Handy*, 2 Sandf, Ch. (N. Y.) 492, N. Y. Code Civ. Proc. § 1627. In *Harlem Sav. Bk.* v. *Mickelsburgh*, 57 How. (N. Y.) Pr. 106, the order of liability between guarantors and grantors assuming

is made for the recovery of a personal judgment in an action to foreclose a mortgage, such a guarantor cannot, of course, be made a party to the action; the only remedy against him is a separate action at law.

In New York an action at law can also be subsequently maintained, but only by consent of the court in which the mortgage was foreclosed. In actions at law, a distinction is made between a guaranty of *payment* and of *collection*,[26] but in the equitable action of foreclosure, if a party is in any way liable for the debt, he can be made a defendant.[27]

The decree of foreclosure and judgment for deficiency should specify in order the respective liabilities of the parties who have guaranteed the payment or collection of the debt, or who are otherwise obligated for it;[28] the decree must always contain conclusions and directions in harmony with the general law of principal and surety. Thus, Vice-Chancel-

payment is considered. In point, *Claflin* v. *Reese*, 54 Iowa, 544, also *Jarman* v. *Wiswall*, 24 N. J. Eq. (9 C. E. Gr.) 267. In *Robertson* v. *Cauble*, 57 Ind. 420, the indorser of a note secured by a mortgage was made a defendant. See *Stark* v. *Fuller*, 42 Pa. St. 320. In *Fluck* v. *Hager*, 51 Pa. St. 459, 91 Am. Dec. 132, the mortgage came back into the hands of the first guarantor, who foreclosed; he was not allowed to enforce the guaranty against the intermediate guarantors. Under the statute of 1858, in Wisconsin, a guarantor could not be made a defendant for the purpose of recovering a personal judgment against him; *Borden* v. *Gilbert*, 13 Wis. 670. But by chap. 243 of the laws of 1862, the law was changed so that a personal judgment can now be recovered; *Burdick* v. *Burdick*, 20 Wis. 348; *Biddle* v. *Pugh*, 59 N. J. Eq. 480, 45 A. 626; *Robert* v. *Kidansky*, 188 N. Y. 638, 81 N. E. 1174; *Morrison* v. *Slater*, 128 App. Div. 467, 112 N. Y. Supp. 855.

[26] In *Johnson* v. *Shepard*, 35 Mich. 115, it was held that a guarantor of *collection* ought not to be made a party defendant to a foreclosure suit, for the reason that no liability attaches to the guarantor till every remedy against the principal has been exhausted. Such a guarantor may be made a party under the New York rule; the fact of a primary and a secondary liability must, however, be recognized and provided for in the decree; *Cady* v. *Sheldon*, 38 Barb. (N. Y.) 103.

[27] N. Y. Code Civ. Proc. § 1627. See *Vanderbilt* v. *Schreyer*, 91 N. Y. 392, 396, and the able opinion *per* Ruger, Ch. J., reversing 21 Hun (N. Y.) 537.

[28] *Jones* v. *Steinbergh*, 1 Barb. Ch. (N. Y.) 253; *Luce* v. *Hinds*,

lor Whittlesey in Luce v. Hinds [29] made the judgment of foreclosure "for the sale of the mortgaged premises, and a personal decree against the obligor (mortgagor) for the deficiency, and in case an execution against him does not realize the money, an execution must afterwards go against the guarantor (assignor) of the mortgage, for any balance due after sale of the premises, and execution unsatisfied against the obligor." [30] The execution must not issue against the guarantor in any case, until an execution against the person primarily liable has been returned unsatisfied.

§ 254. Intermediate assignors of a mortgage guaranteeing payment liable.—It is generally well established that the transfer of a debt or obligation carries with it as an incident all securities for its payment. Thus, the assignment of a bond and mortgage gives to the assignee the benefit of, and the right to sue upon, a guaranty by a previous assignor for their collection; and this proposition is sustained, although such guaranty may not be in terms transferred with the bond and mortgage.[31]

This principle is in harmony with the proposition stated in the second preceding section, that an intermediate purchaser who has assumed the payment of a mortgage is personally liable for the mortgage debt, providing his preceding grantors were liable. It is suggested as a query, whether the same principles of law that are applicable to intermediate purchasers assuming the payment of a mortgage, are not also applicable to intermediate assignors guaranteeing payment; but in the latter case it is not believed that an unbroken line of guar-

Clarke Ch. (N. Y.) 453, 456; *Leonard* v. *Morris,* 9 Paige Ch. (N. Y.) 90.

[29] Clarke Ch. (N. Y.) 457.

[30] See also the quotation from the opinion of Chancellor Walworth in *Curtis* v. *Tyler,* 9 Paige Ch. (N. Y.) 435, in the note to § 229, *ante; Jones* v. *Steinberg,* 1 Barb. Ch. (N. Y.) 253, and the note in § 223, *ante.*

[31] *Craig* v. *Parks,* 40 N. Y. 181, 100 Am. Dec. 469; *Ketchell* v. *Burns,* 24 Wend. (N. Y.) 456; *First Nat. Bk. of Dubuque* v. *Carpenter,* 41 Iowa, 518. See *Fluck* v. *Hager,* 51 Pa. St. 459, 91 Am. Dec. 132,

anties is required in order to hold liable those who have guaranteed payment.

§ 255. Assignors of a mortgage, covenanting as to title and against defences, liable.—The query is raised here as to whether a person, who guarantees that the title to a mortgage is perfect or that there are no defences against it, can be made a defendant to an action to foreclose the mortgage, for the purpose of recovering a personal judgment against him for a breach of such covenant. He might be made a party, on the theory that he is interested in the action and that a complete adjudication can be made only by bringing him before the court. On the other hand, it can scarcely be claimed that he "is liable to the plaintiff for the payment of the debt secured by the mortgage." [32] In case of such a guaranty it would certainly be safe for the plaintiff to omit the guarantor as a party to the foreclosure, and subsequently, by leave of the court, to commence an action at law against him for a breach of his covenant.[33]

§ 256. All persons guaranteeing payment or collection of a bond and mortgage by a separate instrument liable.—In the preceding sections it has been seen that the assignor of a bond and mortgage, who guarantees its payment in the same instrument, is personally liable to the assignee of the mortgage foreclosing, for a judgment of deficiency. The same rule and cases also apply if the guaranty is made by a separate instrument, executed by persons in no way interested in the mortgage.[34] This is based upon the principle that a

where the mortgage came back into the hands of the first guarantor, who foreclosed; he was not allowed to enforce their guaranties against the intermediate guarantors.

[32] N. Y. Code Civ. Proc. § 1627. See *Knickerbocker Ice Co.* v. *Nelson,* 8 Hun (N. Y.) 21.

[33] N. Y. Code Civ. Proc. § 1628.

[34] *Grant* v. *Griswold,* 82 N. Y. 569; *Hunt* v. *Purdy,* 82 N. Y. 486, 37 Am. Rep. 587; *Weinstein* v. *Sinel,* 133 App. Div. 441, 117 N. Y. Supp. 346.

Subsequent guarantors of mortgage debt are proper, although not

creditor is entitled to the benefit of all pledges and securities given to, or in the hands of, a surety of the debtor for his indemnity, and the rule is true whether the surety has been injured or not, as it is a trust created for the benefit of the surety of the debt and attaches to it.[35]

§ 257. Married women obligating themselves in any of the preceding ways generally liable.—A married woman who purchases the equity of redemption in mortgaged premises, and assumes the payment of the mortgage in the deed of conveyance, is personally liable to the mortgagee for a judgment of deficiency, if her grantor was also personally liable, although she may not charge her separate estate with the payment of the mortgage debt.[36]

This proposition was squarely before Andrews, J., in Cashman v. Henry,[37] in 1878, and after referring to the Massachusetts and New Jersey statutes, which are similar to those of New York, he based his decision upon the fact that a "married woman as incident to her right to acquire real and personal property by purchase, and hold it to her sole and separate use, may purchase property upon credit, and bind herself by an executory contract to pay the consideration

necessary parties to foreclosure suit. *Morrison* v. *Slater,* 128 App. Div. 467, 112 N. Y. Supp. 855.

[35] *Crow* v. *Vance,* 4 Clarke (Iowa), 442, citing *Curtis* v. *Tyler,* 9 Paige Ch. (N. Y.) 431.

[36] *Cashman* v. *Henry,* 75 N. Y. 103, 31 Am. Rep. 437; *Vrooman* v. *Turner,* 69 N. Y. 280, 25 Am. Rep. 195, reversing 8 Hun (N. Y.) 78; *Ballin* v. *Dillaye,* 37 N. Y. 35; *Flynn* v. *Powers,* 35 How. (N. Y.) Pr. 279, aff'd 36 How. (N. Y.) Pr. 289, 54 Barb. (N. Y.) 550; *Bush* v. *Babbitt,* 25 Hun (N. Y.) 213; *Scott* v. *Otis,* 25 Hun (N. Y.) 35. See *Munson* v. *Dyett,* 56 How. (N. Y.) Pr. 333. In point, *Coolidge* v. *Smith,* 129 Mass. 554; also *Brewer* v. *Maurer,* 38 Ohio St. 543, 43 Am. Rep. 436, citing the leading cases in other states and holding with the New York decisions. See *Culver* v. *Badger,* 29 N. J. Eq. (2 Stew.) 74, where a married woman, to whom a deed was executed with an assumption cause, was held not liable on its being shown that she did not intend to assume the mortgage by accepting the deed.

[37] 75 N. Y. 103, 115, 31 Am. Rep. 437, 55 How. (N. Y.) Pr. 234.

money, and that her bond, note, or other engagement given and entered into to secure the payment of the purchase price of property acquired and held for her separate use, may be enforced against her in the same manner and to the same extent, as if she were a *feme sole*."[38] If her grantor was not liable, she, of course, would not be liable.

When a married woman assigns a mortgage owned by her, guaranteeing its payment or collection, her liability will be governed by the general rules affecting married women's contracts stated in the early part of this work.[39] Under the act of 1884 in New York, she is now, of course, personally liable upon all her contracts, whatever their form no nature.[40]

§ 258. Persons subsequently liable in any of preceding ways, deceased, their estates liable—Personal representatives proper parties; heirs and devises not proper parties.—In a preceding section it has been seen that the personal representatives, and not the heirs and devisees of the deceased obligor, are proper parties defendant to an action brought to foreclose a mortgage, for the purpose of obtaining a decree determining the amount of any deficiency, and directing the same to be paid by the personal representatives in the due administration of the decedent's estate.[41] When the liability is incurred subsequently to the inception of the

[38] In *Huyler* v. *Atwood*, 26 N. J. Eq. (11 C. E. Gr.) 504, *per* Vice-Chancellor VanFleet, the same question was pointedly before the court and the ruling was the same as in *Cashman* v. *Henry*, 75 N. Y. 103, 31 Am. Rep. 437. At page 506 the Vice-Chancellor says: "The law, in giving married women the right to acquire and hold land, did not intend that their capacity to make contracts to secure the purchase money should be so limited and restricted, that they could get the land without paying for it. Whether they secured the payment of the purchase money by bond and mortgage, note, or contract to assume the payment of a mortgage, it is a contract they have a capacity to make, and must be enforced."

[39] See *Penn Coal Co.* v. *Blake*, 85 N. Y. 226, where a married woman expressly charged her separate estate. See *ante*, § 232.

[40] See *ante*, §§ 230–232, and notes.

[41] See *ante*, §§ 234–236.

bond and mortgage by a contract of assumption,[42] or by guaranteeing payment or collection, the rule is the same.[43]

[42] *Leonard* v. *Morris,* 9 Paige Ch. (N. Y.) 90. See *ante,* §§ 234–236.

[43] *Schofield* v. *Doscher,* 72 N. Y. 491; *Bache* v. *Doscher,* 67 N. Y. 429. See *Mutual Benefit Life Ins. Co.* v. *Howell,* 32 N. J. Eq. (5 Stew.) 146.

CHAPTER XII.

COMMENCEMENT OF ACTION.

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summons alone, as in ordinary civil actions.[44] The summons must contain the title of the action, specifying the court in which the action is brought,[45] the names of the parties to the action,[46] and, if it is brought in the supreme court, the name of the county in which the plaintiff desires the trial.[47] It must be subscribed by the plaintiff's attorney,[48] who is required to add to his signature his office address, specifying a place within the state where there is a post-office, and if in a city, he must add the street, and street number, if any, or other suitable designation of the particular locality of his office.[49]

It should require the defendant to answer the complaint and to serve a copy of his answer on the person whose name is subscribed to the summons at the place within the state

[44] N. Y. Code Civ. Proc. § 416. See also *Ingersoll* v. *Mangam,* 84 N. Y. 622; *People* v. *Northern Pac. R. R. Co.* 50 N. Y. Supr. Ct. (18 J. & S.) 456; *Putnam Co. Chem. Works* v. *Jochen,* 8 N. Y. Civ. Proc. Rep. 424; *Davis* v. *Jones,* 8 N. Y. Civ. Proc. Rep. 43; *Acker* v. *Hauteman,* 63 How. (N. Y.) Pr. 280, 27 Hun (N. Y.) 48; *Kelly* v. *Countryman,* 15 Hun (N. Y.) 97; *McCarthy* v. *McCarthy,* 13 Hun (N. Y.) 579.

[45] *Croden* v. *Drew,* 3 Duer (N. Y.) 652; *Webb* v. *Mott,* 6 How. (N. Y.) Pr. 439; *James* v. *Kirkpatrick,* 5 How. (N. Y.) Pr. 241; *Dix* v. *Palmer,* 5 How. (N. Y.) Pr. 233; *Walker* v. *Hubbard,* 4 How. (N. Y.) Pr. 154.

[46] *Bank* v. *Magee,* 20 N. Y. 355; *Traver* v. *Eighth Ave. R. R. Co.* 6 Abb. (N. Y.) Pr. N. S. 46; *Cooper* v. *Burr,* 45 Barb. (N. Y.) 10; *Miller* v. *Stettiner,* 7 Bosw. (N. Y.) 692; *Hill* v. *Thacter,* 3 How. (N. Y.) Pr. 407; *Eagleston* v. *Son,* 5 Robt. (N. Y.) 640.

[47] *Hotchkiss* v. *Crocker,* 15 How (N. Y.) Pr. 336; *Davison* v. *Powell,* 13 How. (N. Y.) Pr. 288; *Merrill* v. *Grinnell,* 10 How. (N. Y.) Pr. 31.

[48] *Mutual Life Ins. Co.* v. *Ross,* 10 Abb. (N. Y.) Pr. 260, note. *Weir* v. *Slocum,* 3 How. (N. Y.) Pr. 397; *Johnston* v. *Winter* (N. Y. Com. Pl.) 7 Alb. L. J. 135. See also N. Y. Code Civ. Proc. §§ 55, 417.

[49] Supreme Court Rules 1, 10; *Demelt* v. *Leonard,* 19 How. (N. Y.) Pr. 182; *Yorks* v. *Peck,* 17 How. (N. Y.) Pr. 192; *Hurd* v. *Davis,* 13 How. (N. Y.) Pr. 57. See also *German American Bank* v. *Champlin,* 11 N. Y. Civ. Proc. Rep. 452; *Wadsworth* v. *Georger,* 18 Abb. (N. Y.) N. C. 199; *Mayor of N. Y.* v. *Eisler,* 10 Daly (N. Y.) 396; *Wiggins* v. *Richmond,* 58 How. (N. Y.) Pr. 376; *Osborn* v. *McCloskey,* 55 How. (N. Y.) Pr. 345; *Weil* v. *Martin,* 24 Hun (N. Y.) 645; *Wallace* v. *Dimmick,* 24 Hun (N. Y.) 635.

thereon specified, within twenty days after the service of the summons, exclusive of the day of service.[50]

The summons should also contain a notice to the defendant to the effect, that in case he fails to answer the complaint within the time specified for the service of the answer, the plaintiff will apply to the court for judgment on default and for the relief demanded in the complaint. In New York the exact form of the summons is described by the Code.[51]

Under the Georgia code,[52] in an action to foreclose a mortgage, the service must be personal or by publication, and service of the rule *nisi* to foreclose a mortgage by leaving a copy of it in the most notorious place of abode of the defendant, there being no personal service, is not sufficient.[53] But the fact that a defendant is not correctly named in the original notice for foreclosure does not relieve him from the duty to respond to the notice and plead.[54]

It is said by the supreme court of errors of Connecticut that each bondholder whose bonds are secured by a mortgage is, through the trustee and the majority of the bondholders, a party to the legislative and judicial proceedings accompanying the foreclosure; and actual individual notice is not required.[55] And in Louisiana it is said that the holder of a first mortgage, duly executed before a notary, with *pact de non alienando,* is not bound to give notice to any person but the debtor in possession. The fact that others had a junior mortgage by virtue of the same instrument makes no difference.[56]

§ 260. Notice of object of action.—When the summons is served without the complaint, it is usually accompanied

[50] N. Y. Code Civ. Proc. §§ 417, 418.

[51] N. Y. Code Civ. Proc. § 418.

[52] § 3962.

[53] *Meeks* v. *Johnson,* 75 Ga. 629; *Dykes* v. *McClung,* 74 Ga. 382. See Ga. Code, § 3339.

[54] *Lindsey* v. *Delano,* 78 Iowa, 350, 43 N. W. 218.

[55] *Gates* v. *Boston & N. Y. A. L. R. Co.* 53 Conn. 333, 5 Atl. 695.

[56] *New Orleans Nat. Bkg. Assoc.* v. *Le Breton,* 120 U. S. 765, 30 L. ed. 821.

by a notice of the object of the action.[57] Where such a notice is served with the summons, the complaint need not be served upon the defendant, unless he demands a copy of the same in writing within the time for answering.

§ 261. Notice of no personal claim.—The notice served upon the defendant should describe correctly the object of the action; if it does not do so, and the defendant is misled, the judgment will be irregular as against such defendant, and may be set aside on motion. The object of the notice in mortgage foreclosures is to relieve the complainant of the expense of unnecessary disclaimers by defendants, who are made parties to the suit solely for the purpose of extinguishing their claims and of perfecting the title, and against whom no personal judgment for deficiency is sought.[58] But it has been said that even where a defendant has not been served with a notice as permitted by the code,[59] and he unreasonably defends, the court may award costs against him for making such defense.[60] The question of costs, as affected by the service of such notice, will be fully considered hereafter in the chapter on costs.

§ 262. Where some of the defendants are non-residents or absentees.—In an action to foreclose a mortgage, "where a defendant to be served is a foreign corporation;

[57] The form and contents of this notice are prescribed by the code, which provides that "where a personal claim is not made against a defendant, a notice, subscribed by the plaintiff's attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects specific real or personal property, and that a personal claim is not made against him, may be served with the summons. If the defendant so served, unreasonably defends the action, costs may be awarded against him." N. Y. Code Civ. Proc. § 423. See *O'Hara* v. *Brophy,* 24 How. (N. Y.) Pr. 379; *Benedict* v. *Warriner,* 14 How. (N. Y.) Pr. 568; *Gallagher* v. *Egan, 2* Sandf. (N. Y.) 742.

[58] *Jay* v. *Ensign,* 9 Paige Ch. (N. Y.) 230.

[59] N. Y. Code Civ. Proc. § 423.

[60] *O'Hara* v. *Brophy,* 24 How. (N. Y.) Pr. 379.

or, being a natural person, is not a resident of the state; or where, after diligent inquiry, the defendant remains unknown to the plaintiff, or the plaintiff is unable to ascertain whether the defendant is or is not a resident of the state;[61] or where the defendant, being a resident of the state, has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons; or keeps himself concealed therein, with like intent," [62] such defendant may be brought within the jurisdiction of the court by service of the summons upon him by publication, or personally without the state, in the sume manner as in other actions, as directed in the Code.[63]

§ 263. Requisites of affidavit to secure order for service of summons by publication.—In order to obtain an order for the service of the summons on a defendant absent from the state, the plaintiff must show by affidavit the defendant's absence [64] and due diligence in seeking to obtain personal service upon him, on which proof alone can be based an order

[61] *Wortman* v. *Wortman,* 17 Abb. (N. Y.) Pr. 66; *Lefferts* v. *Harris,* 10 Abb. (N. Y.) Pr. N. S. 2, note; *Hulbert* v. *Mutual Ins. Co.* 4 How. (N. Y.) Pr. 278.

[62] N. Y. Code Civ. Proc. § 438.

[63] *Easterbrook* v. *Easterbrook,* 64 Barb. (N. Y.) 421; *Collins* v. *Ryan,* 32 Barb. (N. Y.) 647; *Townsley* v. *McDonald,* 32 Barb. (N. Y.) 604; *Bixby* v. *Smith,* 49 How. (N. Y.) Pr. 50; 5 T. & C. (N. Y.) 279; 3 Hun (N. Y.) 60; *Roche* v. *Ward,* 7 How. (N. Y.) Pr. 416; *VonRhade* v. *VonRhade,* 2 T. & C. (N. Y.) 491. See *Union Trust Co.* v. *Driggs,* 62 App. Div. 213, 70 N. Y. Supp. 947.

Service of the summons upon such a defendant may be made in New York by the publication thereof in two newspapers, designated in the order directing such service, for a specified time, not less than once a week for six successive weeks; or, at the option of the plaintiff, by service of the summons, and of a copy of the complaint and order, without the state, upon the defendant personally, if he is of full age, or an infant of the age of fourteen years or upwards; or, if the defendant is a corporation, upon an officer thereof. On or before the day of the first publication, the plaintiff must deposit in a specified post-office copies of the summons, complaint and order, contained in a securely closed postpaid wrapper, directed to the defendant at a place specified in the order. N. Y. Code Civ. Proc. § 440.

[64] Where the affidavit states that service could not be made "within the county" instead of "within the

for the publication of the summons in an action for foreclosure.[65] The affidavit should be based upon the applicant's own knowledge, and not upon his information and belief.[66] Proof may also be made by the affidavits of other parties.[67] A foreclosure will be invalid, where it is based upon an order of publication, which is made upon the complainant's affidavit that the defendant could not be found, where the summons was returned before the return day as not personally served.[68]

The affidavit for service of the summons by publication, should be made by the plaintiff himself; but if made by his attorney, it should state why it is not made by the plaintiff, and the sources from which the attorney derived his information of the facts set forth in the affidavit.[69] After an order of publication, which has an erroneous caption, has been acted on, it may properly be amended by an order of the court, striking out the erroneous caption and inserting the correct one.[70]

state" as provided by statute, it is defective. *Stillman* v. *Rosenberg*, 111 Iowa, 369, 82 N. W. 768.

[65] See *Evans* v. *Weinstein*, 124 App. Div. 316, 108 N. Y. Supp. 753; *Stull* v. *Masilonka*, 74 Neb. 309, 104 N. W. 188, 108 N. W. 166, where affidavits were held sufficient, and *Lewine* v. *Gerardo*, 60 Misc. 261, 112 N. Y. Supp. 192, where affidavit was held insufficient.

[66] *Carleton* v. *Carleton*, 85 N. Y. 313; *Belmont* v. *Cornen*, 82 N. Y. 256; *Howe Mach. Co.* v. *Pettibone*, 74 N. Y. 68, 12 Hun (N. Y.) 657; *Soule* v. *Hough*, 45 Mich. 418. But see *Smith* v. *Mahon*, 27 Hun (N. Y.) 40.

[67] *Brenen* v. *North*, 7 App. Div. 79, 39 N. Y. Supp. 975; *Kennedy* v. *The New York Life Insurance and Trust Co.* 101 N. Y. 489; *Carleton* v. *Carleton*, 23 Hun (N. Y.) 251; *Fulton* v. *Levy*, 21 Neb. 478, 32 N. W. 307; *Atkins* v. *Atkins*, 9 Neb. 191, 2 N. W. 466.

[68] *Soule* v. *Hough*, 45 Mich. 418. Whether jurisdiction of a foreclosure proceeding is not acquired, where the affidavit for the order of publication is sufficient, though contrary to the facts, *quaere; Whitford* v. *Crooks*, 50 Mich. 40.

[69] *Piser* v. *Lockwood*, 30 Hun (N. Y.) 6.

[70] *Mojarrieta* v. *Saenz*, 80 N. Y. 553; *Phinney* v. *Broschell*, 80 N. Y. 544; *Coffin* v. *Lesster*, 36 Hun (N. Y.) 347.

See also *Mishkind-Feinberg Realty Co.* v. *Sidorsky*, 189 N. Y. 402, 82 N. E. 448.

§ 264. **Change of place of publication.**—While the statute, authorizing the service of a summons by publication, does not authorize such publication to be commenced in one newspaper and to be finished in another; yet in one case such service was held not to be affected by the fact that during the time which the notice was being published, the name of the paper was changed. The place of publication was not changed from one town to another in the same jurisdiction; though the paper was merged in another and its name and place of publication were changed, the identity of the paper and the territory of its circulation remained the same.[71]

§ 265. **Notice to defendants—Proof of publication.**—It is required in New York that there be subjoined to the summons, which is published, a notice to the defendant, to the effect that the summons is served upon him by publication pursuant to an order of the judge, specifying his name and official title and the date of the order directing the publication. The summons, complaint, order and papers upon which it was granted, must be filed with the clerk of the court on or before the day of the first publication.[72]

Proof of the service of the summons by publication should be made in the form prescribed by the statute authorizing the same; but where the statute does not assume to fix the exclusive mode of proof, proof made in a form other than that prescribed by the statute will be sufficient to pass title to the purchaser at a sale thereunder.[73] In New York proof of the publication of the summons and notice must be made by the affidavit of the printer or publisher, or his foreman or principal clerk. Proof of deposit in the post-office, or of delivery, of a paper required to be deposited or delivered by

[71] *Perkins* v. *Keller*, 43 Mich. 53; *Sage* v. *Central R. R. Co.* 99 U. S. (9 Otto), 334, 25 L. ed. 394.

[72] N. Y. Code Civ. Proc. § 442.

[73] *Brown* v. *Phillips*, 40 Mich. 264.

the provisions of the Code, must be made by the affidavit of the person who deposited or delivered it.[74]

§ 266. Where there are unknown owners.—Where there are defendants unknown to the plaintiff, having a lien upon or an interest in the mortgaged premises, whose residence is unknown and cannot with reasonable diligence be ascertained, they may be served by publication of the summons in two newspapers published in the county where the premises are situated.[75] Where in an action of foreclosure unknown owners are made parties defendant, as authorized by the New York Code of Civil Procedure,[76] and are properly described in the summons, the addition of the words "if any" will not invalidate the process.[77]

Where service of the summons has been made upon unknown heirs by publication, as prescribed by the Code, it will bar all the parties in interest, although it may subsequently appear that one of the unknown parties was an infant.[78]

§ 267. Service of summons on married women.—The wife of the mortgagor of land, whether she joins in the execution of the mortgage or not, has an inchoate right of dower in the equity of redemption, which will not be affected by a foreclosure to which she is not made a defendant.[79] The service of the summons upon the husband in a foreclosure, was formerly held to be sufficient service upon the wife also, unless the action was against her separate estate, in which case service was required to be made upon her individually.[80] At

[74] N. Y. Code Civ. Proc. § 444.

[75] N. Y. Code Civ. Proc. § 438.

[76] See N. Y. Code Civ. Proc. §§ 438, 451.

[77] *Abbott* v. *Curran,* 98 N. Y. 665.

[78] *Wheeler* v. *Scully,* 50 N. Y. 667.

[79] *Mills* v. *VanVoorhis,* 10 Abb. (N. Y.) Pr. 152, aff'd 20 N. Y. 412. See *ante* §§ 155, 156.

[80] See *Nagle* v. *Taggart,* 4 Abb. (N. Y.) N. C. 144; *Foote* v. *Lathrop,* 53 Barb. (N. Y.) 183; *Watson* v. *Church,* 3 Hun (N. Y.) 80, 5 T. & C. (N. Y.) 243; *Ferguson* v. *Smith,* 2 Johns. Ch. (N. Y.) 139; *Lathrop* v. *Heacock,* 4 Lans. (N. Y.) 1. An inchoate right of dower is an interest, which results from the marital relation and does not belong to the wife as her sep-

common-law the husband was authorized and required to enter a joint appearance for himself and his wife upon service of the summons upon him alone, if the action concerned his property,[81] but the present Code of Civil Procedure [82] provides that in an action or special proceeding, a married woman shall appear, prosecute, or defend, alone, or joined with other parties, as if she were single; and it shall not be necessary or proper to join her husband with her as a party in any action or special proceeding affecting her separate property.[83] It has been held under this provision of the Code that in an action to foreclose a mortgage upon real property, the wife of the owner of the equity of redemption may appear and defend

arate estate; *Eckerson* v. *Vollmer,* 11 How. (N. Y.) Pr. 42.

[81] *Watson* v. *Church,* 3 Hun (N. Y.) 80; *Lathrop* v. *Heacock,* 4 Lans. (N. Y.) 1; *Leavitt* v. *Cruger,* 1 Paige Ch. (N. Y.) 421. See *ante* §§ 157, 158.

[82] N. Y. Code Civ. Proc. § 450.

[83] *Reynolds* v. *Robinson,* 64 N. Y. 589; *Scott* v. *Conway,* 58 N. Y. 619; *Wright* v. *Wright,* 54 N. Y. 437, aff'g 59 Barb. (N. Y.) 505; *Simar* v. *Canaday,* 53 N. Y. 298, 13 Am. Rep. 523; *Stoneman* v. *Erie R. R. Co.* 52 N. Y. 429; *Hinckley* v. *Smith,* 51 N. Y. 21; *Filer* v. *New York Cent. R. R. Co.* 49 N. Y. 47, 10 Am. Rep. 327; *Moore* v. *Moore,* 47 N. Y. 467, 7 Am. Rep. 466; *Rowe* v. *Smith,* 45 N. Y. 230; *Hoffman* v. *Treadwell,* 39 N. Y. Supr. Ct. (7 J. & S.) 183; *Chambovet* v. *Cagney,* 35 N. Y. Supr. Ct. (3 J. & S.) 474; *Osborn* v. *Nelson,* 59 Barb. (N. Y.) 375; *Kamp* v. *Kamp,* 46 How. (N. Y.) Pr. 143; *Broome* v. *Taylor,* 9 Hun (N. Y.) 155; *Spencer* v. *Humiston,* 9 Hun (N. Y.) 71; *Adams* v. *Curtis,* 4 Lans. (N. Y.) 164; *Beau* v. *Kiah,* 6 T. & C. (N. Y.) 464, 4 Hun (N. Y.) 171; *Freeman* v. *Barber,* 3 T. & C. (N. Y.) 574, 1 Hun (N. Y.) 433. See also *Draper* v. *Stouvenel,* 35 N. Y. 507; *Ackley* v. *Tarbox,* 31 N. Y. 564; *Palmer* v. *Davis,* 28 N. Y. 242; *Darby* v. *Callaghan,* 16 N. Y. 71; *Morrell* v. *Cawley,* 17 Abb. (N. Y.) Pr. 76; *Harley* v. *Ritter,* 9 Abb. (N. Y.) Pr. 400; *Gillies* v. Lent, 2 Abb. (N. Y.) Pr. N. S. 455; *Rowson* v. *Penn. R. R.* 2 Abb. (N. Y.) Pr. N. S. 220; *Foster* v. *Conger,* 61 Barb. (N. Y.) 145; *Ball* v. *Bullard,* 52 Barb. (N. Y.) 141; *Badgley* v. *Decker,* 44 Barb. (N. Y.) 577; *Barton* v. *Beer,* 35 Barb. (N. Y.) 81; *Mann* v. *Marsh,* 35 Barb. (N. Y.) 68; *Merchants' Ins. Co.* v. *Hinman,* 34 Barb. (N. Y.) 410; *Nemberry* v. *Garland,* 31 Barb. (N. Y.) 121; *Spies* v. *Acces. Trans. Co.* 5 Duer (N. Y.) 662; *Rowe* v. *Smith,* 38 How. (N. Y.) Pr. 37; *Mann* v. *Marsh,* 21 How. (N. Y.) Pr. 372; *Barton* v. *Beer,* 21 How. (N. Y.) Pr. 309; *Francis* v. *Ross,* 17 How. (N. Y.) Pr. 561.

by her own attorney, although her husband appears and defends by another attorney.[84]

§ 268. Service of summons on infant defendants.—Where infants are made parties or are necessary defendants in an action to foreclose a mortgage, they must be served with the summons; and until service is made the court will have no jurisdiction of them and the appointment of a guardian *ad litem* will be void.[85] The court will not acquire jurisdiction of such infants where, after the trial, they petition to intervene and have a guardian *ad litem* appointed, and thereafter file an answer by a guardian appointed upon such petition.[86] In a case where substituted service had been defectively made upon infants, but was confirmed by a subsequent order of the court, and later personal service was also made upon them for the purpose of removing any possible grounds of alleged irregularity in the service of the summons, the judgment and the sale under the decree were held to be valid and binding, it appearing that the action was still pending at the time of the personal service.

Under the provisions of the New York Code of Civil Procedure,[87] where the defendant is an infant under the age of fourteen years, service must be made by delivering a copy of the summons within the state to the infant in person, and also to his father, mother or guardian; or, if there is none within the state, to the person having the care and control of such infant, or with whom he resides, or in whose service he is employed. Service on the infant alone, or on the father, mother, guardian, or other person mentioned alone, does not constitute a personal service within the meaning of the statute. Service must be made upon both to meet its requirements.[88]

[84] *Janinski* v. *Heidelberg,* 21 Hun (N. Y.) 439. See *ante* §§ 157, 158.

[85] *Johnston* v. *San Francisco Savings Union,* 63 Cal. 554.

[86] *Johnston* v. *San Francisco Savings Union,* 63 Cal. 554.

[87] N. Y. Code Civ. Proc. § 426.

[88] *Ingersoll* v. *Mangam,* 84 N. Y. 622, aff'g 24 Hun (N. Y.) 202.

An infant defendant is required to appear and defend by a guardian,[89] but a guardian *ad litem* can be regularly appointed only after such a defendant has been served with the summons personally or by the substituted mode prescribed by the Code.[90] Such guardian must be appointed upon the application of the infant, if he is of the age of fourteen years or upwards and applies within twenty days after the service of the summons; if he is under that age or neglects so to apply, upon the application of any other party to the action, or upon the application of his general or testamentary guardian, if he has one, or of a relative or friend, with notice thereof to his general or testamentary guardian, if he has one within the state, or if he has none, to the person with whom the infant resides.[91] Where an infant defendant resides within the state, and is temporarily absent therefrom, the court may in its discretion make an order designating a person to act as guardian *ad litem,* unless he or some one in his behalf, procures such a guardian to be appointed, as prescribed in the Code,[92] within a specified time after the service of a copy of the order.[93] In case an appearance is made by a person appointed guardian *ad litem* for an infant under fourteen years of age who has not been served with the summons, the judgment rendered in the action will not be binding upon such infant.[94]

Where suit is brought to foreclose a mortgage against an infant who resides in another state with his mother, a widow, it will not be presumed that such infant has a guardian residing in the state where suit is brought, and service by publication may be had on filing an affidavit stating that he and his

[89] N. Y. Code Civ. Proc. §§ 471, 473. See also *Buermann* v. *Buermann,* 9 N. Y. Civ. Proc. Rep. 146, 17 Abb. (N. Y.) N. C. 391; *Mace* v. *Scott,* 17 Abb. (N. Y.) N. C. 100; *Freund* v. *Washburn,* 17 Hun (N. Y.) 543.

[90] *Ingersoll* v. *Mangam,* 84 N. Y. 622, aff'g 24 Hun (N. Y.) 202.

[91] N. Y. Code Civ. Proc. § 471. See also the cases cited *supra.*

[92] N. Y. Code Civ. Proc. §§ 471, 473.

[93] *Mace* v. *Scott,* 17 Abb. (N. Y.) N. C. 100, N. Y. Code Civ. Proc. § 473.

[94] *Ingersoll* v. *Mangam,* 84 N. Y. 622, aff'g 24 Hun (N. Y.) 202.

mother are non-residents and that personal service of the summons cannot be made upon him in the state where the action is brought.[95]

§ 269. Failure to appoint guardian ad litem.—Where an infant defendant has been properly served with process, the omission of the court to appoint a guardian *ad litem* for him will not render the judgment void, but only voidable; it can be avoided, however, by no one except the infant or his privies in blood.[96] In such a case where judgment is obtained by fraud or collusion, an action may be maintained by the infant to set it aside.[97] The record of the judgment, however, is *prima facie* evidence of the jurisdiction of the court, and will be held conclusive until clearly and explicitly disproved; the recitals in the judgment may be used to establish the jurisdiction of the court.[98]

§ 270. Service on lunatics and incompetents.—In those cases where the court has reasonable ground to believe that the defendant, by reason of habitual drunkenness, or for any other cause, is mentally incapable adequately to protect his rights, although not judicially declared to be incompetent to manage his affairs, it may, in its discretion, with or without an application therefor, make an order requiring a copy of the summons to be delivered also to a person whom it may designate in the order; in which case service of the summons will not be complete until it is so delivered.[99] But where the

[95] *Davis* v. *Huston*, 15 Neb. 28.

[96] *McMurray* v. *McMurray*, 66 N. Y. 175; *Croghan* v. *Livingston*, 17 N. Y. 218; *Bloom* v. *Burdick*, 1 Hill (N. Y.) 130, 143, 37 Am. Dec. 299; *Austin* v. *Trustees of Charleston Female Seminary*, 49 Mass. (8 Metc.) 196, 41 Am. Dec. 497; *Barber* v. *Graves*, 18 Vt. 290.

[97] *McMurray* v. *McMurray*, 66 N. Y. 175.

[98] *Ingersoll* v. *Mangam*, 84 N. Y. 622, aff'g 24 Hun (N. Y.) 202; *Bosworth* v. *Vandewalker*, 53 N. Y. 597.

[99] N. Y. Code Civ. Proc. § 427. See *Moulton* v. *Moulton*, 47 Hun (N. Y.) 606, 17 N. Y. St. Rep. 427.

defendant has been judicially declared to be incompetent to manage his affairs in consequence of lunacy, and it appears satisfactorily to the court by affidavit, that the delivery of a copy of the summons to him in person, will tend to aggravate his disorder, or to lessen the probability of his recovery, the court may make an order, dispensing with such delivery, in which case the delivery of a copy of the summons to a committee duly appointed for him will be sufficient personal service upon the defendant.[1]

§ 271. **Appearance of defendant.**—The voluntary appearance of a defendant is equivalent to a personal service of the summons upon him,[2] because a voluntary appearance waives all objections to the regularity or the sufficiency of the service of the summons.[3] If a defendant in a mortgage foreclosure enters an appearance by an attorney after judgment has been entered, he will be entitled to notice of all subsequent proceedings; the sufficiency of the notice of appearance is to be determined by the trial court.[4]

A trustee cannot, in the absence of authority, enter an appearance which will confer jurisdiction on the court to enter a personal judgment against the *cestui que trust*.[5]

[1] N. Y. Code Civ. Proc. § 429.

[2] N. Y. Code Civ. Proc. § 424. See *Ferguson* v. *Crawford*, 70 N. Y. 253, 26 Am. Rep. 589, reversing 7 Hun (N. Y.) 25; *Mors* v. *Stanton*, 51 N. Y. 649; *Wheelock* v. *Lee*, 15 Abb. (N. Y.) Pr. N. S. 24; *Brett* v. *Brown*, 13 Abb. (N. Y.) Pr. N. S. 295; *Allen* v. *Malcolm*, 12 Abb. (N. Y.) Pr. N. S. 335; *Tracy* v. *Reynolds*, 7 How. (N. Y.) Pr. 327.

[3] *Ogdensburgh & L. C. R. R. Co.* v. *Vermont & C. R. R. Co.* 63 N. Y. 176.

[4] *Tuller* v. *Beck*, 108 N. Y. 355, 15 N. Y. St. Rep. 686; *Catlin* v. *Ricketts*, 91 N. Y. 668; *Ingersoll* v. *Mangam*, 84 N. Y. 622; *Wheelock* v. *Lee*, 74 N. Y. 495; *Olcott* v. *Maclean*, 73 N. Y. 223; *Martine* v. *Lowenstein*, 68 N. Y. 456; *Phelps* v. *Phelps*, 6 N. Y. Civ. Proc. Rep. 117; *Diossy* v. *West*, 8 N. Y. Week. Dig. 411; *Dake* v. *Miller*, 7 N. Y. Week. Dig. 353; *Markee* v. *City of Rochester*, 6 N. Y. Week. Dig. 102; *Wheelock* v. *Lee*, 54 How. (N. Y.) Pr. 402. See Supreme Court Rule 9.

[5] *Thornily* v. *Prentice*, 121 Iowa, 89, 100 Am. St. Rep. 317, 96 N. W. 728.

§ 272. Appearance by attorney without authority.—A judgment recovered against a defendant, who has not been served with process and who has no knowledge of the suit, but for whom an attorney appeared without authority, will be good, and cannot be attacked collaterally for want of jurisdiction;[6] but if there has been fraud or collusion between the plaintiff's attorney and the attorney for the defendant, or if the attorney for the defendant is not responsible and perfectly competent to answer to his assumed client for damages,[7] or if the signature of the attorney supposed to have appeared was forged, the judgment will not be binding on the defendant.[8]

§ 273. Commencement of foreclosure prevents action at law on bond.—The effect of commencing an action to forecelose a mortgage is to bar an action at law on the note or bond for the recovery of the mortgage debt, or any part thereof, during the pendency of the action for the foreclosure of the mortgage,[9] or if an action at law on the note or bond

[6] *Brown* v. *Nichols,* 42 N. Y. 26. See *Ferguson* v. *Crawford,* 70 N. Y. 253, 26 Am. Rep. 589, reversing 7 Hun (N. Y.) 25; *Denton* v. *Noyes,* 6 Johns. (N. Y.) 296, 5 Am. Dec. 237.

[7] *Denton* v. *Noyes,* 6 Johns. (N. Y.) 296, 5 Am. Dec. 237.

[8] *Ferguson* v. *Crawford,* 70 N. Y. 253, 26 Am. Rep. 589. See Supreme Court Rule 10.

[9] This rule does not apply to an action begun without leave of the probate court upon the bond of a mortgagor's residuary legatee; and the omission to obtain leave from the court in chancery is a mere irregularity that may be waived by the defendants; *Culver* v. *Judge of Superior Court,* 57 Mich. 25. See N. Y. Code Civ. Proc. § 1628.

And in *London & San Francisco Bank* v. *Dexter Horton & Co.* 126 Fed. 593, 61 C. C. A. 515, it is held that a statute prohibiting an action on the note and mortgage at the same time, does not apply where foreclosure is sought on land situated outside of the state. See *Marx* v. *Davis,* 56 Miss. 745; *Meehan* v. *First National Bank,* 44 Neb. 213, 62 N. W. 490; *Equitable Life Insurance Societies* v. *Stevens,* 63 N. Y. 341, 345; *Collins' Petition,* 6 Abb. (N. Y.) N. C. 227, 232; *Nichols* v. *Smith,* 42 Barb. (N. Y.) 381; *Ogden* v. *Bodle,* 2 Duer. (N. Y.) 611; *Engle* v. *Underhill,* 3 Edw. Ch. (N. Y.) 249; *Moore* v. *Anglo-American Dry Dock Co.* 81 Hun (N. Y.) 389, 31 N. Y. Supp. 110, 63 N. Y. S. R.

has already been commenced it will stay all proceedings in such action.[10] Neither can an action at law be maintained later for any deficiency arising on a foreclosure sale, without leave of the court in which the foreclosure was brought.[11]

And the owner of a debt secured by mortgage, who holds an independent obligation or covenant for its payment given by a person other than the mortgagor, cannot enforce his claim against such obligor by an action at law during the pendency of a foreclosure;[12] but it seems that where proceedings for foreclosure and for a judgment of deficiency have

380; *Suydam* v. *Bartle,* 9 Paige Ch. (N. Y.) 294; *Williamson* v. *Champlin,* 8 Paige, Ch. (N. Y.) 70, 1 Clarke, Ch. (N. Y.) 9; *Anderson* v. *Pilgrim,* 30 S. C. 499, 9 S. E. 587, 4 L.R.A. 205, 14 Am. St. Rep. 917, also *ante,* § 11.

Leave of the court having jurisdiction of a foreclosure action in which a decree has been rendered is essential to the commencement of an action at law to enforce the obligation of an indorser upon a note secured by the mortgage, under the Nebraska Code of Civil Procedure, §§ 847, 849, authorizing a deficiency judgment in the foreclosure action against such an indorser, and § 848, providing that no proceeding shall be had at law for the recovery of a debt secured by a mortgage after a decree in foreclosure, unless authorized by the Court. *Meehan* v. *First National Bank,* 44 Neb. 213, 62 N. W. 490.

Leave should not be granted to a bondholder to sue during the pendency of an action to foreclose the mortgage securing such and other bonds, under New York Code of Civil Procedure, § 1628, prohibiting the bringing of any other action without leave of the court to recover any part of the mortgage debt, during the pendency of an action to foreclose the mortgage. *Moore* v. *Anglo-American Dry Dock & W. Co.* 81 Hun (N. Y.) 389, 63 N. Y. S. R. 380, 31 N. Y. Supp. 110.

[10] *Cushman* v. *Leland,* 93 N. Y. 652; *Schaaf* v. *O'Brien,* 8 Daly (N. Y.) 181, 183; *Gillette* v. *Smith,* 18 Hun (N. Y.) 10, 12; *Suydam* v. *Bartle,* 9 Paige Ch. (N. Y.) 294; *Williamson* v. *Champlin,* 8 Paige Ch. (N. Y.) 70, Clarke Ch. (N. Y.) 9.

[11] N. Y. Code Civ. Proc. § 1628. See also *Scofield* v. *Doscher,* 72 N. Y. 491; *Williamson* v. *Champlin,* 8 Paige Ch. (N. Y.) 70; Clarke Ch. (N. Y.) 9. The Supreme Court in Nebraska held in *Clapp* v. *Maxwell,* 13 Neb. 542, that a leading principle of the statute, relative to the foreclosure of mortgages upon real property, is that a mortgagor shall not be answerable for the debt secured, upon the mortgage and personally at the same time, without leave of the court.

[12] *Scofield* v. *Doscher,* 72 N. Y. 491; *Belmont* v. *Cornen,* 48 Conn. 343.

been ineffectual, an action at law can be instituted for the debt without leave of the court in which the foreclosure was brought.[13] This provision of the Code, however, does not exclude such relief at law against the representatives of a deceased mortgagor;[14] but an action upon a guaranty is within the prohibition of this provision, unless authorized by the court.[15]

However an action at law on the note or bond is no bar to an action in equity to foreclose the mortgage.[16] Yet it has been held that the pendency of proceedings against garnishees upon a judgment for a debt secured by mortgage stays foreclosure of the mortgage, under the Nebraska Code, providing that no foreclosure can be had, where proceedings at law for the same debt have been instituted, until their final determination.[17]

§ 274. Action at law on bond by consent of court.— Where an action at law has been commenced without leave of the court in which the foreclosure was brought, and the facts in the case are such that leave would have been granted had a proper application been made to the court, the court may grant leave *nunc pro tunc* upon such terms as may be just,[18] and thus remove the impediment to maintaining the action.[19]

[13] *Culver* v. *Judge of Superior Court,* 57 Mich. 25.

[14] *Glacius* v. *Fogel,* 88 N. Y. 434. *In re Collins,* 17 Hun (N. Y.) 289, after an action for foreclosure had been prosecuted to judgment and sale, upon which a deficiency had arisen, an application was made for leave to sue the representatives and next of kin of the deceased grantor, they not having been made parties to the foreclosure and no claim having been presented against the estate. It was held that such application was addressed to the sound discretion of the court, and it would not be granted when the circumstances of the case would render it inequitable to permit such an action.

[15] *McKernan* v. *Robinson,* 84 N. Y. 105.

[16] *Gillette* v. *Smith,* 18 Hun (N. Y.) 10, 12; *Comstock* v. *Drohan,* 8 Hun (N. Y.) 373, 375.

[17] *Hargreaves* v. *Menken,* 45 Neb. 668, 63 N. W. 951. See *post* § 347.

[18] *Earl* v. *David,* 86 N. Y. 634, aff'g 20 Hun (N. Y.) 527, N. Y. Code Civ. Proc. § 1628.

[19] *Earl* v. *David,* 86 N. Y. 634;

Where such leave is granted after suit has been brought, the complaint should be so amended as to show that proper leave has been granted.[20] It has been said that such an order may be granted *ex parte,* even after the neglect to obtain such leave has been set up as a defense.[21]

The provision of the statute prohibiting an action at law to recover the debt or any part of it during the pendency of an action to foreclose, unless leave of the court has been first duly obtained, has no application to an action by an assignee against the mortgagee upon his guaranty of the payment of the debt,[22] and does not prohibit a junior mortgagee, who has filed a notice of claim to surplus moneys arising upon the foreclosure of a prior mortgage, from bringing, without leave of the court, an action to recover the debts secured by his mortgage.[23] The pendency of an action on a promissory note, secured by mortgage, to have the amount due on the note ascertained and for a decree for the sale of the property described in the mortgage, but in which no personal judgment is sought, is not a bar to another action upon the note against the maker for a personal judgment.[24] A judgment in an action to foreclose a mortgage executed by a husband and wife to secure the payment of the wife's promissory note, constitutes no bar to a subsequent action to subject the separate estate of the wife to the payment of a deficiency arising upon the sale of the property mortgaged.[25]

§ 275. Tender after suit brought.—The New York Code of Civil Procedure authorizes a tender after suit is brought "where the complaint demands judgment for a sum

McKernan v. *Robinson,* 84 N. Y. 105; *Scofield* v. *Doscher,* 72 N. Y. 491; *Equitable Life Ins. Co.* v. *Stevens,* 63 N. Y. 341.

[20] *Earl* v. *David,* 86 N. Y. 634.

[21] *McKernan* v. *Robinson,* 84 N. Y. 105.

[22] *Schaaf* v. *O'Brien,* 8 Daly (N. Y.) 181. See *Baxter* v. *Smack,* 17 How. (N. Y.) Pr. 183.

[23] *Wyckoff* v. *Devlin,* 12 Daly (N. Y.) 144.

[24] *Spence* v. *Union Cent. Ins. Co.* 40 Ohio St. 517.

[25] *Avery* v. *Vansickle,* 35 Ohio St. 270.

of money only; and the action is brought to recover a sum certain, or which may be reduced to certainty by calculation."[26] But an action to foreclose a mortgage, being a proceeding purely *in rem,* cannot properly be said to be brought for the recovery of money only; and consequently, in such an action, the defendant has no right to make and plead a tender.[27] But where an action is brought to foreclose a mortgage against real property, upon which a portion only of the principal and interest is due and another portion of either is to become due, the defendant can have the cause dismissed, without costs as against the complainant, by payment into court, at any time before a final judgment directing a sale is rendered, the sum due together with the plaintiff's costs in the action;[28] and he may, after a final judgment directing a sale has been rendered, but before the sale is made, pay into court the amount due for the principal and interest and the costs of the action, together with the expenses of the proceedings to sell, if any, and have all proceedings upon the judgment stayed.[29]

Should the plaintiff in a mortgage foreclosure accept from the defendant the principal due, and the interest thereon, together with the costs, he will thereby waive the making of the payment into court, and the decree in the usual form of foreclosure and sale, where subsequent installments are to fall due,

[26] N. Y. Code Civ. Proc. § 731.

[27] *Astor* v. *Palache,* 49 How. (N. Y.) Pr. 231; *Bartow* v. *Cleveland,* 16 How. (N. Y.) Pr. 364, 7 Abb. (N. Y.) Pr. 339; *Thurston* v. *Marsh,* 14 How. (N. Y.) Pr. 572, 5 Abb. (N. Y.) Pr. 389.

But in Pennsylvania, a tender, subsequent to the filing of a *scire facias sur mortgage* of the principal, interest, costs, and half the attorney's fee provided for by the mortgage in case of foreclosure, is sufficient to prevent foreclosure, where the interest was fully paid to within two days of the issuance of the *scire facias* and the mortgage then assigned to plaintiff, who issued the *scire facias* without demand for the principal, although it was several years overdue. *Teller* v. *Willett* (Pa. C. P.), 31 W. N. C. 127.

[28] N. Y. Code Civ. Proc. § 1634; *Malcolm* v. *Allen,* 49 N. Y. 448, 5 Alb. L. J. 334; *Long* v. *Lyons,* 54 How. (N. Y.) Pr. 129.

[29] N. Y. Code Civ. Proc. § 1625.

cannot be entered.[30] The plaintiff is not required to accept payment from the hands of the defendant, after the decree has been entered. If the defendant wishes a stay in the execution of the decree of foreclosure and sale, he should apply to the court for leave to make the payment into court, and procure an order for a stay of proceedings; even then the plaintiff will be entitled to have a provision inserted in the decree for its enforcement in case of future defaults. An observance of the provisions of the Code, regulating proceedings for the foreclosure of mortgages, where the whole sum is not due, should be strictly pursued, in order that both parties may be made acquainted with the terms of the decree, and have an opportunity to know and to protect their rights.[31]

§ 276. **What claims may be foreclosed.**—All valid mortgages may be foreclosed, where the whole or a part of the debt secured is due and default has been made in the payment of the principal or of the interest. And where a mortgage has been adjudged to be void for usury, the mortgagee may enforce a parol mortgage, which was taken up with the proceeds of such usurious loan.[32] It has been held that an agreement in writing, although not embodied in the mortgage itself, designed to make the right of the mortgagee to foreclose the mortgage dependent upon an event other than the expiration of the time limited in the mortgage, at the election of the mortgagee, and thus make it possible to enforce the collection of the money whenever it become evident that the security was becoming insufficient, is legal and valid between the parties, as well as against all persons dealing with the property with notice of its existence.[33] And it is said that a mortgage of lands which is collateral to the actual personal obligation

[30] *Long* v. *Lyons,* 54 How. (N. Y.) Pr. 129.

[31] *Long* v. *Lyons,* 54 How. (N. Y.) Pr. 129. See *post* chapter on Tender and Payment into Court.

[32] *Allison* v. *Schmitz,* 98 N. Y. 657. See *ante,* chap. iii.

[33] *Metropolitan L. Ins. Co.* v. *Hall, 32* N. Y. S. R. 92, 10 N. Y. Supp. 92.

of the mortgagor enforceable at law, no matter in what shape that obligation exists, may be enforced in foreclosure proceedings,[34] even though an ineffectual attempt to foreclose by advertisement has been made.[35] And it is thought that the pendency of an action by the people for the dissolution of an insolvent corporation is not a bar to suit to foreclose a mortgage upon the property of the corporation.[36] The fact that the mortgagee has caused the equity of redemption in mortgaged land to be sold in satisfaction of a judgment rendered on a debt not secured by a mortgage, will not impair his right to foreclose.[37] It has been said that a failure of the mortgagor to signify a readiness to pay and to unite with the mortgagee in obtaining an order to pay the money into court, where the condition of the mortgage requires it, will allow the mortgagee to foreclose.[38] And a wife who, in consideration of joining with her husband in the execution of a mortgage on behalf of a tract of land owned by him, has received a mortgage on the other half of the tract, providing that it shall be void if the husband shall save to her the inchoate right of dower in the former half of the land, otherwise to remain in full force and virtue, may foreclose her mortgage upon her husband becoming insolvent, and recover the amount thereof, less the consideration paid her for executing a quitclaim deed to the other mortgagee; and she need not wait for the foreclosure of the other mortgage.[39]

After the death of a mortgagor the mortgagee may institute an action to foreclose the mortgage against the heirs of the mortgagor, and cannot be compelled to relinquish his lien on the real estate and to share in the general assets of the

[34] *Shelden* v. *Warner,* 59 Mich. 444, 26 N. W. 667. This was under How. Mich. Stat. § 6702.

[35] *Rogers* v. *Benton,* 39 Minn. 39; 12 Am. St. Rep. 613, 38 N. W. 765.

[36] *Herring* v. *New York, L. E. & W. R. Co.* 105 N. Y. 340, 12 N. E. 763.

[37] *Porter* v. *Wheeler,* 105 Ala. 451, 17 So. 221.

[38] *Crescent Min. Co.* v. *Wasatch Min. Co.* 151 U. S. 317, 38 L. ed. 177, 14 Sup. St. R. 348.

[39] *Milburn* v. *Milburn* (Ind.) 40 N. E. 1082.

estate;[40] and the mortgagee is not bound to proceed against the estate of the deceased mortgagor before bringing his action to foreclose the mortgage.[41]

§ 277. Same—Amount due.—A potent clerical error tending to lessen the amount due under the mortgage will not prevent its being foreclosed for the full amount. Thus, it has been said that where a mortgage is conditioned for the payment of $265, a power of sale" in case of the nonpayment of said sum of $165" is clearly a clerical error, and the mortgagee may foreclose for the amount actually due.[42] And where a mortgage has been assigned as collateral security for a much smaller debt, it may be foreclosed, even as against a junior lienholder, for the full amount and that, too, before the last secured note is due.[43]

§ 278. Same—Mortgage on charitable institutions.—The supreme judicial court of Kentucky, in the case of Commonwealth v. Louisville Trust Company,[44] say that the holder of mortgage bonds of a charitable institution issued under legislative authority for money borrowed by it to erect new buildings, is not bound, where such buildings were never finished and no rents received therefrom, to look alone for the payment of the bonds to the contemplated rents of the buildings under a provision of the statute creating a sinking fund into which the rents were to be paid and the money arising therefrom applied to the redemption or payment of the bonds.

A mortgage made by a church corporation may be foreclosed upon breach of conditions providing for payment of interest, taxes, assessments, water rents, or insurance, although by another provision thereof, the payment of the principal sums could be enforced only in the event of the sale of

[40] *Jones* v. *Null*, 9 Neb. 57.

[41] *Bell* v. *Hobaugh*, 65 Ind. 598.

[42] *Damon* v. *Deeves*, 62 Mich. 465, 29 N. W. 42.

[43] *Colby* v. *McOmber*, 71 Iowa, 469, 32 N. W. 459.

[44] 26 S. W. 583, 16 Ky. L. Rep. 131.

the church property, or said property ceasing to belong to it, or upon the church edifice ceasing to be used as a regular Baptist house of worship, and the congregation worshipping therein ceasing to be recognized by The Southern New York Baptist Association, or upon the buildings other than the church edifice being used for religious services and other charitable work conducted by said Baptist Church, and none of these events happened.[45]

§ 279. Same—Mortgage assigned as collateral security.—It is held that a mortgage assigned as collateral security for a much smaller debt may be foreclosed, as against objection of a junior lien-holder, for its whole amount, and before the last secured debt is due.[46] And the foreclosure of a mortgage assigned as collateral security, not to collect the principal debt, but to preserve the security, does not bar an action upon another mortgage executed as security for the principal debt, under a statute [47] providing that there can be but one action for the recovery of any debt secured by a mortgage upon real property.[48]

§ 280. Same—Death of mortgagor—Presentation of claim.—The death of the mortgagor before maturity or payment of a mortgage debt does not in any way affect the rights of the mortgagee to foreclose the mortgage on default of any of its covenants,[49] without previous presentation as a

[45] *New York City Baptist Mission Society* v. *Tabernacle Baptist Church,* 17 Misc. 699, 41 N. Y. Supp. 513.

[46] *Colby* v. *McOmber,* 71 Iowa, 469, 32 N. W. 459.

[47] Such as Cal. Code Civ. Proc. § 726.

[48] *Merced Secur. Sav. Bank* v. *Casaccia,* 103 Cal. 641, 37 Pac. 648.

[49] See *Fearn* v. *Ward,* 80 Ala. 555, 2 So. 114; *Smith* v. *Gillman,* 80 Ala. 296; *Gutzeit* v. *Pennie,* 98 Cal. 327, 33 Pac. 199; *More* v. *Calkins,* 95 Cal. 435, 30 Pac. 583, 29 Am. St. Rep. 128; *Angelo Nevada Assur Corp.* v. *Nadeau,* 90 Cal. 393, 27 Pac. 302; *Dreyfuss* v. *Giles,* 79 Cal. 409, 21 Pac. 840; *Bull* v. *Coe,* 77 Cal. 54, 11 Am. St. Rep. 235, 18 Pac. 808; *Kohli* v. *Hale,* 141 Ind. 411, 40 N. E. 1060; *Andrews* v. *Morse,* 51 Kan. 30, 32 Pac. 640; *Barrick* v. *Horner,* 78 Md. 253, 44

claim against the estate,[50] or an allowance by the administrat-

Am. St. Rep. 283, 27 Atl. 1111; *Fraser* v. *Bean,* 96 N. C. 327, 2 So. 159; *Puckett* v. *Reed,* 3 Tex. Civ. App. 350, 22 S. W. 515.

The right of a trustee in a trust deed, which conveys the legal title, to execute the power of sale conferred thereby, is not affected upon the death of the grantor by Cal. Code Civ. Proc. §§ 1493, 1502, providing for presentation of claims against estates, or by § 1500, allowing foreclosure of mortgages only when all recourse against any other property of the estate is expressly waived in the complaint, since such death does not revoke the power or limit the effect of the deed. *More* v. *Calkins,* 95 Cal. 435, 29 Am. St. Rep. 128, 30 Pac. 583.

[50] *Fearn* v. *Ward,* 80 Ala. 555, 2 So. 114; *Smith* v. *Gillam,* 80 Ala. 296; *Hodges* v. *Taylor* (Ark.) 13 S. W. 129; *Gutzeit* v. *Pennie,* 98 Cal. 327, 33 Pac. 199; *Angli Nevada Assur. Corp.* v. *Nadeau,* 90 Cal. 393, 27 Pac. 302; *Dreyfuss* v. *Giles,* 79 Cal. 409, 21 Pac. 840; *Bull* v. *Coe,* 77 Cal. 54, 11 Am. St. Rep. 235, 18 Pac. 808; *Andrews* v. *Morse,* 51 Kan. 30, 32 Pac. 640; *Fraser* v. *Bean,* 96 N. C. 327, 2 So. 159. See *post,* § 282.

In Alabama the failure to present the debt as a claim against the estate of the deceased mortgagor, within eighteen months after the granting of letters of administration (Code, § 2597), is no bar or defense to a bill for the foreclosure of the mortgage. *Fearn* v. *Ward,* 80 Ala. 555; *Smith* v. *Gillam,* 80 Ala. 296.

In Arkansas the contrary doctrine prevails, and failure to foreclose within the statutory period is a bar under Kirby's Dig. § 5399. *Mueller* v. *Light,* 92 Ark. 522, 31 L.R.A.(N.S.) 1013, 123 S. W. 646.

In California the mortgagee of property of a deceased person need not present the mortgage as a claim against the estate; and his failure to do so is no bar to his right to foreclose, under the Code of Civil Procedure, § 1500, where the complaint in the foreclosure suit expressly waives all claims against any other property of the estate. *Dreyfuss* v. *Giles,* 79 Cal. 409, 21 Pac. 840. And this right is not affected because such right is already barred for failure to present the debt as a claim against the estate within the time given by Cal. Code of Civ. Proc. §§ 1493, 1500. *Anglo Nevada Assur. Corp.* v. *Nadeau,* 90 Cal. 393, 27 Pac. 302.

Same—A mortgage executed by one party to secure the debt of another is enforceable against the property after the debtor's death, although the holder of the note does not present it as a claim against his estate. *Bull* v. *Coe,* 77 Cal. 54, 11 Am. St. Rep. 235, 18 Pac. 808.

In Kansas the failure of the mortgagee to exhibit his mortgage debt as a demand against the estate of a deceased mortgagor within the statutory time for presentation of claims will not preclude the foreclosure of the mortgage and the subjection of the mortgaged property to the payment of the debt; but unless the claim is so exhibit-

or or a court [51] because the death of the mortgagor in no wise affects the lien of the mortgagee or his rights thereunder, even as against the heirs of the mortgagor, who have a right to have the mortgage debt paid out of the personal property of the decedent; [52] but where the mortgage is foreclosed without presentation and allowance against the estate of the deceased mortgagor, the collection of the debt will be limited to the proceeds arising from the sale of the mortgaged propery.[53] And an action to foreclose a mortgage may be prosecuted to judgment against the grantees of the mortgagor and subsequent incumbrancers, although an administrator of the deceased mortgagor is removed pending the suit and no other is appointed in his stead, where the plaintiff waives all recourse against any of the property of the estate except the mortgaged premises.[54] On parity of principle it has been held that administration upon a mortgagee's estates is not necessary for the foreclosure of a mortgage upon land which he had sold prior to his death, if no personal judgment is sought.[55]

§ 281. Same—Defective and mutilated mortgages.—It has been held that a mortgage which by its terms is expressly intended to secure payment of a note, but is defective, in the power of sale, in providing only for payment of costs of the trust and interest, without making any provision for the principal, may be foreclosed by a court of equity without waiting for the instrument to be reformed.[56] And the New Jersey court of chancery has said the fact that a bond and

ed, the collection of the debt is limited to the proceeds arising from the sale of the mortgaged property. *Andrews* v. *Morse,* 51 Kan. 30, 32 Pac. 640.

[51] *Kohli* v. *Hale,* 141 Ind. 411, 40 N. E. 1060.

[52] *Fraser* v. *Bean,* 96 N. C. 327

[53] *Andrews* v. *Morse,* 51 Kan. 30, 32 Pac. 640.

[54] *Gutzeit* v. *Pennie,* 98 Cal. 327, 33 Pac. 199.

[55] *Puckett* v. *Reed,* 3 Tex. Civ. App. 350, 22 S. W. 515.

[56] *Milligan* v. *Cromwell,* 3 N. M. 557, 9 Pac. 359; *Seewald* v. *Reynolds,* 3 N. M. 567, 9 Pac. 376.

mortgage are mutilated by having a portion of the first page torn off, and by the destruction of the seals and signatures, will not prevent foreclosure upon proof that the mutilation was the mistake of the mortgagee who intended to and supposed he was destroying some other paper, especially in connection with a written admission by the mortgagor under seal, of the fact of such mistake, coupled with a promise to pay the amount secured by the mortgage.[57]

§ 282. Same—Mortgage on homestead.—In some states a mortgage lien is postponed to the homestead exemption rights, and although a lien on the property, it cannot be enforced until after the homsetead right expires.[58] In those states where a mortgage on the homestead may be enforced by foreclosure, the mortgagee of a homestead is not required to exhause other securities before foreclosing the mortgage on such homestead.[59] In those cases where the husband and wife join in mortgaging their homestead, and the husband is subsequently adjudged insolvent, the holder of the mortgage may foreclose without presenting a claim against the insolvent's estate.[60]

[57] *Collignon* v. *Collignon,* 52 N. J. Eq. 516, 28 Atl. 794.

[58] *Lowery* v. *Parker,* 83 Ga. 341, 9 S. E. 677.

Purging a mortgage of all the usury in the debt in the judgment of foreclosure, does not prevent the waiver of homestead and exemption from being void and remaining void. The mortgage lien will be postponed to an exemption right afterwards asserted in the property, but the lien can be enforced after such right expires. *Lowry* v. *Parker,* 83 Ga. 341, 9 S. E. 677.

[59] *Blake* v. *McCosh,* 91 Iowa, 544, 60 N. W. 127.

[60] *Montgomery* v. *Robinson,* 76 Cal. 229, 18 Pac. 261. See *ante,* § 280.

Under California Code of Civil Procedure, § 1475, requiring presentation of claims secured by liens on the homestead against a decedent's estate, a deed absolute intended as a mortgage, made by husband and wife upon her separate property, which had been declared a homestead, to secure his debt, can be foreclosed after his death, although no claim is presented against the estate, upon which the creditor has waived all demands for the mortgage debt. *Bull* v. *Coe,* 77 Cal. 54, 11 Am. St. Rep. 235, 18 Pac. 808.

§ 283. Same—Indemnity mortgages.—A mortgage to indemnify may be foreclosed like any other mortgage.[61] Thus it has been said that a mortgage upon other lands of a grantor to secure the repayment of the whole purchase money of land the title to which is in litigation, in case of failure of title by an adverse determination, may be foreclosed before eviction and without first bringing an action on the covenants of seisin in the deed to determine the damages, since the latter are liquidated by the mortgage itself.[62] And where a mortgage is given to indemnify the mortgagor's sureties in a note to a third person, and also to secure another note given by the mortgagor to one of his sureties, and the co-sureties afterwards release all their interest in the mortgage to the surety holding the note for his own benefit, the latter may, in enforcing the mortgage for the satisfaction of his own debt, include a foreclosure for the benefit of himself and his co-sureties, although the payee and holder of such note is not made a party.[63]

§ 284. Same—Lost mortgages or notes.—The chancery court of New Jersey has held that a mortgage executed to a person since deceased may be foreclosed as a lost mortgage where, although there is some conflict in the evidence as to whether it has been paid, the weight of the evidence is against that theory, and it is claimed that the deceased lost or mislaid it during one of his fits of temporary mental aberration.[64] And a foreclosure and sale under a mortgage given to secure notes is proper upon proof that they are due and unpaid, and are lost, and have never been sold or disposed of.[65] But a complaint to foreclose a mortgage securing a note is

[61] *Houston* v. *Nord,* 39 Minn. 490, 40 N. W. 568; *Nix* v. *Draughan,* 56 Ark. 240, 15 S. W. 893; *McDaniel* v. *Austin,* 32 S. C. 601, 11 S. E. 350. See *ante,* § 67.

[62] *Nix* v. *Draughan,* 56 Ark. 240. 15 S. W. 893.

[63] *McDaniel* v. *Austin,* 32 S. C. 601, 11 S. E. 350.

[64] *Mulford* v. *Brown* (N. J. Ch.) 28 Atl. 513.

[65] *Allendorph* v. *Ogden,* 28 Neb. 201, 44 N. W. 220.

properly dismissed where an allegation that the note is lost is denied by answer, and is not proved upon the trial, and the note is not produced.[66]

§ 285. Same—Other securities.—A mortgagee holding other securities for the same debt will not be required to exhaust such other securities before proceeding to foreclose his mortgage;[67] he is entitled to waive such other securities, if he so elects.[68] Neither can a mortgagee be compelled to proceed against one who has agreed to indemnify him against loss in case the mortgage security is insufficient to pay the note to secure which it is given, and who has agreed with the mortgagor that he would pay the note when due, before re-

[66] *Field* v. *Anderson,* 55 Ark. 546, 18 S. W. 1038.

[67] *Bull* v. *Coe,* 77 Cal. 54, 11 Am. St. Rep. 235, 18 Pac. 808; *Blake* v. *McCosh,* 91 Iowa, 544, 60 N. W. 127; *Weihl* v. *Atlanta Furniture Mfg. Co.* 89 Ga. 297, 15 S. E. 282, 37 Am. & Eng. Corp. Cas. 693; *Moore* v. *Kraemer,* 50 N. J. Eq. 776, 26 Atl. 961; *Bishop Bailey Building & Loan Association* v. *Kennedy* (N. J. Ch.) 12 Atl. 141, *Hersner* v. *Martin,* 8 Wash. 698, 36 Pac. 1096.

Even when the mortgage on a homestead *Blake* v. *McCosh,* 91 Iowa, 544, 60 N. W. 127; *Stiles* v. *Stannard,* 67 Vt. 246, 31 Atl. 294.

The same rule applies to trust deeds. *Sis* v. *Boarman,* 11 App. D. C. 116.

[68] *Bull* v. *Coe,* 77 Cal. 54, 11 Am. St. Rep. 235, 18 Pac. 808; *Hersner* v. *Martin,* 8 Wash. 698, 36 Pac. 1096.

Thus it has been said that a holder of a mortgage for the purchase price of land to whom is also assigned as additional security the interest of the mortgagor in certain notes, which have never come into his hands but remain in the hands of the one from whom the mortgagor purchased them, as security for their purchase price, may waive such additional security and foreclose the mortgage without accounting for the notes assigned to him. *Hersner* v. *Martin,* 8 Wash. 698, 36 Pac. 1096.

Under California Code of Civil Procedure, § 726, providing that there can be but one action for the recovery of a debt secured by a mortgage, a mortgagee who also has the title to property purchased jointly with the debtor, but conveyed to the mortgagee separately as further security for the same debt, may foreclose the mortgage, waiving, if he chooses, the security of the other property. *Bull* v. *Coe,* 77 Cal. 54, 11 Am. St. Rep. 235, 18 Pac. 808. See also *Commercial Bank of Santa Ana* v. *Kershner,* 120 Cal. 495, 52 P. 848.

sorting to the mortgage security.[69] For this reason it is thought that the creditors of an insolvent corporation cannot compel the holder of a mortgage taken in good faith as further security for the note of the corporation indorsed by stockholders or directors, to proceed first against the indorsers; but their only method of preventing his selling under the mortgage is to advance the mortgage debt and demand an assignment of the note and mortgage.[70] But it has been held that where a building association holds a first mortgage upon real estate, and, as an additional security, stock issued by it to the mortgagor, it will be compelled, for the benefit of a second mortgagee, to first exhaust such additional security.[71]

§ 286. Same—Mortgage on partnership property.—A mortgage on individual property which is put into a partnership by the mortgagor before the filing of the mortgage for record can only be enforced against the interest in the property left to the mortgagor after settlement of the partnership business.[72] But it has been said that one to whom a partner has given a mortgage on his separate land to secure a partnership debt without personally binding himself for the payment of the debt, may, after the death of such partner, bring an

[69] *Stiles* v. *Stannard,* 67 Vt. 246, 31 Atl. 294.

[70] *Weihl* v. *Atlanta Furniture Mfg. Co.* 89 Ga. 297, 15 S. E. 282, 37 Am. & Eng. Corp. Cas. 693.

[71] *Bishop Bailey Building & Loan Association* v. *Kennedy* (N. J. Ch.) 12 Atl. 141.

In a recent case the New Jersey court of errors and appeals held that a widow entitled to a legacy under her husband's will, who takes from one of the executors having funds in hand for the payment of the legacy a mortgage on lands held by him in trust, and executes a release of the legacy to the executors, which is filed as a voucher for payment, is a purchaser for value of the mortgage, and cannot be compelled to resort first to the executors or the estate from which such legacy is payable, before enforcing her mortgage as against the owners of the lands. *Moore* v. *Kraemer,* 50 N. J. Eq. 776, 26 Atl. 961.

[72] *Ringo* v. *Wing,* 49 Ark. 457, 5 S. W. 787

action to foreclose the mortgage without first proceeding against the surviving partner.[73]

§ 287. Same—Mortgage on undivided interest—Partition.—The supreme court of South Carolina have said that to an action for the mere foreclosure of a mortgage on an undivided interest in land, the right of the plaintiff to recover judgment is not affected by any question as to the nature and extent of such interest.[74] And it is thought that the voluntary partition of the property converted by an indivisible mortgage does not operate to prevent the mortgage creditor from enforcing his mortgage against either part thereof.[75]

§ 288. Same—Mortgage with power of sale.—The fact that a mortgage contains a power of sale[76] will not deprive the mortgagee of the right, or take away the jurisdiction of a court of equity, to foreclose the mortgage;[77] and a provision in a mortgage containing no power of sale that after default the mortgagee or his assigns may take possession of the mortgaged premises, and receive the rents until the right of the parties shall be fully adjusted according to law, does not prevent the mortgagee from having the land sold under a deed of foreclosure if the debt is not paid.[78]

§ 289. Same—Prior sale on superior lien.—It is thought that the sale of mortgaged premises upon prior mortgages, and the application of the proceeds upon them, do not prevent a

[73] *London P. & A. Bank* v. *Smith,* 101 Cal. 415, 35 Pac. 1027.

[74] *Wylie* v. *Lipsey,* 31 S. C. 608, mem., 9 S. E. 1056.

[75] *Groves* v. *Sentell,* 153 U. S. 465, 38 L. ed. 785, 14 Sup. Ct. Rep. 898.

[76] See *post,* §§ 310, *et seq.*

[77] *Utermehle* v. *McGarth,* 1 App. Cas. D. C. 359; 21 Wash. L. Rep. 755; *Credit Froncier Franco-Canadien* v. *Andrew,* 9 Maint. Rep. 65; see § 310.

[78] *Stewart* v. *Bardin,* 113 N. C. 277, 18 S. E. 320.

subsequent action on a junior mortgage.[79] And it has been said that a stipulation and judgment in a suit to foreclose a prior mortgage, that the premises be sold so as to realize sufficient to pay the junior mortgage, does not require the holder of the latter, upon failure of the purchasers of some of the parcels to complete their purchases, to proceed against them; but he is at liberty to foreclose his mortgage against the parcels the purchase of which has not been completed.[80]

The supreme court of Michigan, in the case of Watson v. The Grand Rapids and Indiana Railroad Company,[81] say that a second mortgagee of property including a railroad right of way is under no duty to the railroad company, in bidding at a sale under the prior mortgage, at which the property without that portion sold to the railroad company was first put up, to bid upon both parcels when he can protect himself by bidding upon one alone, and, on purchasing the portion so put up for an amount sufficient to satisfy the prior mortgage, may, in the absence of any conduct on his part to mislead the railroad company, foreclose his second mortgage upon the railroad property.

§ 290. Same—Release of mortgagor from personal liability.—The lien of the mortgagee on the land is a thing separate and distinct from his right to a personal judgment for any deficiency that may arise on foreclosure and sale of the premises; hence it has been held that a purchaser of mortgaged premises subject to the mortgage cannot object to a foreclosure because the mortgagor has been released from personal liability for the mortgage debt.[82] The supreme court of Utah, in the case of Kershaw v. Dyer,[83] say that the marshal's receipt given to the mortgagor's reciting that a payment

[79] *Hargreaves* v. *Igo,* 64 N. H. 619, 15 Atl. 137.

[80] *Jarvis* v. *Chapin,* 59 Hun, 525, 37 N. Y. S. R. 198, 13 N. Y. Supp. 693.

[81] 91 Mich. 198, 51 N. W. 990.

[82] *Osborn* v. *Williams,* 82 Iowa, 456, 48 N. W. 811.

[83] 6 Utah, 239, 24 Pac. 621, 21 *Id.* 1000.

by them of the difference between the amount of the decree and a sum bid on one of the lots mortgaged is "in full of all demands as deficiency," is not binding on the mortgagee, who, on the failure of the bidder to comply with his bid and a second sale of the lot for a less sum, is entitled to have the other lot sold to pay the deficiency, although it has been mortgaged to third persons on the faith of the receipt.

§ 291. Same—Riparian mortgages.—It is thought that on the foreclosure of a mortgage given by a riparian owner, covering the shore, and including land lying under water in front of the upland, which was afterwards leased from the state and improved by filling below high-water mark, the rights of the mortgagee in the land which was submerged at the time the mortgage was given, and which has since been reclaimed, should be defined before the sale is ordered;[84] otherwise an uncertain interest will be sold, which would be an injustice to all the parties. The purchaser at such a sale would buy an equitable estate and interest which could only be settled by a suit in equity. It would be contrary to equitable principles to thus invite further litigation, and make it necessary to bring the parties again before the court in other proceedings to determine rights which can be ascertained and defined before the sale is ordered, and for these reasons they should be first defined so as to do justice to all when the lands are sold for the payment of the mortgage debt.[85] In the course of the opinion in Point Breeze Ferry and Improvement Company v. Bragaw,[86] Judge Scudder, speaking for the court, says: "At the time the mortgage was given, the mortgagor was a riparian owner, and as such he had the right of pre-emption and reclamation to the lands under water in front of his land bordering thereon. These could not be taken from him by the state,

[84] *Point Breeze Ferry & Imp. Co.* v. *Bragaw,* 47 N. J. Eq. (2 Dick.) 298, 20 Atl. 967.

[85] *Point Breeze Ferry & Imp. Co.* v. *Bragaw,* 47 N. J. Eq. (2 Dick.) 298, 20 Atl. 967.

[86] 47 N. J. Eq. (2 Dick.) 298, 20 Atl. 967.

through its agent, the board of riparian commissioners, until after six months' notice in writing he should have neglected to apply for the grant or license, and neglected to pay, or secure to be paid, the price the said commissioners fixed.[87] He could apply to the commissioners for a lease, grant or conveyance, upon such a compensation therefor, to be paid to the state, as should be determined by the commissioners.[88] These rights he conveyed to the mortgagee as security for his mortgage debt, who thereby became entitled to an equitable estate or interest therein.[89] The defendant took the two-foot strip above high-water mark, or the *ripa*, subject to the mortgage, and the right of pre-emption and reclamation of the land under water, as also subject to the equitable interest of the mortgagee."[90]

§ 292. Same—Six months' clause.—It is not unusual to insert in mortgages given by railways and other corporations, a clause providing that the mortgagor shall retain possession of the mortgaged premises and receive the rents and profits for a period of six months after default and demand; but such claims do not cut off the right of the holders of bonds upon which an installment or interest is unpaid to proceed to foreclose by action. Thus a provision of a mortgage, that until default made in principal or interest for six months after demand of payment the mortgagor shall be suffered and permitted to possess and enjoy the property and use the income, but if default is made for six months it shall be lawful for the trustee to take possession, and that such provision is cumulative to the ordinary remedy by foreclosure, and the trustee may institute proceedings to foreclose in such manner as the majority of bondholders may direct,—does not

[87] N. J. Revision, p. 984, § 8 (Laws 1869).

[88] N. J. Revision, p. 985, § 1 (Laws 1871).

[89] In New York a different rule prevails, it is thought, and unless specifically set forth in the mortgage will not be covered. See *post*, § 703.

[90] *Boon* v. *Kent*, 42 N. J. Eq. (15 Stew.) 131, 7 Atl. 344.

operate as a limitation on the right of holders of overdue interest coupons to enforce payment by bill in equity to foreclose, until the coupons are six months overdue and payment has been demanded in writing, but is merely a limitation upon the power of the trustee to oust the company from possession under the powers granted him.[91] And it is thought that where a mortgage provides for entry, which is not to be made until six months after default and demand of payment, and another article provides for sale equally limited, followed by a paragraph saying: "This provision is cumulative to the ordinary remedies by foreclosure in the courts * * * upon default being as aforesaid,"—six months' delay after default is not necessary before suit for foreclosure.[92]

§ 293. Same—Wrongful discharge.—It is thought the beneficiaries under a mortgage in trust which has been wrongfully discharged by the trustee upon his purchase for himself of the mortgaged premises may maintain a suit to reinstate and foreclose it, without demanding that it be foreclosed by the trustee or calling him to an account.[93]

§ 294. What claims cannot be foreclosed.—It is not every mortgage that can be foreclosed; but only such as are valid and the rights thereunder are perfect. Thus a mortgagee cannot enforce a mortgage which the mortgagor had no right to make,[94] such as those executed by a guardian upon the lands of his ward,[95] or is otherwise invalid [96] or fraudu-

[91] *Farmers' Loan & T. Co.* v. *Winona & S. W. R. Co.* 59 Fed. 957.

[92] *Mercantile Trust Co.* v. *Missouri, K. & T. R. Co.* 36 Fed. 221, 1 L.R.A. 397, 4 Ry. & Corp. L. J. 362.

[93] *Kirsch* v. *Tozier,* 63 Hun (N. Y.) 607, 44 N. Y. S. R. 654, 18 N. Y. Supp. 334.

[94] *Briggs* v. *Norris,* 67 Mich. 325; 34 N. W. 582.

[95] *Kingman* v. *Harmon,* 32 Ill. App. 529.

[96] *Fulton* v. *Northern Illinois College,* 56 Ill. App. 372; *Dudley* v. *Congregation of T. O. of St. F.* 19 N. Y. Supp. 605, 47 N. Y. S. R. 60; *Gleaton* v. *Gibson,* 29 S. C. 514, 7 S. E. 833.

lent.[97] A mortgage cannot be foreclosed where the condition on part of the mortgagee remains unperformed;[98] or the notes which the mortgage was given to secure are not in the possession of the holder of the mortgage and no indemnifying bond has been given;[99] or the mortgagee has assigned the mortgage;[1] or the mortgage contains a prohibited penalty;[2] or the right is barred by sale under a prior mortgage, thereby cutting off the mortgagee's equity of redemption;[3] or the right is barred by the lapse of time under peculiar circumstances;[4] or its enforcement for any reason would be inequitable.[5] And equity will not decree foreclosure of a mortgage void in law for want of a proper mortgagee, even though the

[97] *House* v. *Lockwood,* 17 N. Y. Supp. 817, 43 N. Y. S. R. 750.

[98] Where a wife signed a mortgage upon their homestead with her husband, on consideration of an agreement that the mortgage would convey an interest in a mill to her husband, the mortgage cannot be foreclosed as against her unless the conveyance is made or offered as provided in the agreement. *Gammon* v. *Wright,* 31 Ill. App. 353.

[99] *Pharis* v. *Surrett,* 54 Mo. App. 9.

[1] A receiver of a bank cannot maintain an action to foreclose a mortgage given as collateral security for a note to the bank, where in consideration of a part payment on such note he has assigned the mortgage to a third party, with the agreement that the proceedings thereon shall be conducted in the receiver's name, and the assignee retains possession of the mortgage pursuant to that agreement. *Johnson* v. *Clarke* (N. J. Ch.) 28 Atl. 558.

[2] The supreme court of state of Washington, in *Krutz* v. *Robbins,* 12 Wash. 7, 40 Pac. 415, 28 L.R.A. 676, 50 Am. St. Rep. 871, say that a stipulation in a mortgage providing for interest on the principal note secured thereby, at the rate of 12 per cent. per annum in case of default in payment of the principal, interest, insurance, or taxes, while the note itself provides for 7 per cent. only until its maturity,—is essentially a penalty, and will not be enforced in equity.

[3] *Land Mortg. Invest. & A. Co.* v. *Vinson,* 105 Ala. 389, 17 So. 23.

[4] Thus it has been said that a mortgage omitting by mutual mistake a part of the property previously agreed to be included cannot be foreclosed against such omitted part, where the right to reform has been lost by lapse of time. *Sprague* v. *Cochran,* 70 Hun (N. Y.) 512, 53 N. Y. S. R. 617, 24 N. Y. Supp. 369.

[5] *Sherrer* v. *Harris* (Ark.) 13 S. W. 730; *Gordon* v. *McGinnis,* 92 Mich. 97, 52 N. W. 455; *Long* v. *Long* (Mo.) 28 S. W. 69; *Pharis* v. *Surrett,* 54 Mo. App. 9.

This doctrine is forcibly illustrat-

plaintiff has been imposed upon by fraudulent acts of a broker, and all the acts of the plaintiff were in good faith.[6]

The supreme court of Montana, in the case of Child v. Morgan,[7] say that a mortgage covering three lots, given to secure a gross sum and containing a condition of defeasance that the said sum is to be a specific lien on one-third thereof on each of the lots, releasable at any time by the payment of such third, is a separate mortgage for such third upon each lot separately, and cannot be foreclosed as an entirety upon all the lots; and a sale of all of them togther for a gross sum is invalid.

Where property mortgaged is in the hands of a receiver appointed in a chancery suit brought after the mortgage was executed, to set aside the mortgagor's title, it is contempt of court to file a bill to foreclose the mortgage; yet the court has jurisdiction to foreclose, and will refuse to entertain the suit only upon the application of the receiver, and not in those cases where the receiver's answer merely alleges that he is a receiver of the personalty, and disclaims all interest in the reality, and no attempt is made by any of the interested parties to restrain or prevent prosecution of foreclosure.[8]

The supreme court of Kansas say[9] that a real estate mortgage cannot be foreclosed on a railroad right of way

ed by a decision of the supreme court of Michigan, in which it is held that the business of a corporation is not unprofitable, within the meaning of a trust deed given to secure bonds, providing that if the business is not profitable the trustee may upon request of the bondholders take possession of the property, where, after making proper allowances for differences in inventory prices and for extraordinary expenses in refunding its indebtedness, profit is shown, although its books, by reason of failure to make such allowances, show a loss. *Michigan Trust Co.* v. *Lansing Lumber Co.* 103 Mich. 392, 61 N. W. 668.

[6] *Shirley* v. *Burch,* 16 Oreg. 83, 8 Am. St. Rep. 273, 18 Pac. 352.

[7] 51 Minn. 116, 52 N. W. 1127. See *post,* § 308.

[8] *Mulcahey* v. *Strauss,* 151 Ill. 70, 37 N. E. 702, aff'g 52 Ill. App. 252.

[9] *Chicago, K. & W. R. Co.* v. *Nashua Sav. Bank,* 52 Kan. 467, 35 Pac. 18.

condemned after the execution of the mortgage where the company duly paid the award to the proper officer and it was drawn by the mortgagor, although no award was made to the mortgagee. The correctness of this doctrine is very much questioned. There seems to be a hopeless conflict in decisions on the question whether or not mortgagees are necessary parties to condemnation proceedings.[10] But those cases holding them necessary parties, it is thought, stand on a much higher ground than those holding a contrary view, for the reason that the mortgagee has an interest in the land, and the rights secured to him by his mortgage are property rights which cannot be taken from him without due notice and an opportunity to be heard. To hold that property which is mortgaged for all that it is worth can be condemned and the compensation handed over to an insolvent mortgagor, seems an invasion of

[10] Some of the authorities holding the affirmative: *South Park Comrs.* v. *Todd*, 172 Ill. 379, 64 Am. St. Rep. 44; *Deisner* v. *Simpson*, 72 Ind. 435; *Severin* v. *Cole*, 38 Iowa, 463; *Wilson* v. *European & North Am. R. Co.* 67 Me. 358; *Michigan Air Line R. Co.* v. *Barnes*, 40 Mich. 383; *Siman* v. *Rhodes*, 24 Minn. 25; *Stewart* v. *Raymond R. Co.* 7 Smed. & M. (Miss.) 568; *Platt* v. *Bright*, 29 N. J. Eq. (2 Stew.) 128; *North Hudson County R. Co.* v. *Booraem*, 28 N. J. Eq. (1 Stew.) 450; *Booraem* v. *Wood*, 28 N. J. Eq. (1 Stew.) 371; *Warwick Institute for Savings* v. *Providence*, 12 R. I. 144; *Adams* v. *St. Johnsbury & Lake Champlain R. Co.* 57 Vt. 240; *Wade* v. *Hennessy*, 55 Vt. 207; *Hagar* v. *Brainard*, 44 Vt. 294; *Wooster* v. *Sugar River Valley R. Co.* 57 Wis. 311; 15 N. W. 401; *Aspinwall* v. *Chicago & Northwestern R. Co.* 41 Wis. 474; *Kennedy* v. *Milwaukee & St. P. R. Co.* 22 Wis. 581; *Martin* v. *London, Chatham, etc. R. Co.* L. R. 1 Eq. Cas. 145.

Some of the cases holding the negative: *Whiting* v. *New Haven*, 45 Conn. 303; *Cool* v. *Crommet*, 13 Me. 250; *Welch* v. *Boston*, 126 Mass. 442; *Bancroft* v. *Cambridge*, 126 Mass. 438; *Read* v. *Cambridge*, 126 Mass. 427; *Farnsworth* v. *Boston*, 126 Mass. 1; *Vaugh* v. *Wethcrell*, 116 Mass. 138; *Paine* v. *Woods*, 108 Mass. 160; *Breed* v. *Eastern R. Co.* 71 Mass. (5 Gray) 470; *Grand Rapids* v. *Grand Rapids & Ind. R. Co.* 58 Mich. 641; *Bank of Auburn* v. *Roberts*, 44 N. Y. 192; *Home Ins. Co.* v. *Smith*, 28 Hun (N. Y.) 296; *Hooker* v. *Martin*, 10 Hun (N. Y.) 302; *Astor* v. *Hoyt*, 5 Wend. (N. Y.) 603; *President, etc., of Schuylkill Navigation Co.* v. *Theoburn*, 7 Serg. & R. (Pa.) 411; *Keystone Bridge Co.* v. *Summers*, 13 W. Va. 476.

equitable principles,[11] and looks very much like depriving a man of his property without compensation and without due process of law; both of which are an invasion of the constitutional rights of a mortgagee. For this reason, it is thought that he is a necessary party, and if not made a party and given an opportunity to protect his interests he may have the same remedy by foreclosure that he would have if the property condemned had been conveyed for private uses.[12]

§ 295. Same—Attachment returned—Exhausting legal remedy.—Under a statute providing[13] that no proceedings shall be had to foreclose after a judgment at law has been obtained, until an execution has been issued on the judgment and returned unsatisfied, the return of an attachment pending an action at law on a debt secured by a mortgage, in which a judgment is obtained, is not sufficient to authorize an action to foreclose the mortgage.[14] The prevailing rule in all the States is that the legal remedy must first be exhausted, in the absence of conditions justifying equitable action.[15]

[11] *Severin* v. *Cole,* 38 Iowa, 463.

[12] *Severin* v. *Cole,* 38 Iowa, 463; *Dodge* v. *Omaha & S. W. R. Co.* 20 Neb. 276, 29 N. W. 936; *North Hudson R. Co.* v. *Booraem,* 28 N. J. Eq. (1 Stew.) 450; *Adams* v. *St. Johsbury & Lake Champlain R. Co.* 57 Vt. 240; *Wade* v. *Hennessy,* 55 Vt. 207; *Kennedy* v. *Milwaukee & St. P. R. Co.* 22 Wis. 581.

[13] As does Neb. Code, § 851. See *Zug* v. *Forgan,* 3 Neb. (Unof.) 149, 90 N. W. 1129; *Montpelier Savings Bank & Trust Co.* v. *Follett,* 68 Neb. 416, 94 N. W. 635.

[14] *Hargreaves* v. *Menken,* 45 Neb. 668, 63 N. W. 951.

[15] Thus the supreme court of New York, in the case of *Guilford* v. *Crandell,* 69 Hun (N. Y.) 414, 23 N. Y. Supp. 465, say that the holder of a mortgage executed to secure a sum also secured by a judgment by a confession, who forecloses it pursuant to an agreement with the mortgagor's wife that the property shall be bid in and the wife shall give a mortgage on the same property to secure the same indebtedness, under the code (N. Y. Code Civ. Proc. § 1630) providing that where final judgment for the plaintiff has been rendered in an action to recover any part of the mortgage debt an action shall not be commenced or maintained to foreclose the mortgage until an execution has been returned unsatisfied upon the judgment, can-

§ 296. Same—Fraud in mortgage prevents foreclosure.—No principle of law is more firmly established than the doctrine that fraud vitiates all it touches. And the doctrine applies with pertinent force when an action is brought in equity to enforce mortgages that are tinctured with fraud. Thus the supreme court of New York, in the case of House v. Lockwood,[16] say that a mortgage intended to enable a husband to go through bankruptcy, and concealed from the court by the mortgagee, who instituted the bankruptcy proceedings and acted therein as an unsecured creditor, will not be enforced in equity. Nor will equity lend its aid to enforce a mortgage where the foreclosure would defraud creditors.[17]

§ 297. Same—Inequitable or oppressive.—A mortgage will not be foreclosed where to do so would be inequitable or oppressive in the sense of invading a legal or equitable right. Thus it has been said that where one person pays a judgment against another, under which land of the latter is about to be sold on execution, and takes a deed of the land, absolute in form, at the same time executing an obligation to reconvey upon the debtor's refunding the amount of the judgment, with interest, during the grantee's life; also executing a conveyance giving the debtor's wife the use of the land for life; and dies after the debtor has made several payments, after which the wife also dies,—his devisee is not entitled to a judgment for the possession, but only to a decree for the balance due on the judgment.[18] A person is also entitled to be relieved from the payment of money given by her uncle, for her and her mother's benefit, to another uncle, who induced her to give a mortgage therefor, claiming that he would save it for her and pay it to her after she had secured the whole title

not maintain a suit to foreclose the latter mortgage until the legal remedy upon the judgment by confession is exhausted, since the original indebtedness and judgment are not paid or extinguished.

[16] 17 N. Y. Supp. 817, 43 N. Y. S. R. 750.

[17] *Weis* v. *Levy*, 106 App. Div. 496, 94 N. Y. Supp. 857.

[18] *Sherrer* v. *Harris* (Ark.) 13 S. W. 730.

to the homestead, and then included such mortgage in the consideration of a mortgage to secure advances made to her.[19] And the purchaser under a second deed of trust is not entitled to maintain an action for the foreclosure of the prior deed of trust, of which he is the equitable assignee for the purpose of recovering a judgment for any deficiency which might result from the sale under it, where the property is worth more than the entire amount due thereon.[20]

§ 298. Same—Invalid mortgage.—An invalid mortgage will not be enforced,[21] and a mortgage void on its face, or the invalidity of which appears in the proof required to be produced by the mortgagee to establish it, should be cancelled, at the mortgagor's instance, in a suit to foreclose it, since a title obviously void does not constitute even a cloud.[22] But it is held by the supreme court of South Carolina, in the case of Gleaton v. Gibson,[23] that in an action to foreclose a mortgage, if the mortgage proves to be invalid, but the debt intended to be secured thereby is established, judgment can be rendered for the debt.

§ 299. Same—Same—Mortgage on ward's lands.—In all cases a bill to foreclose a mortgage must be dismissed where it appears that the mortgagor, since deceased, took title as guardian for the benefit and to the use of her daughter and ward, whose money furnished the consideration paid for the land; and the fact that the money obtained on the mortgage was expended in improvements will not avail the complainant, especially where no accounting was ever made by the

[19] *Gordon* v. *McGinnis,* 92 Mich. 97, 52 N. W. 455.

[20] *Long* v. *Long* (Mo.) 28 S. W. 69.

[21] Thus it has been held that a mortgage taken by a city invalid because of its want of power to make the loan, confers no right of action upon the city. *Fulton* v. *Northern Illinois College,* 56 Ill. App. 372.

[22] *Dudley* v. *Congregation of T. O. of St. F.* 47 N. Y. S. R. 60, 19 N. Y. Supp. 605.

[23] 29 S. C. 514, 7 S. E. 833.

deceased guardian.[24] In the case of Kingman v. Harmon,[25] it is said that where the mother and the guardian of a minor executed a mortgage upon the minor's land which is held upon an attempted foreclosure to be void, the mother's interest in the estate of her child, who has since died, cannot be reached by the mortgagee in the foreclosure proceedings.

§ 300. Same—Interest paid.—In the case of Bolman v. Lohman,[26] where a mortgage purports to be given as security for money loaned, made payable on demand, and conditioned that interest be paid semi-annually; and which contained a condition that on failure to pay such interest, the mortgage might be foreclosed both for principal and interest; and by which it was further provided that on the death of mortgagee the money should belong to the mortgagor if living, but in the event of her death, to her surviving children,—the court held this did not authorize foreclosure as to the principal so long as the interest was paid as stipulated, and, when diligent effort to pay promptly was shown, a default and consequent forfeiture could not be claimed. And it has been said by the supreme court of California, in the case of Van Loo v. Van Aken,[27] that a mortgage given as security for the payment of a designated sum on a specified date, five years after its execution, with annual interest according to the terms of a promissory note providing for a compounding of the interest if unpaid, cannot be foreclosed before its maturity, for default in payment of the interest.

§ 301. Same—Mortgagee administrator.—It is said in Brown v. Mann,[28] that the assignee of a mortgage cannot maintain an action of foreclosure against the estate of a decedent, for which the mortgagee is administrator, if the assignment was made for the sole purpose of having the mort-

[24] *Hunt* v. *Bradfield* (N. J.) 16 Atl. 178.
[25] 32 Ill. App. 529.
[26] 79 Ala. 63.
[27] 104 Cal. 269, 37 Pac. 925.
[28] 71 Cal. 192, 12 Pac. 51.

gage foreclosed for the mortgagee's benefit. The federal circuit court sitting in Vermont, in the case of Sowles v. Witters,[29] say that mortgages with condition broken, held by an executor who takes another mortgage to himself individually on the same and other lands, for the same amount, with extended time of payment, under an agreement that the original mortgages shall remain in force until the second is paid, and that payment on the latter shall discharge the former and foreclose the second mortgage, and remortgages the property for his individual indebtedness, with notice to the mortgagee of the origin of his title, and who is in effect charged with the mortgages by being ordered to pay legacies to a larger amount, and is exonerated from such charge by the residuary legatee, cannot be foreclosed by him, since the conversion of such mortgages to his own use, and being charged with their amount, makes them his individual property, and his foreclosure of the second mortgage operates to discharge the original mortgages.

§ 302. Removed fixtures.—A mortgagee cannot enforce his lien against buildings or other fixtures which were upon the land at the time the mortgage was executed, and which have been removed and become a part of another freehold.[30] Thus, the severance and removal of a house from mortgaged premises takes it out from under the operation of the mortgage and frees it from the mortgage lien,[31] because such severance and removal change the character of the house from real to personal property, whether the act of severance and removal is accidental or intentional.[32] Where a piece of land and a dwelling house thereon were mortgaged, and the mortgagor subsequently removed the house and used a portion of

[29] 54 Fed. 568.

[30] *Harris* v. *Bannon*, 78 Ky. 568.

[31] *Buckout* v. *Swift*, 27 Cal. 433, 87 Am. Dec. 90; *Peirce* v. *Goddard*, 39 Mass. (22 Pick.) 559, 33 Am. Dec. 764; *Betz* v. *Vesner*, 46 N. J. Eq. 256, 7 L.R.A. 630, 19 Am. St. Rep. 387, 19 Atl. 206.

[32] *Buckout* v. *Swift*, 27 Cal. 433, 87 Am. Dec. 90. See *Citizens' Bank* v. *Knapp*, 22 La. An. 117; *Codrington* v. *Johnstone*, 1 Beav. 520.

the materials together with new materials in erecting a house on another lot belonging to him, which lot, together with the house thus erected, he afterwards, for a valuable consideration, conveyed to a third person, the court held in an action brought by the mortgagee for their recovery, that the old materials used in the construction of the new house became a part of the freehold, and that the right of property therein vested in the purchaser and was free from the lien of the mortgage.[33] And where a mortgage was executed upon certain real estate upon which there was a grist-mill, and the mortgagor sold the millstones in the mill, which were removed by the purchaser, it was held, in an action brought by the mortgagee to recover the property, that the title to the millstones passed to the purchaser.[34]

This is in accordance with the general rule in equity, that a mortgagor in possession has the right to cut timber on the mortgaged lands, and to do other similar acts, and that a court of equity will not interfere to restrain him in the exercise of such right, until it is made to appear that the cutting of the timber and other like acts are being carried to an extent which will render the land insufficient security for the amount due upon the mortgage.[35] This right continues even after the

[33] *Peirce* v. *Goddard,* 39 Mass. (22 Pick.) 559, 32 Am. Dec. 764. See *Fryatt* v. *Sullivan Co.* 5 Hill (N. Y.) 116.

[34] *Cooper* v. *Davis,* 15 Conn. 556.

[35] *Buckout* v. *Swift,* 27 Cal. 433, 87 Am. Dec. 90. See *VanWyck* v. *Alliger,* 6 Barb. (N. Y.) 511; *Brady* v. *Waldron,* 2 Johns. Ch. (N. Y.) 147; *King* v. *Smith,* 2 Hare, 239; *Hampton* v. *Hodges,* 8 Ves. 105; *Wright* v. *Atkyns,* 1 Ves. & B. 313, 314; *Judkins* v. *Woodman,* 81 Me. 351, 17 Atl. 298; *Ensign* v. *Colburn,* 11 Paige Ch. (N. Y.) 503. But where timber is being cut with the fraudulent purpose of diminishing the value of the security, a court of equity will restrain the act, even in the absence of covenants in the mortgage, because courts of equity have general power, in proper cases, to restrain mortgagors from diminishing the security to the injury of the mortgagee or his assignee.

See *Robinson* v. *Russell,* 24 Cal. 467; *Cooper* v. *Davis,* 15 Conn. 556; *Nelson* v. *Pinegar,* 30 Ill. 473; *State* v. *Northern C. R. Co.* 18 Md. 198; *Parsons* v. *Hughes,* 12 Md. 1; *Litka* v. *Wilcox,* 39 Mich. 94; *Emmons* v. *Henderer,* 24 N. J. Eq. (9 C. E. Gr.) 39; *Phœnix* v. *Clark,* 6 N. J. Eq. (2 Halst.) 447; *Robinson* v.

decree of foreclosure and sale, and until the expiration of the period allowed for redemption.[36]

It has been said by the Chancery Court of New Jersey where a building has been removed from the land by a mortgagor in possession, on bill to foreclose the mortgage it cannot be returned to the mortgaged property,[37] because property affixed to mortgaged land when once severed, removed and sold to a *bona fide* purchaser, cannot be followed and reclaimed,[38] the remedy of the mortgagee being at law.[39] But in those cases where the building is removed from the mortgaged premises without the knowledge or consent of the mortgagee or the assignee for value of the mortgage, to other lots belonging to the mortgagor[40] or his wife,[41] they remain subject to the lien of the mortgage in the hands of a purchaser

Preswick, 3 Edw. Ch. (N. Y.) 246; *Miles* v. *French,* 11 Hun (N. Y.) 563; *Brady* v. *Waldron,* 2 John Ch. (N. Y.) 148; *Patton* v. *Moore,* 16 W. Va. 428, 37 Am. Rep. 789; *Frank* v. *Brunnemann,* 3 W. Va. 462; *Bunker* v. *Locke,* 15 Wis. 635.

[36] *Cooper* v. *Davis,* 15 Conn. 556.

[37] *Betz* v. *Vesner,* 46 N. J. Eq. (1 Dick.) 256, 7 L.R.A. 630, 19 Am. St. Rep. 387, 19 Atl. 206.

[38] *Cooper* v. *Davis,* 15 Conn. 556; *Clark* v. *Reyburn,* 1 Kan. 281; *Citizens' Bank* v. *Knapp,* 22 La. Ann. 117; *Wilson* v. *Maltby,* 59 N. Y. 126; *VanPelt* v. *McGraw,* 4 N. Y. 110; *Gardner* v. *Heartt,* 3 Dun. (N. Y.) 232; *Fryatt* v. *Sullivan Co.* 5 Hill (N. Y.) 116; *Lane* v. *Hitchcock,* 14 John (N. Y.) 213; *Gore* v. *Jenness,* 19 Me. 53; *Byron* v. *Chapin,* 113 Mass. 308; *Gowding* v. *Shea,* 103 Mass. 360, 4 Am. Rep. 563; *Kircher* v. *Schalk,* 39 N. J. L. (10 Vr.) 335; *Kimball* v. *Darling,* 32 Wis. 684; *Hutchins* v. *King,* 68 U. S. (1 Wall.) 53, 17 L. ed. 544; *Codrington* v. *Johnstone,* 1 Beav. 520.

[39] *Betz* v. *Vesner,* 46 N. J. Eq. (1 Dick.) 256, 7 L.R.A. 630, 19 Am. St. Rep. 387, 19 Atl. 206. But the Supreme Court of Louisiana, in the case of *Learned* v. *Walton,* 42 La. An. 455, 7 So. 723, say that a sequestration of property which is immovable by destination, and forms part of realty under mortgage, but which has been removed therefrom by the mortgagor, as an ancillary proceeding for the recovery and restoration thereof to the mortgaged premises for seizure and sale, is a legal and valid proceeding, and does not have the effect of changing executory proceedings into those *via rodinaria.* See *Dakota L. & T. Co.* v. *Parmelee,* 5 S. D. 341, 58 N. W. 811.

[40] *Partridge* v. *Hemenway,* 89 Mich. 454, 28 Am. St. Rep. 322, 50 N. W. 1084.

[41] A dwelling moved by mortgagor to an adjoining lot belong-

by quitclaim deed of the lots to which they are removed, and may be sold under the mortgage if the lots covered thereby do not bring suffcient for its satisfaction.[42]

§ 303. Same—From leasehold—Following property.—The Supreme Court of Pennsylvania, in the case of Gill v. Weston,[43] say that a mortgagee of leasehold-property has the right to follow property of a chattel nature embraced in the mortgage, wherever he may find it; and the fact that the lessee may have given the party in possession permission to remove it from the leased premises, confers upon the latter no right, where the mortgage has been seasonably recorded, to resist an action by the mortgagee to take it or to refuse to return it on demand, for the reason that the law regards such removal as a fraud upon the mortgagee, and for that reason permits him to follow the property and assert his right thereto as against the wrongdoer.[44] And it is thought that there is no reason why such mortgagee may not pursue the property in the hands of the wrong-doer and take it, notwithstanding the mortgage is not yet due, unless the mortgagor has provided against it by reserving to himself the possession and control of the property until a default is made in the payment of the mortgage debt.[45]

§ 304. Doctrine of merger.—A merger takes place only where the titles to the land and to the mortgage, equtiable as well as legal, unite in the same person.[46] Thus it has been held, that if a mortgagor conveys the mortgaged premises to

ing to his wife, without the knowledge of the mortgagee, but with her knowledge, does not destroy the lien of the mortgagee. *Hamlin* v. *Parsons,* 12 Minn. 108, 90 Am. Dec. 284.

[42] *Partridge* v. *Hemenway,* 89 Mich. 454, 28 Am. St. Rep. 322, 50 N. W. 1084.

[43] 110 Pa. St. 312, 1 Atl. 921.

[44] *Wittmer's Appeal,* 45 Pa. St. 455, 84 Am. Dec. 505; *Hoskin* v. *Woodward,* 45 Pa. St. 42.

[45] *Gill* v. *Weston,* 110 Pa. St. 312, 1 Atl. 921; *Tryon* v. *Munson,* 77 Pa. St. 256, 264; *Martin* v. *Jackson,* 27 Pa. St. 504, 67 Am. Dec. 489.

[46] *Jordan* v. *Cheney,* 74 Me. 359.

his mortgagee and another, and the mortgagee afterwards conveys his interest to the other person, this will extinguish the mortgage and unite the whole title in such purchaser.[47] But where, upon the foreclosure of a second mortgage, the mortgagee and a third person bid off the property together, which is conveyed to them by the same deed, one undivided half to the mortgagee and the other to such third person, such purchase and deed will not, as to the undivided half deeded to such third person, and in the absence of an intention of the mortgagee that it should do so, operate to merge or release the lien of a first mortgage on the property held by the mortgagee, nor will a subsequent sale of the undivided half purchased by him have that effect.[48]

§ 305. Purchase of equity by mortgagee from mortgagor.—There is no legal restraint on a mortgagor's selling the mortgaged property to the mortgagee in satisfaction of his debt;[49] but where the validity of such a sale is in issue, the burden of proof is upon the mortgagee to show that the sale of the mortgagor's equity was voluntarily made, that his conduct in making the purchase was in all things fair, and that he paid for the property what is was reasonably worth.[50] But the purchase by a mortgagee of the legal title to the property covered by the mortgage will not operate as a merger and extinguish the lien of his mortgage, unless such was the intention of the parties, and this intention will not be presumed where the interests of the mortgagee require that the mort-

[47] *Lyman* v. *Gedney*, 114 Ill. 388, 55 Am. Rep. 871.

[48] *Clements* v. *Griswold*, 46 Hun (N. Y.) 377, 11 N. Y. S. R. 826.

[49] A mortgagee has a perfect right to purchase the mortgaged premises, and the mere fact that the deed to him is made in satisfaction and payment of the mortgage will not make such deed a mortgage; the surrender of the evidences of the mortgage debt, and the failure to execute a new obligation to pay, are circumstances affording evidence that the conveyance was not intended as a mortgage. *Rue* v. *Dole*, 107 Ill. 275.

[50] *Jones* v. *Franks*, 33 Kan. 497.

gage should remain in force.[51] In such a case the law will regard the mortgage as a continuing lien, which may be enforced against the land,[52] in the hands of the mortgagee or his assignees, when it can be done without prejudice to the rights of the mortgagor or third parties.[53]

Where the assignee of a bankrupt, with the approval of the court, conveyed mortgaged property to the mortgagees in satisfaction of their claims, and the mortgage was thereupon discharged of record, it was held that the conveyance would not divest the property of other liens junior to the mortgage, but that such liens would remain subject to that of the mortgage, which, as against them, would be presumed not to have been discharged.[54]

A mortgage does not necessarily merge or become extinct by being transferred to the person holding the fee title; and where a person becomes entitled to an estate, subject to a charge for his own benefit, he may take the estate and keep up the charge. The question in such cases rests upon the intention, actual or presumed, of the person in whom the estates are united. Thus a mortgagee, after the conveyance to him of the mortgagor's equity of redemption, may keep a mortgage alive in favor of one to whom he had assigned the mortgage as collateral security prior to the conveyance to him of the equity of redemption. He may also obtain further advances on such an assignment, which fact will be evidence of an intention to keep the mortgage alive for the protection of his assignee; and in such a case a merger will certainly not take place.[55] But where mortgaged premises are conveyed by the mortgagor to the mortgagee in satisfaction of the mortgage debt, so that a recovery could not be had upon

[51] *Pike* v. *Gleason*, 60 Iowa, 150; *First Nat. Bank of Waterloo* v. *Elmore*, 52 Iowa, 541.

[52] *Pike* v. *Gleason*, 60 Iowa, 150.

[53] *Hoffman* v. *Wilhelm*, 68 Iowa, 510; *Vannice* v. *Bergen*, 16 Iowa, 555, 85 Am. Dec. 531.

[54] *Stimpson* v. *Pease*, 53 Iowa, 572.

[55] *International Bank of Chicago* v. *Wilshire*, 108 Ill. 143; *Rue* v. *Dole*, 107 Ill. 275.

the original debt in an action at law, the transaction must be regarded as an absolute sale and constitutes a merger, although the grantee may execute a contract for reconveyance upon the payment of the amount of the mortgage within a limited time.[56]

§ 306. **Conveyance after assignment of notes.**—A conveyance of real estate by a mortgagor to his mortgagee, after a transfer of the notes secured together with the mortgage to an assignee, who takes the same *bona fide,* will not operate as a merger of the mortgage, nor affect the assignee's rights. After the recording of the assignment of the mortgage, a purchaser from the mortgagee as grantee of the mortgagor, will take subject to the equitable rights of the assignee.[57]

§ 307. **Mortgage on undivided interest in land.**—A mortgage on an undivided interest in land may be foreclosed and the interest sold.[58] Thus, where one member of a partnership mortgages property belonging to the firm, using the partnership name and reciting that he is a member of such firm, the mortgage may be foreclosed as against him, and his interest in the property sold; but it can not be foreclosed against the members who did not execute it, as the mortgage does not bind their interests.[59] And where one of two co-mortgagees has become the owner of the equity of redemption in the mortgaged property, the other can maintain a bill for foreclosure to recover his proportionate share of the mortgage fund.[60]

Where two tenants in common unite in executing a joint mortgage for a joint and several debt, one of them cannot

[56] *Rue* v. *Dole,* 107 Ill. 275.

[57] *International Bank of Chicago* v. *Wilshire,* 108 Ill. 143.

[58] *Sutlive* v. *Jones,* 61 Ga. 676; *Baker* v. *Shepard,* 30 Ga. 706.

[59] *Sutlive* v. *Jones,* 61 Ga. 676 .

[60] *Sandford* v. *Bulkley,* 30 Conn. 344.

compel the mortgagee to accept his half of the debt, and to proceed against his co-tenant's moiety for the collection of the other half, although such tenant may tender a sufficient bond of indemnity against final loss. In a foreclosure against both mortgagors the court will not decree a sale of the undivided moieties separately.[61]

§ 308. Mortgages on separate pieces of property for the same debt.—It has been said that a mortgagee may legally hold two mortgages on different pieces of land, as security for the same debt, and that he may foreclose the mortgage on one piece without foreclosing that on the other; and that whether a foreclosure on one will bar a foreclosure on the other depends upon the value of the premises foreclosed.[62] It seems that if the land sold under the foreclosure of one of the mortgages, is equal in value to the debt, the debt will be thereby paid and the remaining premises will be relieved from the lien of the mortgage.[63]

A mortgagee cannot foreclose as to part of the mortgaged premises, where they form a single tract, and not as to the balance; because, if the mortgagor has a right to redeem any part, he has a right to redeem the whole premises.[64] The foreclosure of a mortgage will not be barred by the existence of another mortgage which is a prior security for the same debt.[65] The giving of a bond and mortgage as collateral security to an existing bond and mortgage does not, *per se*, operate as a suspension of the right to foreclose such first bond and mortgage.[66]

When a mortgage, given to secure a gross sum, covers several separate lots or tracts of land and contains a defeas-

[61] *Frost* v. *Frost*, 3 Sandf. Ch. (N. Y.) 188.

[62] *Burpee* v. *Parker*, 24 Vt. 567.

[63] *Burpee* v. *Parker*, 24 Vt. 567. See *Case* v. *Boughton*, 11 Wend. (N. Y.) 106; *West* v. *Chamberlain*, 25 Mass. (8 Pick.) 336; *Amory* v. *Fairbanks*, 3 Mass. 562; *Omaly* v. *Swan*, 3 Mason C. C. 474.

[64] *Spring* v. *Haines*, 21 Me. 126.

[65] *Connerton* v. *Millar*, 41 Mich. 608.

[66] *Fireman's Ins. Co.* v. *Wilkinson*, 35 N. J. Eq. (8 Stew.) 160.

ance that the sum secured is to be a specific lien on each lot for its proportion of the gross sum, and such lot is to be releasable at any time by the payment of such proportionate amount of the encumbrance, constitutes a separate mortgage for such proportionate amount upon each lot separately, and the mortgage cannot be foreclosed upon the lots as one entirety and then sold in a lump for a gross sum, but the foreclosure and sale must be on each separately.[67]

§ 309. Where mortgagee has lien on personal property sufficient to pay debt.—In Alabama an action to foreclose a mortgage on real estate cannot be maintained, where it appears that the mortgage also covers personal property sufficient to satisfy the mortgage debt, until the remedy against the personal property has been exhausted.[68] In most of the other states, however, the contrary doctrine prevails.[69]

And where a mortgagee who holds two mortgages, one on

[67] *Child* v. *Morgan,* 51 Minn. 116, 52 N. W. 1127.

The Supreme Court of Minnesota, in the case of *Mason* v. *Good now,* 41 Minn. 9, 42 N. W. 482, have said that a mortgage on several lots, which apportions the sum secured among them, specifying the amont for which each is liable, and providing that each is mortgaged for that sum, and "for no other sum whatever," and in case of default, "so far as it affects either of said lots," the whole principal sum represented by such lot shall be due, and the mortgage may be foreclosed for that sum, "it being the intention that this mortgage shall be regarded, and is hereby made, a separate and distinct mortgage for each and every lot, * * * and that a default * * * shall render operative the power of sale only so far as it extends to the lot or lots whereon such default shall have been made,"—in legal effect constitutes a separate mortgage on each lot to secure a separate and distinct sum, although for convenience all were united in one instrument; and while, in case of default on several of the lots, the mortgagee may foreclose as to all lots in default in one notice of sale, yet such notice must state the amount claimed to be due on each lot separately.

[68] *Koger* v. *Weakly,* 2 Port. (Ala.) 516. See also *Blair* v. *White,* 61 Vt. 110, 17 Atl. 49.

[69] *Bull* v. *Coe,* 77 Cal. 54, 11 Am. St. Rep. 235, 18 Pac. 808; *Blake* v. *McCosh,* 91 Iowa, 544, 60 N. W. 127; *Weihl* v. *Atlanta Furniture Mfg. Co.* 89 Ga. 297, 15 S. E. 282, 37 Am. & Eng. Corp. Cas. 693; *Moore* v. *Kraemer,* 50 N. J. Eq. 776, 26 Atl. 961; *Bishop Bailey Building & Loan Association* v.

real and the other on personal property, to secure the payment of the same debt, forecloses the mortgage on the personal property and converts it to his own use, it will operate as a payment and satisfaction of the entire mortgage debt, if its value is equal to or exceeds the amount of the debt secured.[70]

§ 310. Mortgage with power of sale.—A power given in the mortgage "to proceed to sell in the manner prescribed by law," is in substance the same as any power to proceed to sell by means of an action to foreclose.[71] The fact that a mortgage or deed of trust contains a power of sale, and contemplates a foreclosure without the aid of the court, will not deprive the court of jurisdiction and preclude a foreclosure by action.[72] The mortgage power of sale is simply a cumu-

Kennedy (N. J. Eq.) 12 Atl. 141; *Hersner* v. *Martin,* 8 Wash. 698, 36 Pac. 1096.

Even when the mortgage is on a homestead. *Blake* v. *McCosh,* 91 Iowa, 544, 60 N. W. 127; *Stiles* v. *Stannard,* 67 Vt. 246, 31 Atl. 294. The New Jersey court of chancery, in the case of *Lanahan* v. *Lawton,* 50 N. J. Eq. 276, 23 Atl. 476, say that a mortgagee suing to foreclose his mortgage will not be required, as against other creditors, to first exhaust his remedy against corporate shares held by him as collateral, but that he will be allowed to endorse them in blank and deposit them with the court.

[70] *Koger* v. *Weakly,* 2 Port. (Ala.) 516; *Androscoggin Sav. Bank* v. *McKenny,* 78 Me. 442.

[71] *Brickell* v. *Batchelder,* 62 Cal. 623. See the chapter *post* on Foreclosure by Advertisement and Sale.

Such provisions are valid, *Vesy* v. *Russell,* 65 N. H. 646, 23 Atl. 522, and when to the mortgagee, pass under the assignment of the mortgage. *Johnson* v. *Glenn,* 80 Md. 369, 30 Atl. 993. A valid scale can be made thereunder either by the mortgagee or his assignee. *Vesy* v. *Russell,* 65 N. H. 646, 23 Atl. 522. See *Thompson* v. *Ellenz,* 58 Minn. 301, 59 N. W. 1023. It has been said that a power of sale in a mortgage, authorizing the mortgagee in case of default to sell the premises at public auction and convey them to the purchaser agreeably to the statute in such case made and provided, is a complete and valid common-law power capable of being executed, even in the absence of any statute regulating the manner of its exercise. *Webb* v. *Lewis,* 45 Minn. 285, 47 N. W. 803.

[72] *Carradine* v. *O'Connor,* 21 Ala. 573; *Marriott* v. *Givens,* 8 Ala. 694; *McGowan* v. *Branch Bank of Mobile,* 7 Ala. 823; *Butler* v. *Laduc,* 12 Mich. 173; *Heyward* v. *Judd,* 4 Minn. 483; *Green* v. *Gaston,* 56 Miss. 748; *Morrison* v. *Bean,* 15 Tex. 267. In Massachusetts there

lative remedy given to the mortgagee, and does not affect the jurisdiction of the court;[73] neither will it change or affect the mortgagor's right to redeem so long as that power remains unexecuted.[74]

But after a sale made under such a power, the mortgagor's interest will be entirely divested and he will have no right to redeem.[75] And the fact that a judgment has been recovered upon the debt secured by the mortgage, will not impair the power of sale in the mortgage;[76] but in New York, while a foreclosure suit is pending, no judgment will be rendered nor execution issued in a suit at law upon the note or bond without leave of the court in which the foreclosure is pending.[77] The acceptance of security in the form of a mortgage will not prevent a creditor from pursuing any other remedy on his debt;[78] in some states he may proceed at law and in equity for its recovery at one and the same time, or successively.[79]

are special statutory provisions regulating the foreclosing of mortgages containing a power of sale; *Childs* v. *Dolan,* 87 Mass. (5 Allen) 319. See Massachusetts Gen. Stat. ch. 140, §§ 38–44; *Herrick* v. *Teachout,* 74 Vt. 196, 52 Atl. 432; *McLarty* v. *Urquhart,* 153 N. C. 339, 69 S. E. 245.

[73] *Cormerais* v. *Genella,* 22 Cal. 116, 124, 125; *Walton* v. *Cody,* 1 Wis. 420. Where the holder of such a mortgage applies to a court of equity for a foreclosure thereof, he abandons the power of sale contained in the mortgage, and submits his cause to the court for such relief as to the court may seem just; *Heyward* v. *Judd,* 4 Minn. 483, 495.

[74] *Benham* v. *Rowe,* 2 Cal. 387, 56 Am. Dec. 342; *Turner* v. *Bouchell,* 3 Har. & J. (Md.) 99 .

[75] *Kinsley* v. *Ames,* 43 Mass. (2 Metc.) 29; *Brisbane* v. *Stoughton,* 17 Ohio, 482; *Turner* v. *Johnson,* 10 Ohio, 204.

[76] *Hewitt* v. *Templeton,* 48 Ill. 367, 370; *Thornton* v. *Pigg,* 24 Mo. 249; *Tappan* v. *Evans,* 11 N. H. 311; *His Majesty's Attorney-Gen.* v. *Winstanley,* 5 Bligh. 130; *Burnell* v. *Martin,* Doug. 417.

[77] *Suydam* v. *Bartle,* 9 Paige Ch. (N. Y.) 294; *Williamson* v. *Champlin,* 8 Paige Ch. (N. Y.) 70. See N. Y. Code Civ. Proc. § 1628. See *ante,* §§ 273, 274.

[78] *Downing* v. *Palmateer,* 1 T. B. Mon. (Ky.) 64; *Ely* v. *Ely,* 72 Mass (6 Gray) 439; *Longworth* v. *Flagg,* 10 Ohio, 300; *Morrison* v. Buckner, Hemspt. C. C. 442.

[79] *Very* v. *Watkins,* 18 Ark. 546; *Delahay* v. *Clement,* 4 Ill. (3 Scam.) 201; *Slaughter* v. *Foust,* 4 *Blackf.* (Ind.) 379; *Andrews* v. *Scotton,* 2 Bland Ch. (Md.) 665; *Ely* v. *Ely,* 72 Mass. (6 Gray) 439; *McCall* v. *Lenox,* 9 Serg. & R.

§ 311. Same—Void under statute.—In some of the states the statutes provide that all liens on land, other than judgments, shall be foreclosed by suit.[80] In such states a clause in a mortgage, or other instrument creating a lien on land, providing for foreclosure in any manner other than by suit, is void.[81] In other states the sale of property under a power in a mortgage or trust deed is specifically regulated by statute,[82] and in such states a sale under a power without conforming to the statutes will not cut off the equity of redemption.[83] Other states declare by statute [84] that all contracts for the forfeiture of property subject to a lien, in satisfaction of a lien secured thereby, are void. Within the meaning and prohibition of such a statute is a compromise agreement between a mortgagor and a mortgagee, by which the latter agrees to accept a smaller amount than the sum claimed by it, providing it shall be paid within a designated time, with a sale of the mortgaged property after the expiration of such period, with the consent of the mortgagor, to the mortgagee for the purpose of transferring to the real purchaser, because of a provision in the agreement rendering such sale necessary.[85]

§ 312. Same—Who may execute power—Where naked power.—Powers of sale in mortgages are of two kinds; the one naked powers, and the other powers coupled with an interest. The first can be executed by the person designated only.[86] Thus it is said that a power of sale in a mortgage to

(Pa.) 302; *Hughes* v. *Edwards*, 22 U. S. (9 Wheat.) 489, 6 L. ed. 143. See the cases cited *supra* and in §§ 273, 274, *ante*.

[80] As in Oregon. See Hill's Oreg. Code, § 414.

[81] *Thompson* v. *Marshall*, 21 Oreg. 171, 27 Pac. 957.

[82] As in Michigan. See How. Mich. Stat. § 7847.

[83] *Pierce* v. *Grimley*, 77 Mich. 273, 43 N. W. 932.

[84] As California. See Cal. Civ. Code, § 2889.

[85] *Corcoran* v. *Hinkel* (Cal.) 34 Pac. 1031.

[86] *Barrick* v. *Horner*, 78 Md. 253, 44 Am. St. Rep. 283, 27 Atl. 1111; *Bradford* v. *King* 18 R. I. 743, 31 Atl. 166. Compare *Western Mary-*

a trustee who has no beneficial interest is a collateral and naked power which cannot on his death, pass by operation of law to his legal representatives, although he has become the assignee of the beneficial interest in the mortgage.[87] And the successors of original trustees appointed under a will cannot proceed under a power of sale in a mortgage to the original trustees and their assigns, where the mortgage was not directly transferred, but became their equitable property through an attempt to rid the property of a trust, and they must proceed not under the power in the instrument, but by strict foreclosure.[88]

§ 313. Same—Same—Where coupled with an interest.—A power of sale conferred upon the mortgagee in a

land R. Land & I. Co. v. *Goodwin,* 77 Md. 271, 26 Atl. 319. See *Hussey* v. *Hill,* 120 N. C. 312, 58 Am. St. Rep. 789, 26 S. E. 919.

[87] *Barrick* v. *Horner,* 78 Md. 253, 44 Am. St. Rep. 283, 27 Atl. 1111.

[88] *Bradford* v. *King,* 18 R. I. 743, 31 Atl. 166.

A power of sale to the trustee, "his heirs, executors and administrators, and assignees," in a mortgage is not such a naming of the executors as will authorize them to execute the power, where the trustee has no beneficial interest in the mortgage, under Maryland Code, art. 666, providing that in all mortgages there may be inserted a clause authorizing the mortgagee, or any person to be named therein, to sell the mortgaged premises. *Barrick* v. *Horner,* 78 Md. 253, 44 Am. St. Rep. 283, 27 Atl. 1111.

It is said by the supreme court of Alabama, in the case of *Long* v. *Stansel,* 106 Ala. 389, 17 So. 519, that a deed of land upon condition that a trust shall be raised for the payment of an amount for which the grantor is liable, and providing for enforcement of the same by its sale as in case of foreclosing mortgages under statute, or by a bill in chancery, and for the execution thereof by some suitable person to be appointed by any person interested in the trust fund, authorizes a public sale in case of default, by a person appointed as provided; and a purchaser thereat acquires a good title. And the supreme court of Arkansas recently held, in the case of *Stallings* v. *Thomas,* 55 Ark. 326, 16 S. W. 184, that under a trust deed authorizing the trustee named therein to sell in case of default, and providing that the beneficiary may substitute another to execute the power in case the trustee named fails or refuses to execute it, as substitution is unauthorized and a sale by a substituted trustee void, where the trustee named was not requested and did not refuse to execute the power.

mortgage coupled with an interest, is appurtenant to the estate, and passes to the executors, administrators and assignees of the mortgagee, and is not lost by the death or insanity of the mortgagor,[89] and may be exercised by the mortgagee,[90] his assignee,[91] or by the executors or administrators of the mortgagee's estate.[92] But such power cannot be executed by the mortgagee after he has parted with his interest in the premises.[93]

§ 314. Same—When sale to be made.—A sale under the power in a trust deed cannot be made until the debt is due,[93a] or there is a default in some of the covenants of the instrument. In those cases where the debt is due the trustees in a trust have no right to delay a sale after default until a

[89] *Barrick* v. *Horner,* 78 Md. 253, 44 Am. St. Rep. 283, 27 Atl. 1111.

A power of sale in a mortgage, declaring it lawful for the trustee named, his successors and assigns, at any time after default to sell the property mortgaged, is a power coupled with an interest, which may be exercised by a new trustee appointed, upon the release of the trustee named, by the court on his application; especially where the mortgage is assigned to the new trustee by the former one under direction of the court. *Western Maryland R. Land & I. Co.* v. *Goodwin,* 77 Md. 271, 26 Atl. 319; *Muth* v. *Goddard,* 28 Mont. 237, 98 Am. St. Rep. 553, 72 Pac. 621.

[90] *Very* v. *Russell,* 65 N. H. 646, 23 Atl. 522.

[91] *Hartley* v. *Matthews,* 96 Ala. 224, 11 So. 452; *Johnson* v. *Glenn,* 80 Md. 369, 30 Atl. 993; *Thurber* v. *Carpenter,* 18 R. I. 782, 31 Atl. 5; *Barry* v. *Anderson,* 18 Ont. App. 247.

A power of sale in a mortgage is not personal to the mortgagee, but passes to an assignee, under the Alabama Code, 1886, § 1884, making it part of the security for the mortgage debt, and providing that it may be executed by any person who becomes entitled to the money. *Hartley* v. *Matthews,* 96 Ala. 224, 11 So. 452. See *Maslin* v. *Marshall,* 94 Md. 480, 51 Atl. 85.

[92] Foreign administrator may execute power of sale contained in a mortgage running to the mortgagee, his executors, administrators, and assigns, in Rhode Island. *Thurber* v. *Carpenter,* 18 R. I. 782, 31 Atl. 5.

[93] *Sadler* v. *Jefferson,* 143 Ala. 669, 39 So. 380.

[93a] A sale under a trust deed is void, when on the proper statement of account, the lender is indebted to the borrower. *Jackson* v. *Cassidy,* 68 Tex. 282, 4 S. W. 541.

more favorable or convenient season, without the consent of the creditor or beneficiaries.[93b]

In those cases in which the instrument creating the trust provides that a sale shall be made upon default only upon the request of a certain person or persons, a sale made without such request will be void;[39c] as where the instrument provides for sale by the trustee on the request of the payee, and the request is made by the purchaser of the property at a prior invalid sale, but to whom neither the note nor the deed of trust have been transferred.[93d]

It is thought that an order of the orphan's court, or of any other court having charge of the infant's estate, is neither necessary nor proper to enable executors to sell under a power contained in a mortgage.[93e]

§ 315. Same—Notice of sale.—To render a sale valid under a power in a mortgage or trust deed a sufficient notice of sale is necessary;[94] but a sale of land under a power contained in a trust deed is valid, although the notice of sale is published in newspapers other than those designated by the court judges for publication of legal notices, under the statute,[95] for the reason that such statutes and designation of papers thereunder do not apply to sales under power in mortgages and trust deeds, but only to such sales as are made under court proceedings.[96]

It is usual and proper to give notice to the grantor or his assignees of the appointment or election of a new trustee to

[93b] *Wheeler* v. *McBlair,* 5 App. Cas. D. C. 305, 23 Wash. L. Rep. 153. See *post,* § 316.

[93c] *Whitney* v. *Krapf,* 8 Tex. Civ. App. 304, 27 S. W. 843. See *post,* § 318.

[93d] *Boone* v. *Miller,* 86 Tex. 74, 23 S. W. 574.

[93e] *Chilton* v. *Brooks,* 71 Md. 445, 18 Atl. 868, 28 Am. & Eng. Corp. Cas. 32.

[94] As to notice of sale and its contents, regularity and sufficiency, see *post,* §§ 543, 545. See also *Ford* v. *Nesbitt,* 72 Ark. 267, 79 S. W. 793; *Chace* v. *Morse, as adm'r,* 189 Mass. 559, 76 N. E. 142.

[95] As in Missouri. See Mo. Rev. Stat. 1889, § 312.

[96] *Dart* v. *Bagley,* 110 Mo. 42, 19 S. W. 313.

execute the trust on the death, refusal or incapacity to act of the person originally selected; but it seems that, in the absence of statutory requirement, this is not essential, for the supreme court of California, in the case of Dyer v. Leach,[97] say that a failure to give notice to the grantor in a deed of trust, or his grantees, of the appointment by the court of a successor to a deceased trustee, will not, in California, invalidate a sale made by such successor.

§ 316. Same—Duties of person making sale.—A trustee empowered to sell property under a deed of trust is bound to sell under every possible advantage for the beneficiaries, and must act with fair and impartial attention to the latter's interests;[98] and the sale may be vacated in case of his failure to do so.[99] But such trustee is not bound, besides duly advertising the property for sale thereunder according to its terms, to go out and hunt up bidders,[1] or to give the grantor personal notice of the intended sale,[2] or to inform himself as to the value of the property,[3] or to delay the sale until a more convenient season;[4] and his failure to do so is not a ground for setting the sale aside.[5]

A trustee in a deed of trust need not personally attend at a sale thereunder, but may act by others in advertising and auctioneering the land.[6] And a person representing the trustee in a trust deed in advertising and selling the land is not incapacitated by the fact that he is empowered to bid a sum named for the person to whom the sale is made.[7]

[97] 91 Cal. 191, 27 Pac. 598, 25 Am. St. Rep. 171.

[98] *Givens* v. *McCray,* 196 Mo. 306, 113 Am. St. Rep. 736, 93 S. W. 374.

[99] *Fowler* v. *Taylor,* 19 D. C. 456, 19 Wash. L. Rep. 131.

[1] *Harlin* v. *Nation,* 126 Mo. 97, 27 S. W. 330.

[2] *Harlin* v. *Nation,* 126 Mo. 97, 27 S. W. 330.

[3] *Harlin* v. *Nation,* 126 Mo. 97, 27 S. W. 330.

[4] *Wheeler* v. *McBlair,* 5 App. Cas. D. C. 375, 23 Wash. L. Rep. 153.

[5] *Harlin* v. *Nation,* 126 Mo. 97, 27 S. W. 330.

[6] *Dunton* v. *Sharpe,* 70 Miss. 850, 12 So. 800. See also *Ray* v. *Home & Foreign Investment & Agency Co. Ltd.* 98 Ga. 122, 26 S. E. 56.

[7] *Dunton* v. *Sharpe,* 70 Miss. 850, 12 So. 800.

§ 317. Same—Possession not necessary to the execution of.—The trustee's possession of the property is not a condition precedent to the sale under a power in a trust deed providing that it shall be his duty, on request, to take the property into his possession and sell it.[8] Neither is it where the instrument provides that "upon default of payment of the debt secured the trustee shall immediately take possession, and, having given notice, sell the land conveyed," because such provisions are intended simply to confer upon the trustee the right of possession, and not to make such taking of possession a condition precedent to the exercise of the power of sale.[9]

§ 318. Same—Sale must be in strict accordance with power.—The general rule is that a sale under a power must be in strict accordance therewith.[10] Thus it is said that a sale by a trustee in a trust deed intended as security, not made in strict accordance with the power of sale contained therein, does not divest the trustee or his grantee of the equitable estate, although it carries with it the legal title; and a second sale after such conveyance of the legal title, although made upon a readvertisement and concluded in strict compliance with the terms of the deed, will be ineffectual to pass such equity.[11]

Where a sale is to be made under a power only upon the request of a designated party or parties, a sale without such request is void.[12] Thus under a deed of trust providing that sale may be made at the request of the payee in the

[8] *Hamilton* v. *Halpin,* 68 Miss. 99, 8 So. 739.

[9] *Tyler* v. *Herring,* 67 Miss. 169, 19 Am. St. Rep. 263, 6 So. 840.

[10] *Chace* v. *Morse, as adm'r* 189 Mass. 559, 76 N. E. 142; *McCollum* v. *Jones,* 141 S. W. 1030 (Tex. Civ. App.); *Roarty* v. *Mitchell,* 7 Gray (Mass.) 243; *Smith* v. *Provin;* 4 Allen (Mass.) 516; *Bigler* v. *Waller,* 14 Wall. 297, 20 L. ed. 891; *Shillaber* v. *Robinson,* 97 U. S. 68, 24 L. ed. 967.

[11] *Stephens* v. *Clay,* 17 Colo. 489, 31 Am. St. Rep. 328, 30 Pac. 43.

[12] *Whitney* v. *Krapf,* 8 Tex. Civ. App. 304, 27 S. W. 843.

note secured thereby, a sale is void if made at the request of one who has become the purchaser of the property by a prior invalid sale, to whom neither the note nor the deed of trust were transferred.[13] But where the mortgagee is empowered by the mortgage to sell for cash only the fact that he gives the purchaser at the foreclosure sale time in which to make the payment of the purchase price, and takes his note for part of the purchase money, does not render the sale invalid;[14] nor will it entitle the mortgagor to any relief, where he has received proper credit for the sum bid as cash, except that he will be entitled to recover the balance after payment of the debt, expenses and charges.[15]

§ 319. Same—Valid exercise of power.—A sale under a power cannot be made until the debt is due, or some covenant in the instrument creating the trust is broken,[16] and then to be valid must be conducted strictly in accordance with the provisions of the statute regulating sales under power.[17] Thus, he must make the statutory record of an assignment of the mortgage before exercising the power of sale in the name of the assignee,[18] and the notice of sale must be signed by the proper party and in accordance with statutory requirement.[19]

On collateral attack of the title conferred by sale under a power, it will be conclusively presumed that all the prerequisites to a sale of lands under a trust deed were performed, where the deed of trust expressly provides that the recital in the trustee's deed to the purchaser shall be full evidence of

[13] *Boone* v. *Miller,* 86 Tex. 74, 23 S. W. 574.

[14] *Sawyer* v. *Campbell,* 130 Ill. 186, 22 N. E. 458.

[15] *Tompkins* v. *Drennen,* 6 C. C. A. 83, 56 Fed. 694.

[16] See *ante,* § 314. *Chace* v. *Morse, as adm'r* 189 Mass. 559, 76 N. E. 142.

[17] *Pierce* v. *Grimley,* 77 Mich. 273, 43 N. W. 932.

[18] *Burke* v. *Backus,* 51 Minn. 174, 53 N. W. 458.

[19] *Dunning* v. *McDonald,* 54 Minn. 1, 55 N. W. 864.

the truth of the matter therein stated, and that all prerequisites to the sale shall be presumed to have been performed.[20] And the mere fact that the enforcement of the legal rights of a beneficiary in a trust deed, by a sale by the trustee under the power contained therein, results in pecuniary loss to the debtor, cannot have the effect of annulling the sale, where it is impartially and fairly made according to the terms of the deed, although the debtor is entitled to the utmost good faith and fairness in the execution of the power.[21] It will be a valid exercise of the power where a mortgagee sells the premises by public auction ostensibly to a third person, but in reality to himself and takes possession as owner under such purchase, and thereafter sells in full proprietory right to another; and the latter sale will extinguish the right to redeem.[22]

§ 320. Same—Who may purchase.—The general rule is that a mortgagee selling under a power of sale cannot purchase at his own sale, either directly or indirectly.[23] But a purchase by the mortgagee is not absolutely void; it is merely voidable,[24] and only voidable at the instance of the mortgagor or the owner of the equity of redemption at the time of the

[20] *Jesson* v. *Texas Land & L. Co.* 3 Tex. Civ. App. 25, 21 S. W. 624.

[21] *Smith* v. *Deeson* (Miss.) 14 So. 40.

[22] *Henderson* v. *Astwood* (P. C.) [1894] A. C. 150.

[23] *Dunn* v. *Oetinger Bros.* 148 N. C. 276, 61 S. E. 679; *Standback* v. *Thornton,* 106 Ga. 81, 31 S. E. 805; *Shew* v. *Call,* 119 N. C. 450, 26 S. E. 33, 56 Am. St. Rep. 678; *Harrison* v. *Manson,* 95 Va. 593, 29 S. E. 420; *Payton* v. *McPhaul,* 128 Ga. 510, 58 S. E. 50; *Mutual Loan & Banking Co.* v. *Haas,* 100 Ga. 111, 27 S. E. 980, 62 Am. St. Rep. 317. See also *Dwyer* v. *Rohan,* 99 Mo. App. 120, 73 S. W. 384; *Stark* v. *Love,* 128 Mo. App. 24, 106 S. W. 87.

The mortgagee may however purchase when the mortgagor consents. *Houston* v. *National Mutual Building & Loan Asso.* 80 Miss. 31, 31 So. 540, 92 Am. St. Rep. 565.

[24] *Copsey* v. *Sacremento Bank,* 133 Cal. 659, 66 Pac. 7, 85 Am. St. Rep. 238; *Herbert Craft Co.* v. *Bryan,* 68 Pac. 1020 (Cal.); *Quirq* v. *Liebert,* 12 App. D. C. 394; *Standback* v. *Thornton,* 106 Ga. 81, 31 S. E. 805; *Harrison* v. *Manson,* 95 Va. 593, 29 S. E. 420; *Payton* v. *McPhaul,* 128 Ga. 510, 58 S. E. 50; *Rich* v. *Morisey, as ex'r, etc.* 149 N. C. 37, 62 S. E. 762.

sale.[25] Neither a judgment creditor of the mortgagor whose judgment is rendered subsequently to the execution and recording of the mortgage, nor a purchaser at the sale under such a judgment subsequently to a sale under the power, is allowed to impeach a purchase by the mortgagee at his own sale.[26]

The beneficiaries named in a trust deed,[27] the mortgagor,[28] or his legal representatives[29] may, however, purchase at a sale of mortgaged premises, on default, under a power of sale.

§ 321. Same—Rights of purchasers.—A trustee in a deed of trust has no power to convey, except in the event of the contingency to which his power is limited,[30] and a purchaser from him acquires no title which will support an action to quiet title unless the trustee has acquired the power of sale by the happening of such contingency.[31] And it is held that a provision in a deed of trust, declaring that the recitals in a deed of the trustee to a purchaser of the property upon a sale made upon a default, shall be conclusive proof of the default and of due publication of the notice of sale, is not available to a purchaser with knowledge of the want of authority in the trustee to sell by reason of the fact that no default has been made.[32]

It has been said that the rights and duties of the beneficiary named in a trust deed, who purchases the property at an in-

[25] *Payton* v. *McPhaul,* 128 Ga. 510, 58 S. E. 50.

[26] *Williams* v. *Williams,* 122 Ga. 178, 106 Am. St. Rep. 100; *Martinez* v. *Lindsay,* 8 So. 787 (Ala.); *Payton* v. *McPhaul,* 128 Ga. 510, 58 S. E. 50.

[27] *Merryman* v. *Blount,* 79 Ark. 1, 94 S. W. 714. See *Stallings* v. *Thomas,* 55 Ark. 326, 18 S. W. 184.

[28] *Coleman* v. *McKee,* 24 R. I. 596, 54 Atl. 374.

[29] *Chilton* v. *Brooks,* 71 Md. 445, 18 Atl. 868. This decision was made under Md. Code, art. 66, § 14. See *Markswell* v. *Markswell,* 157 Mo. 326, 57 S. W. 1078.

[30] See *ante,* § 314.

[31] *Savings & L. Soc.* v. *Burnett,* 106 Cal. 514, 37 Pac. 180. See *post,* § 683, *et seq.*

[32] *Savings & L. Soc.* v. *Burnett,* 106 Cal. 514, 37 Pac. 180.

valid sale by the trustee and enters into possession thereof, are merely the rights and duties of a mortgagee in possession after condition broken.[33]

§ 322. Same—deed on sale.—In all cases where land is sold under a power conferred in a mortgage deed, the legal title remains in the mortgagor until the deed of conveyance is executed, under the power, by the mortgagee or his assigns in the name of the mortgagor,[34] and a deed in the name of the mortgagee or his assigns will not transfer title to the land so sold.[35]

It has been said that a deed executed under a power of sale in a deed of trust is not invalidated by the fact that the notice of sale required therein was published for part of the required time in one paper and for the remainder in another, where the publication was but the continuation of one notice, the two newspapers having been consolidated during the time of publication of the notice.[36]

§ 323. Same—Void and voidable sales.—A sale under a deed of trust is void, when on the proper statement of account, the lender is indebted to the borrower.[37] And a sale of mortgaged premises under a power contained in the mortgage, pursuant to a notice which is not signed by an assignee of a part interest in the mortgage, whose assignment is put on record between the first and last days of publication of the notice, is invalid.[38] In those cases where a mortgage confers

[33] *Stallings* v. *Thomas,* 55 Ark. 326, 18 S. W. 184.

[34] *Dendy* v. *Waite,* 36 S. C. 569, 15 S. E. 712; *Johnson* v. *Johnson,* 27 S. C. 309, 3 S. E. 606, 13 Am. St. Rep. 636.

[35] *Johnson* v. *Johnson,* 27 S. C. 309, 3 S. E. 606, 13 Am. St. Rep. 636.

[36] *Wilkerson* v. *Eilers,* 114 Mo. 245, 21 S. W. 514.

[37] *Jackson* v. *Cassidy,* 68 Tex. 282, 4 S. W. 541.

[38] *Dunning* v. *McDonald,* 54 Minn. 1, 55 N. W. 864.

Defects in a sale under a power contained in a mortgage, which are cured by the lapse of five years by virtue of Minn. Laws 1883, chap. 112, do not include the omission to make the statutory record of an assignment of the mortgage before

a power of sale, and a third party purchases for the benefit of the mortgagee, the sale is not absolutely void, but voidable only.[39]

A sale may be avoided for the misconduct of the trustee making the sale; but a statement by one of the trustees in a trust deed, denouncing a bid by one who failed to complete his purchase as a trick, and a question of the representative of the mortgagor as to whether the latter caused it to be done, with a true statement to the attorney of a loan company from which the mortgagor was attempting to obtain a loan to take up the mortgage, of the existence of mechanics' liens, do not constitute misconduct on the part of the trustees which will entitle the mortgagor to relief from the sale.[40] And it is said that a perversion of the power to sell land under a mortgage is not shown by the fact that some advantage may accrue to the mortgagee besides the payment of the debt, or an advantage may accidentally accrue thereby to others.[41]

§ 324. Same—Revocation or suspension of power.—A power of sale of mortgaged premises on default, inserted in a mortgage, based on a valuable consideration, cannot be revoked by any act or deed of the mortgagor,[42] and in most states,[43] is not affected by the death of the mortgagor or owner of the equity of redemption.[44] After the death of a creditor secured

exercising the power of sale in the name of the assignee. *Burke* v. *Backus,* 51 Minn. 174, 53 N. W. 458.

[39] *Nichols* v. *Otto,* 132 Ill. 91, 174, 23 N. E. 411.

[40] *Anderson* v. *White,* 2 App. Cas. D. C. 408, 22 Wash. L. Rep. 159.

[41] *Holland* v. *Citizens Sav. Bank,* 16 R. I. 734, 19 Atl. 654, 8 L.R.A. 553.

[42] *Johnson* v. *Johnson,* 27 S. C. 309, 13 Am. St .Rep. 636, 3 S. E. 606; *Hampshire* v. *Greeves,* 143 S. W. 147 (Tex.)

[43] *In Georgia* a power of sale given by a mortgage is revoked by the death of the mortgagor. *Wilkins* v. *McGhee,* 86 Ga. 764, 13 S. E. 84; *Williams* v. *Washington,* 40 S. C. 457, 19 S. E. 1. See also: *Johnson* v. *Johnson,* 27 S. C. 309, 3 S. E. 606, 13 Am. St. Rep. 636.

[44] *Varnum* v. *Meserve,* 90 Mass. (8 Allen) 158; *Conners* v. *Holland,* 113 Mass. 50; *Muth* v. *Goddard,* 28

by a trust deed containing a power of sale, there can be no sale until an administrator has been appointed.[45]

It is said by the supreme court of South Carolina, in the case of Williams v. Washington,[46] that a deed by a mortgagee, executed in his own name, under a power of sale in a mortgage by joint owners of the lands, after such power has been revoked by the death of one of the mortgagors, although ineffective as a deed, will operate as an equitable assignment of the mortgage, so as to enable the guarantee or his assignee to foreclose the mortgage.

Where the mortgage is recorded, loss of the instrument will not affect the power of sale.[47]

Mont. 237, 72 Pac. 621, 98 Am. St. Rep. 553.

The power of sale given in a mortgage or deed of trust is a power coupled with an interest, and continues in force and survives the death of the constituent, *Wiener* v. *Zwieb,* 141 S. W. 771 (Tex.); *Carter* v. *Slocomb,* 122 N. C. 475, 29 S. E. 720, 65 Am. St. Rep. 714; *Grandin* v. *Emmons,* 10 N. D. 223, 86 N. W. 723, 88 Am. St. Rep. 684, 54 L.R.A. 610; *Sulphur Mines Co.* v. *Thompson's Heirs,* 93 Va. 293, 25 S. E. 232; *Openshaw* v. *Dean,* 125 S. W. 989 (Tex. Civ. App.); *Taylor* v. *Williams,* 101 Tex. 388, 108 S. W. 815. But see *Texas Loan Agency* v. *Dingee,* 33 Tex. Civ. App. 118, 75 S. W. 866; *Williams* v. *Armstead, as trustee, etc.* 41 Tex. Civ. App. 35, 90 S. W. 925; *Whitmire* v. *May,* 96 Tex. 317, 72 S. W. 375; *Markham* v. *Wortham,* 67 S. W. 341 (Tex. Civ. App.); *Girardeau* v. *Perkins,* 126 S. W. 633 (Tex. Civ. App.); *Harris* v. *Wilson,* 40 S. W. 868 (Tex. Civ. App.)

In *Rogers' Heirs* v. *Watson,* 81 Tex. 400, 17 S. W. 29, it is held that although the execution of the power of sale in a mortgage is suspended by the death of the mortgagor, it becomes effective and may be exercised at the expiration of four years from the death without administration upon the estate, since under the statute (Tex. Rev. Stat. art. 1827) the jurisdiction of the probate court to issue letters is lost at the end of four years. *Gillaspie* v. *Murray,* 27 Tex. Civ. App. 580, 66 S. W. 252. See also *Taylor* v. *Williams,* 101 Tex. 388, 108 S. W. 815. But see *Swearingen* v. *Williams, as ex'r, etc.* 28 Tex. Civ. App. 559, 67 S. W. 1061.

[45] *Armistead* v. *Kirby,* 106 Va. 585, 56 S. E. 570. See also *Williams* v. *Armistead, as trustee, etc.* 41 Tex. Civ. App. 35, 90 S. W. 925; *Texas Loan Agency* v. *Dingee,* 33 Tex. Civ. App. 118, 75 S. W. 866.

[46] 40 S. C. 457, 19 S. E. 1.

[47] *Bibb* v. *Crews,* 113 Ala. 617, 21 So. 341.

§ 325. Same—Avoiding or setting aside power.—It is thought that courts will not avoid a power given by a mortgagor to his mortgagee to make a sale of the mortgaged lands on default, but will closely scrutinize the sale made thereunder.[48] And a sale under a power in a deed of trust executed when the grantor has sufficient mental capacity, upon giving thirty days' notice, as therein prescribed, cannot be avoided on the ground that the grantor was temporarily insane and confined in an asylum when the sale was made, and had no guardian, where the deed did not provide against such a summary sale in case of the grantor's insanity, or other unseen misfortune.[49] Nor will the sale be set aside because of the mortgagor's insanity at the time of the sale, where the mortgagee was ignorant of that fact.[50]

§ 326. Breach of payment of installment—Accelerated maturity of debt.—The parties to a mortgage may by their contract make the time fixed for the payment of the principal debt, depend upon the prompt payment of the several installments of principal and interest, as they fall due; and may provide either in the note or mortgage that a failure to pay an installment of principal or interest, when it becomes due and payable, shall work a forfeiture of the credit and make the entire debt due at once.[51] Such a stipulation inserted in

[48] *Johnson* v. *Johnson,* 27 S. C. 309, 3 S. E. 606, 13 Am. St. Rep. 636.

[49] *Van Meter* v. *Darrah,* 115 Mo. 153, 22 S. W. 30.

[50] *Landberg* v. *Davidson,* 72 Minn. 49, 42 L.R.A. 103, 74 N. W. 1018.

[51] *Hoodless* v. *Reid,* 112 Ill. 105; *McClelland* v. *Bishop,* 42 Ohio St. 113, 122. See also *ante,* chap. iii. But the court of appeals of New York, in the case of *Hollister* v. *Stewart,* 111 N. Y. 644, 19 N. E. 782, say where a mortgage has provided that on default of payment of principal or interest the trustee shall take legal procedings to enforce it, and thereafter provides also that in case of a default in respect to covenants for further assurance, the trustees shall have discretion to enforce or waive the rights of the bondholders, unless required to act by a majority of such bondholders, this discretion cannot be held to apply to defaults in principal or interest.

the mortgage is for the benefit and advantage of the mortgagee or his assignee, and is of full force as to the remedy on the mortgage;[52] but it does not operate to vary or extinguish the agreement expressed on the face of the notes themselves for general purposes.[53]

Where the parties to a mortgage covenant that in case of default in the payment of either principal or interest, the whole of the principal and interest shall become due at the option of the mortgagee, such stipulation should be inserted in both the notes and the mortgage, in order that where there are several notes falling due at different times, the holder of any of them may bring suit to foreclose in case of default.[54]

§ 327. Failure to pay installment of principal.—Where money secured by a mortgage is payable in installments, the mortgage may be foreclosed for an over-due installment of principal or interest,[55] by entry or by a provisional decree

A condition in a mortgage that if, at the expiration of the time limited for the payment of the installments, there should remain due on the mortgage a named sum, the mortgagor might have the privilege of paying the amount due by giving his note therefor, secured by a mortgage on other real estate, does not prohibit the installments from falling due at the time stipulated, or prohibit a sale under the mortgage to satisfy them when due; but the mortgagor may, in such case, stop the sale by insisting on the terms of the stipulation in the mortgage, and complying therewith. *Bacon* v. *Northwestern Mut. L. Ins. Co.* 131 U. S. 258, 33 L. ed. 128, 9 Sup. Ct. 737.

[52] *Redman* v. *Purrington,* 65 Cal. 271; *McClelland* v. *Bishop,* 42 Ohio St. 113, 122.

[53] *Morgan* v. *Martien,* 32 Mo. 438; *McClelland* v. *Bishop,* 42 Ohio St. 113, 122.

[54] *McClelland* v. *Bishop,* 42 Ohio St. 113, 122. See *Mallory* v. *West Shore, H. R. R. R. Co.* 35 N. Y. Sup. Ct. (3 J. & S.) 174, and also *Noell* v. *Gaines,* 68 Mo. 649.

[55] *Mussina* v. *Bartlett,* 8 Port. (Ala.) 277; *Gibbons* v. *Hoag,* 95 Ill. 45; *Adams* v. *Essex,* 1 Bibb (Ky.) 149, 4 Am. Dec. 623; *Pepper* v. *Dunlap,* 16 La. 163; *Salmon* v. *Clagett,* 3 Bland Ch. (Md.) 125; *Watkins* v. *Hackett,* 20 Minn. 106; *Kennedy* v. *Hammond,* 16 Mo. 341; *Noyes* v. *Barnet,* 57 N. H. 605; *Johnson* v. *Brown,* 31 N. H. 405; *American Life Ins. Co.* v. *Rycrson,* 6 N. J. Eq. (2 Halst.) 9.

of judgment and sale.[56] And such an action or proceeding will not bar another foreclosure for a subsequent installment;[57] and the mortgage will thus continue in force as to all subsequently maturing contracts.[58]

In those cases where a mortgage given to secure more than one promissory note is foreclosed to make the amount due on the one first maturing, the decree should preserve the lien of the mortgage as to the subsequently maturing notes, where the petition recites the facts as to the notes secured, giving their dates, amounts, and time of maturity, and prays foreclosure for the first note, and for sale of the real estate on special execution.[59] In those cases, however, where a bill is filed to foreclose a mortgage after the maturity of one note, but before that of another, and the latter note matures before the decree of foreclosure and sale is rendered, the decree may cover both, if a proper foundation therefor has been laid in the bill.[60]

Where there is a series of negotiable notes in the usual form, for separate sums of money payable at specified times, with a mortgage securing each according to its terms containing a stipulation, that if default be made in the payment of any one of the notes or interest thereon, each and all of them shall become due and payable, and the mortgage shall become absolute as to "said notes remaining unpaid at the

[56] *Lansing* v. *Capron,* 1 Johns. Ch. (N. Y.) 617; *Robinson* v. *Wilcox,* 2 N. Y. Leg. Obs. 160; *Jones v. Lawrence,* 18 Ga. 277; *Hunt* v. *Harding,* 11 Ind. 245; *Eastabrooke* v. *Moulton,* 9 Mass. 258.

[57] *Cox* v. *Wheeler,* 7 Paige Ch. (N. Y.) 248; *McDougal* v. *Downey,* 45 Cal. 165; *Wilson* v. *Hayward,* 2 Fla. 27; *Robbins* v. *Swain,* 68 Ill. 197; *Skelton* v. *Ward,* 51 Ind. 46; *Kemerer* v. *Bournes,* 53 Iowa, 172; *Poweshiek County* v. *Dennison,* 36 Iowa, 244, 16 Am. Rep. 521; *Darrow* v. *Scullin,* 19 Kan. 57; *Hubbard* v. *Jarrell,* 23 Md. 66; *Smith* v. *Osborn,* 33 Mich. 410; *Kimmel* v. *Willard,* 1 Doug. (Mich.) 217; *Fowler* v. *Johnson,* 26 Minn. 338; *Magruder* v. *Eggleston,* 41 Miss. 284; *Buford* v. *Smith,* 7 Mo. 489; *Allen* v. *Wood,* 31 N. J. Eq. (4 Stew.) 103; *West's Appeal,* 88 Pa. St. 341.

[58] *Bridgeman* v. *Johnson,* 44 Mich. 491.

[59] *Burroughs* v. *Ellis,* 76 Iowa, 649, 38 N. W. 141.

[60] *McLane* v. *Piaggio,* 24 Fla. 71, 3 So. 823.

happening of such default," such stipulation relates to the remedy of foreclosure by an action or other proceeding under the mortgage, and upon default the mortgage may be foreclosed for the whole debt.[61] Such a covenant in the mortgage also inures to the benefit of the assignee of the mortgage, who may foreclose for the whole debt upon default in the payment of an installment thereof.[62]

In the foreclosure of a mortgage, given to secure the payment of a sum of money in installments, the court may stay proceedings in the action, if the defendant pays the installments due and consents to a decree of foreclosure subject to the future order of the court in case of a subsequent default.[63]

§ 328. Failure to pay installment of interest.—It has been said that a mortgage given as security for the payment of a promissory note with interest, but containing no provision for foreclosure upon the non-payment of interest, cannot be foreclosed until the principal sum becomes due;[64] but the better and prevailing opinion is that a mortgage may be foreclosed for interest due on the mortgage note, although the principal of the note may not yet be due.[65] The practice

[61] *McClelland* v. *Bishop,* 42 Ohio St. 113, 122.

[62] *Redman* v. *Purrington,* 65 Cal. 271.

[63] *Campbell* v. *Macomb,* 4 Johns. Ch. (N. Y.) 534; *Lansing* v. *Capron,* 1 Johns. Ch. (N. Y.) 617; *Robinson* v. *Wilcox,* 2 N. Y. Leg. Obs. 160; *Jones* v. *Lawrence,* 18 Ga. 277; *Stanhope* v. *Manners,* 2 Eden, 197. See *ante,* chap. iii.

[64] *Brodribb* v. *Tibbets,* 58 Cal. 6.

[65] *Valentine* v. *VanWagner,* 37 Barb. (N. Y.) 60; *Bank of San Luis Obispo* v. *Johnson,* 53 Cal. 99; *Hunt* v. *Dohrs,* 39 Cal. 304; *Butler* v. *Blackman,* 45 Conn. 159; *Booknau* v. *Burnet,* 49 Iowa, 303; *Stafford* v. *Maus,* 38 Iowa, 133; *Van Doren* v. *Dickerson,* 33 N. J. Eq. (6 Stew.) 388; *Mahn* v. *Hussey,* 28 N. J. Eq. (1 Stew.) 546; *Glass* v. *Warwick,* 40 Pa. St. 140, 80 Am. Dec. 566; *Mercantile Trust Co.* v. *Missouri, K. & T. R. Co.* 36 Fed. 221, 1 L.R.A. 397, 4 Ry. & Corp. L. J. 362.

Bondholder may maintain action to foreclose where trustee refuses. In a case where a railroad mortgage provided that the principal should become due upon default in interest, and, upon request of a majority of the bondholders, that the trustees should foreclose the mortgage; and upon such request

of foreclosure for small installments of interest, however, is condemned as oppressive.[66] While in an action to foreclose, brought for the non-payment of a small balance of interest, the court may dismiss the complaint, it is not, in the absence of any waiver of the default, bound to do so, and its refusal will not be such an error as to authorize a reversal on appeal.[67] Thus, where a debt is made payable at the end of a term of years, with the interest payable annually, a bill to foreclose the mortgage which secures it may be properly filed at the expiration of the first year if the interest is not paid.[68]

Where a mortgage is conditioned for the payment of a certain sum with interest according to the terms of a note, to secure which the mortgage was given, the terms of such note will be imported into the mortgage, and a failure to pay the interest, as provided in the note, will constitute a breach of the contract for which the mortgage may be foreclosed.[69] Some of the cases, however, hold that a failure to pay interest as it becomes due, under such a clause in the note or mort-

the trustees filed a bill to foreclose in the state courts, which was dismissed for want of jurisdiction; and, before their appeal therefrom was determined, upon request of a bondholder, refused to renew the litigation in the federal court; a suit brought thereby the bondholder in his own name may be sustained to the extent of accrued and unpaid interest. *Beekman* v. *Hudson River West Shore R. Co.* 35 Fed. 3. In such an action a mortgagee who has assigned the bond and mortgage before any payment of interest is due cannot put in the defense that before the assignment the interest was settled with him, but not indorsed, as against the purchaser without knowledge thereof. And a subsequent purchaser of the premises who purchased subject to the bond and mortgage, who has neither paid anything on his purchase nor assumed payment of the bond, and who does not allege that he supposed the interest was paid, cannot, in such suit, claim any benefit from the alleged previous payment of interest. *Newton Twp. Bldg. & Loan Assoc.* v. *Boyer,* 42 N. J. Eq. 273, 10 Atl. 876.

[66] *Mabie* v. *Hatinger,* 48 Mich. 341.

[67] *House* v. *Eisenlord,* 102 N. Y 713.

[68] *Dederick* v. *Barber,* 44 Mich. 19; *Scheibe* v. *Kennedy,* 64 Wis. 564.

[69] *Scheibe* v. *Kennedy,* 64 Wis. 564.

gage, authorizes a foreclosure for such interest only, and not for the principlal, which is not yet due.[70]

Where a note or bond secured by a mortgage, provides that on default in the payment of the interest thereon for a specified number of days after the same becomes due and payable, the principal shall, at the option of the obligee, become payable after default, and the obligee ratifies several parol extensions of the time for paying the interest made by an agent, a subsequent similar extension will be deemed a waiver of the forfeiture, and an action to foreclose for such interest will not be permitted.[71]

Where a note contains a clause providing that "any interest remaining due and unpaid shall be added monthly to the principal and bear interest at the same rate," and the mortgage securing such note provides that in case default shall be made in the payment of the principal sum or of the interest thereon, or any part thereof, according to the terms of the note, the mortgagee shall be empowered to proceed to sell the mortgaged premises in the manner prescribed by law; the mortgagee will have the right, on default in the monthly payment of interest, to commence an action to foreclose.[72] But such a clause in the mortgage, giving the mortgagee the right to sell in case of default, refers to a default in the payment of interest, not to a default in adding it unpaid to the principal; the right to dispose of the interest due and unpaid in the mode prescribed in the note, is given to the mortgagee and not to the mortgagor; and the mortgagee may delay exercising it, or waive it, but a delay in exercising such right cannot be so construed as to deprive him of it.[73]

Where a mortgage provides that upon failure to pay an installment of interest or principal when due, the whole sum

[70] *Bank of San Luis Obispo* v. *Johnson,* 53 Cal. 99.

[71] *Bell* v. *Bomaine,* 30 N. J. Eq. (3 Stew.) 24.

[72] *Bricknell* v. *Batchelder,* 62 Cal. 623.

[73] *Bricknell* v. *Batchelder,* 62 Cal. 623.

shall become due and payable if the mortgagee so elects,[74] a formal notice of election to foreclose the whole debt on failure to pay an installment is unnecessary; a declaration of such election in the complaint will be sufficient.[75]

It has been held that conditions inserted in a mortgage, giving the trustees and bondholders power to waive defaults in interest which have continued six months after demand, do not give them any power to anticipate a default and provide for any waiver or extension of time of payment upon such default in the future.[76]

The supreme court of New York, in the case of Trenor v. La Count[77] say that an action to foreclose a mortgage, in which the plaintiff elects to have the entire sum become due for default in payment of interest for more than thirty days, in accordance with a provision incorporated in the mortgage, will not be stayed simply on the ground that plaintiff's attorneys are unfriendly towards the defendants.

§ 329. Equitable mortgage to repay purchase money.— An instrument designated as a "memoranda of contract," signed by the parties to be charged, recited that the party for whose benefit the instrument was given had advanced the money with which to purchase a certain piece of land, which was described in the instrument, the use and control of which was to be turned over to such party until sold, and when sold the purchase price was to be returned to him with one half of the profit. On the death of the parties purchasing, an action was brought on the contract with a demand in the complaint that the land be ordered sold and that the claim for the purchase money advanced be paid out of the proceeds. The court held that the instrument was an equitable mortgage,

[74] *Lowenstein* v. *Phelan,* 17 Neb. 429.

[75] *Johnson* v. *VanVelsor,* 43 Mich. 208. See *ante,* chap. iii.

[76] *McClelland* v. *Norfolk Southern R. Co.* 110 N. Y. 469, 18 N. E. 237, 18 N. Y. S. R. 344, 38 Alb. L. J. 410, 1 L.R.A. 299, 6 Am. St. Rep. 397.

[77] 84 Hun (N. Y.) 426, 32 N. Y. Supp. 412, 65 N. Y. S. R. 610.

and that the plaintiff was entitled to have the land sold to pay the debt evidenced by it. No time having been fixed in which the purchase money was to be repaid, the law required that it should be paid within a reasonable time.[78]

§ 330. Equitable mortgage by deposit of title deeds.— In England it has long been held that a deposit of title deeds with a creditor by his debtor is evidence of a valid agreement to give a mortgage, which agreement may be enforced by treating the transaction as an equitable mortgage.[79] Some of the American courts, however, have repudiated this doctrine and refused to recognize this species of mortgage;[80] but in many states such mortgages are valid, although not a common form of security.[81] In those states where equitable mortgages by deposit of title deeds are valid, they may be foreclosed by an equitable action. In New York a mere parol agreement to make a mortgage, or a deposit of a deed, does not create an equitable lien; the doctrine is said to be almost unknown, because there is no practice of creating liens in that manner.[82] It is very questionable whether the doctrine of an equitable mortgage by a deposit of title deeds could be maintained under the New York statutes. It has been held in Tennessee that a mortgage by parol and a deposit of title deeds, is not valid under the statute;[83] and the same doctrine, it seems, prevails in Massachusetts.[84]

[78] *Brown* v. *Brown,* 103 Ind. 23.

[79] See *Stoddard* v. *Hart,* 23 N. Y. 556, 560.

[80] See *Stoddard* v. *Hart,* 23 N. Y. 556, 561; *Berry* v. *Mutual Ins. Co.* 2 Johns. Ch. (N. Y.) 603; *Vanmeter* v. *McFadden,* 8 B. Mon. (Ky.) 435; *Shitz* v. *Dieffenbach,* 3 Pa. St. 233; *Bicknell* v. *Bicknell,* 31 Vt. 498.

[81] See *Mounce* v. *Byars,* 16 Ga. 469; *Gothard* v. *Flynn,* 25 Miss. 58; *Gale* v. *Morris,* 29 N. J. Eq. (2 Stew.) 222; *Hackett* v. *Reynolds,* 4 R. I. 512; *Jarvis* v. *Dutcher,* 16 Wis. 307. See also *Chase* v. *Peck,* 21 N. Y. 581, 584.

[82] *Stoddard* v. *Hart,* 23 N. Y. 556, 561. See *Berry* v. *Mutual Ins. Co.* 2 Johns. Ch. (N. Y.) 603.

[83] *Meador* v. *Meador,* 3 Heisk. (Tenn.) 562.

[84] *Ahrend* v. *Odiorne,* 118 Mass. 261, 19 Am. Rep. 449.

§331. Agreement to execute mortgage.—An agreement to execute a mortgage on land is in equity a specific lien upon such land;[85] and a mortgage thus created, is entitled to preference over subsequent judgments.[86] But the agreement to execute a mortgage must be in writing, the mere advancement of money not being such a part performance as will take the contract out of the statute of frauds.[87]

It is a general principle in equity jurisprudence that an agreement in writing to execute a mortgage, or a mortgage defectively executed, or an imperfect attempt to create a mortgage, or an apportionment of specific property to the discharge of a particular debt, will create a mortgage in equity which will have preference over subsequent judgments. This rule is founded on the principle that a court of equity looks upon things agreed to be done as actually performed.[88] An agreement in writing to execute a mortgage will be enforced, where it is plain that the parties intended to impose a charge upon specified lands as a security for the payment of a sum of money; and the agreement will be treated as conferring rights similar to those inherent in mortgages.[89] And this is

[85] See *Payne* v. *Wilson*, 74 N. Y. 348, 351; *Chase* v. *Peck*, 21 N. Y. 581; *Seymour* v. *Canandaigua & N. F. R. R. Co.* 14 How. (N. Y.) Pr. 531; *White* v. *Carpenter*, 2 Paige Ch. (N. Y.) 217, 264; *In re Howe*, 1 Paige Ch. (N. Y.) 125, 129, 130, 19 Am. Dec. 395; *Bloom* v. *Noggle*, 4 Ohio St. 45.

[86] *Payne* v. *Wilson*, 74 N. Y. 348, 352; *Robinson* v. *Williams*, 22 N. Y. 380, 386; *In re Howe*, 1 Paige Ch. (N. Y.) 125, 129, 19 Am. Dec. 395; *Rockwell* v. *Hobby*, 2 Sandf. Ch. (N. Y.) 9.

[87] *Marquat* v. *Marquat*, 7 How. (N. Y.) Pr. 417; *Dean* v. *Anderson*, 34 N. J. Eq. (7 Stew.) 496, and note. There is an exception to this rule where an accident, fraud or mistake is shown, and where, upon the well established principles of equity, such relief would be permissible. See *Ray* v. *Adams*, 4 Hun (N. Y.) 332.

[88] *National Bank of Norwalk* v. *Lanier*, 7 Hun (N. Y.) 623; *Burger* v. *Hughes*, 5 Hun (N. Y.) 180. See *Siemon* v. *Schurck*, 29 N. Y. 598; *Wadsworth* v. *Wendell*, 5 Johns. Ch. (N. Y.) 230; *Arnold* v. *Patrick*, 6 Paige Ch. (N. Y.) 310 *White* v. *Carpenter*, 2 Paige Ch. (N. Y.) 217; *Morse* v. *Faulkner*, 1 Anst. 11, 14; *Burn* v. *Burn*, 3 Ves. 582.

[89] See *Chase* v. *Peck*, 21 N. Y. 581; *DePierres* v. *Thorn*, 4 Bosw. (N. Y.) 266; *Stewart* v. *Hutchins*, 6 Hill (N. Y.) 143; *Seymour* v.

true also where the parties do not explicitly contract for the giving of a mortgage, but it is manifestly equitable that the land should be charged with the indebtedness.[90]

It has been held that an attempt to execute a mortgage, which fails for want of some of the formalities required by statute, will constitute a valid mortgage in equity,[91] even against judgment creditors.[92] But an instrument in the form of a mortgage, which contains the name of no mortgagee, will not become operative by its delivery to one who advances money upon the agreement that he shall hold the paper as security for his loan.[93] And it is questionable whether such an instrument could be made effectual by parol authority from a mortgagor to insert the lender's name as mortgagee.[94]

§ 332. Junior mortgagee cannot compel foreclosure by senior mortgagee.—It rests with the holder of a mortgage to select for himself the time and manner of enforcing his security, so long as he does not prosecute it unlawfully or unjustly as against a subordinate interest.[95] And the principle is well established that a junior mortgagee, in an action to foreclose his mortgage, cannot make the prior mortgagee a party to the suit, and compel the foreclosure of such prior mortgage.[96]

Canandaigua & N. F. R. R. Co. 14 How. (N. Y.) Pr. 531.

[90] *Hoyt* v. *Doughty,* 4 Sandf. (N. Y.) 462.

[91] *Payne* v. *Wilson,* 74 N. Y. 348.

[92] *Delaire* v. *Keenan,* 3 Desaus. (S. C.) Eq. 74, 4 Am. Dec. 604. *Contra, Price* v. *Cutts,* 29 Ga. 142, 74 Am. Dec. 52.

[93] *Chauncey* v. *Arnold,* 24 N. Y. 330, 2 Am. L. Reg. 317.

[94] *Chauncey* v. *Arnold,* 24 N. Y. 330, 2 Am. L. Reg. 317.

[95] *Adams* v. *McPartlin,* 11 Abb. (N. Y.) N. C. 369.

[96] *Adams* v. *McPartlin,* 11 Abb. (N. Y.) N. C. 369; *McReynolds* v. *Munns,* 2 Keyes (N. Y.) 214. See *Emigrant Industrial Savings Bank* v. *Goldman,* 75 N. Y. 127; *Frost* v. *Koon,* 30 N. Y. 428; *Corning* v. *Smith,* 6 N. Y. 82. See *ante,* chap. ix. See also *Seibert* v. *Minneapolis & St. L. R. Co.* 52 Minn. 246, 53 N. W. 1151; *Lambertville Nat. Bank* v. *McCready Bag & Paper Co.* (N. J. Ch.) 15 Atl. 388, 1 L.R.A. 334; *Garrett* v. *Peirce,* 74 Ill. App. 225. See *Threefoot Bros. & Co.* v. *Hillman,* 130 Ala. 244, 30 So. 513, 89 Am. St. Rep. 39.

Neither can he maintain a suit to cut off, by foreclosure, the interest of the prior mortgagee.[97] But he may make him a party to the foreclosure suit for the purpose of having the amount of his incumbrance ascertained and paid out of the proceeds.[98] And where a prior mortgagee has been made a party to an action to foreclose by the junior mortgagee, he may in his answer set up the prior mortgage and ask to have it paid in its priority, before any of the proceeds of the sale are applied to the payment of the plaintiff's mortgage; and the court may render judgment to that effect;[99] but it is improper to insert such a clause in the judgment, where it may operate to the prejudice of the other defendants who have no opportunity for contesting the priority claimed.[1] The prior mortgagee is not obliged, however, to take this course to protect his rights.[2]

§ 333. **Joinder of actions.**—The Code permits the plaintiff to unite in the same complaint two or more causes of action, whether they are such as have heretofore been denominated legal or equitable, or both, where they arise out of the same transaction, or transactions connected with the same subject matter.[3] Where the plaintiff has other liens upon the property besides his mortgage lien, he may set them out in the complaint and have them established; or after the sale of the premises he may present and establish a claim to the surplus, the same as any other person holding a lien subsequent to the mortgage.[4]

Where a mortgagee holds two or more mortgages upon the same premises they should both be set out in the com-

[97] *Rose* v. *Chandler*, 50 Ill. App. 421.

[98] *Emigrant Industrial Savings Bank* v. *Goldman*, 75 N. Y. 127.

[99] *Doctor* v. *Smith*, 16 Hun (N. Y.) 245. See *ante*, chap. ix.

[1] *Payn* v. *Grant*, 23 Hun (N. Y.) 134.

[2] *Payn* v. *Grant*, 23 Hun (N. Y.) 134.

[3] N. Y. Code Civ. Proc. § 484.

[4] *Field* v. *Hawxhurst*, 9 How. (N. Y.) Pr. 75; *Tower* v. *White*, 10 Paige Ch. (N. Y.) 395.

plaint and foreclosed in the same action, only one suit to foreclose both being proper; if the mortgagee brings two suits he will be allowed costs in but one of them.[5] And the assignee of two mortgages on the same land executed by the same mortgagor at different times to different mortgagees may unite them in one action to foreclose.[6] So also two mortgages given by different persons to secure the same debt may be foreclosed in one and the same suit.[7] And a single mortgage given to secure two debts may be foreclosed in favor of both creditors in the same action.[8] Only one foreclosure being permissible on a single mortgage to secure different debts due to different creditors, if more than one action is commenced they will be consolidated.[9]

If a person holds two mortgages on the same property to secure different debts, one of which is due, and the other is not due, he may file his complaint for the foreclosure of both mortgages, although the second may not be due, providing it will become due before the decree for the sale of the property is entered; the defendant cannot defeat the action as to the second mortgage by tendering the amount due on the first mortgage after the maturity of the second.[10] And where the whole of the junior mortgage has become due and payable, and a part only of the senior mortgage is due, the complainant will be entitled to a decree to sell sufficient of the mortgaged premises to pay the amount of both mortgages, unless the defendant, previous to the sale, pays the junior

[5] *Roosevelt* v. *Ellithrop,* 10 Paige Ch. (N. Y.) 415; *Demarest* v. *Berry,* 16 N. J. Eq. (1 C. E. Gr.) 481; *Oconto Co.* v. *Hall,* 42 Wis. 59.

[6] *Pierce* v. *Balkam,* 56 Mass. (2 Cush.) 374.

[7] *McGowan* v. *Branch Bank of Mobile,* 7 Ala. 823. Under the California statute (Civ. Code § 726) two deeds absolute in form, but in fact mortgages, given for the benefit of the same parties to secure the same indebtedness, but on different property, must be included and foreclosed in the same action. *Hall* v. *Arnott,* 80 Cal. 348, 22 Pac. 200.

[8] *Chamberlin* v. *Beck,* 68 Ga. 346.

[9] *Benton* v. *Barnet,* 59 N. H. 249.

[10] *Hawkins* v. *Hill,* 15 Cal. 499, 76 Am. Dec. 499. See *Campbell* v. *Macomb,* 4 Johns. Ch. (N. Y.) 534.

mortgage and the costs of foreclosure, together with the portion of the senior mortgage which has become due.[11]

Where a mortgagee is the holder of two mortgages upon the same property, but one of them covers only a portion of the premises included in the other, suit should be brought in the first place for the foreclosure of the mortgage covering the entire premises, for an action upon the other mortgage would then be unnecessary.[12] But a person who is the holder of two mortgages upon separate pieces of property securing the same debt, or securing different debts cannot foreclose both of such mortgages in one action.[13] And where one mortgage on several separate lots is given to secure a gross sum, the instrument providing that each lot shall bear its proportionate share, and be discharged upon the payment of that proportionate share, the instrument cannot be foreclosed on all the lots in the same action, but there must be a distinct action to foreclose on each lot.[14]

§ 334. Consolidation of actions.—The Code provides, that where two or more actions, in favor of the same plaintiff against the same defendant, for causes of action which may be joined, are pending in the same court, the court may, in its discretion, by order, consolidate any or all of them into one action.[15] And where one of the actions is pending in the supreme court, and another is pending in another court, the supreme court may, by order, remove to itself the action in the inferior court, and consolidate it with that in the supreme court.[16]

The power of the court to consolidate several actions pending in such court, exists only where it would have been

[11] *Hall* v. *Bamber,* 10 Paige Ch. (N. Y.) 296.

[12] *Demarest* v. *Berry,* 16 N. J. Eq. (1 C. E. Gr.) 481.

[13] See *Tobin* v. *Smith* (Ohio C. P.) 1 Ohio N. P. 75, 1 Ohio Dec. 675.

[14] See *Child* v. *Morgan,* 51 Minn. 116, 52 N. W. 1127. See *ante,* § 308.

[15] N. Y. Code Civ. Proc. § 817.

[16] N. Y. Code Civ. Proc. § 818.

proper to join the several causes of action in the same complaint under the provisions of the Code;[17] even where the power exists the court may, in its discretion, refuse to exercise it. It has been held that the power conferred by these sections of the Code is confined exclusively to the consolidation of actions at law, and is not applicable to cases in equity.[18] It was held, however, under a former statute, that suits in equity, such as foreclosures of mortgages, may be consolidated as well as actions at law, but that the granting or denying of the application is discretionary.[19]

It has been said, where two actions were brought to foreclose two mortgages on separate adjoining parcels of land, both of which were executed by the defendant to the plaintiff for the same debt, and the parties in both actions were the same and the defences identical, that the actions could not be consolidated;[20] because actions for the foreclosure of mortgages are not actions on contract within the meaning of the Code of Civil Procedure,[21] which provides for the joinder in the same complaint of such actions alone. Foreclosures are actions *in rem* against parcels of land, and such actions cannot be consolidated where they do not arise out of the same transaction or subject-matter.[22] But where several notes secured by a single mortgage are held by different parties, if each holder brings a foreclosure suit, the actions may be consolidated.[23]

In South Carolina one mortgage by A, and another by A and B, to secure the same debt may be foreclosed in one action,[24] but an action of partition and one for foreclosure of

[17] N. Y. Code Civ. Proc. § 484.

[18] *Selkirk* v. *Wood,* 9 N. Y. Civ. Proc. Rep. 141; *Bech* v. *Ruggles,* 6 Abb. (N. Y.) N. C. 69; *Lockwood* v. *Fox,* 8 Daly (N. Y.) 11, 27; *Kipp* v. *Delamater,* 58 How. (N. Y.) Pr. 183; *Grant* v. *Spencer,* Voorhies Code (1864), 336f.

[19] *Eleventh Ward Savings Bank* v. *Hay,* 55 How. (N. Y.) Pr. 438.

[20] *Selkirk* v. *Wood,* 9 N. Y. Civ. Proc. Rep. 141.

[21] N. Y. Code Civ. Proc. § 484.

[22] *Selkirk* v. *Wood,* 9 N. Y. Civ. Proc. Rep. 141.

[23] *Benton* v. *Barnet,* 59 N. H. 249.

[24] *Dial* v. *Gray,* 24 S. C. 572.

mortgage, cannot be united anywhere.[25] Equity will not permit one tenant in common in the possession of the land to foreclose by separate advertisements three mortgages which he holds upon his co-tenant's interest, all of which are past due.[26] But the foreclosure of different mortgages given by a railway company will not be consolidated where the cases are not, and there is no certainty as to when either one will be ripe for decree; and in case of one being delayed while another is speeded, a consolidation will never be proper.[27]

It seems that after suits to foreclose trust deeds covering different premises and having different trustees, have been consolidated, it is improper to consolidate debts and direct the sale of the premises conveyed by both deeds to pay the entire amount of indebtedness.[28]

[25] *Belt* v. *Bowie,* 65 Md. 350, 4 Atl. 295.

[26] *Dohm* v. *Haskin,* 88 Mich. 144, 50 N. W. 108.

[27] *Mercantile Trust Co.* v. *Missouri, K. & T. R. Co.* 41 Fed. 8, 7 Ry. & Corp. L. J. 30.

[28] *Brown* v. *Kennicott,* 30 Ill. App. 89.

CHAPTER XIII.

THE COMPLAINT.

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§ 335. Form of complaint.—The complaint in an action for the foreclosure of a mortgage, in respect to its form and

other matters, is regulated by the Code of Civil Procedure.[29] The complaint under the New York Code is the same in substance as the former bill in equity, and must, as in other actions, contain the title of the action, and state in plain and concise language the facts constituting the cause of action, "without unnecessary repetition." It must also contain a demand for the judgment to which the plaintiff believes himself entitled.[30] It is also required that "the complaint, in an action to foreclose a mortgage upon real property, must state, whether any other action has been brought to recover any part of the mortgage debt, and if so, whether any part thereof has been collected." [31]

In an action for foreclosure the mortgage and the bond or note secured thereby must, in some manner, be made a part of the complaint or bill;[32] but if the substance of the mortgage is set out, it will be sufficient.[33] The plaintiff in a suit to foreclose a mortgage can recover upon default only on the cause stated in his complaint or bill;[34] and where a personal judgment is desired for any deficiency that may arise, facts

[29] N. Y. Code Civ. Proc. § 518, et seq.

[30] N. Y. Code Civ. Proc. § 481. Similar provisions are made by the codes of the various states in which codes of procedure have been adopted. See California Code Civ. Proc. § 426; Dakota Code Civ. Proc. § 111; Florida Code Civ. Proc. § 93; Iowa Code Proc. § 2646; North Carolina Code Civ. Proc. § 93; Ohio Code Civ. Proc. § 85. See also *Wa Ching* v. *Constantine*, 1 Idaho (N. S.) 266.

[31] N. Y. Code Civ. Proc. § 1629; *Lovett* v. *German Reformed Church*, 12 Barb. (N. Y.) 67; *North River Bank* v. *Rogers*, 8 Paige Ch. (N. Y.) 649.

[32] See *Whitney* v. *Buckman*, 13 Cal. 536; *Harlan* v. *Smith*, 6 Cal. 173; *Shoaf* v. *Joray*, 86 Ind. 70; *Buck* v. *Axt*, 85 Ind. 512; *Ogborn* v. *Eliason*, 77 Ind. 393; *Hiatt* v. *Goblt*, 18 Ind. 494; *Brown* v. *Shearon*, 17 Ind. 239; *Mickle* v. *Maxfield*, 42 Mich. 304. See *post*, § 340.

[33] *Emeric* v. *Tams*, 6 Cal. 155; *Ætna Life Ins. Co.* v. *Finch*, 84 Ind. 301; *Sturgeon* v. *Board of Commissioners*, 65 Ind. 302; *Cecil* v. *Dynes*, 2 Ind. 266. See *Washington Investment Assoc.* v. *Stanley*, 38 Or. 319, 63 P. 489, 84 Am. St. Rep. 793, 58 L.R.A. 816.

[34] See *Simonson* v. *Blake*, 12 Abb. (N. Y.) Pr. 331, 20 How. (N. Y.) Pr. 484; *Shoaf* v. *Joray*, 86 Ind. 70; *Knowles* v. *Rablin*, 20 Iowa, 101; *Hansford* v. *Holdam*, 14 Bush (Ky.) 210; *Converse* v. *Blumrich*, 14 Mich. 109, 90 Am. Dec. 230.

sufficient to support it must be set out in the complaint, and such relief specially demanded.

In those cases where there is a demand for a foreclosure merely, neither the note secured nor the copy of it need be filed with the complaint;[35] but a complaint seeking to foreclose a mortgage given to secure a note, with a general demand for judgment upon the indebtedness evidenced by the note, is not a complaint for foreclosure simply; and the failure to file therewith a copy of the note is fatal on demurrer.[36] It has been held that in a suit to foreclose a mortgage, where it is averred that the land was the separate estate of the wife, and the conveyance was made by the wife to the husband concurrently with the execution of the mortgage by the husband and wife, it is necessary that the complaint should show that the debt secured by the mortgage was one which the wife had herself contracted, and that it was a debt within her power to contract.[37]

§ 336. Same—Foreclosure by partnership.—It is a well-settled rule of pleading that in a complaint for the foreclosure of a mortgage, the plaintiff should show ownership of it either as a mortgagee, assignee, or otherwise. In the case of foreclosure by a partnership, it has been said that the existence of the partnership is sufficiently alleged and proved if a complaint in foreclosure alleges that the mortgage was given to certain persons named, who constituted a partnership firm, and the mortgage contains a recital that the persons named were partners, since the execution of the mortgage is an admission by defendants of the existence of the partnership.[38]

[35] *Roche* v. *Moffitt,* 107 Ind. 58, 3 N. E. 940. See *post,* § 340.

[36] *Roche* v. *Moffit,* 107 Ind. 58, 3 N. E. 940. See *post,* § 340.

[37] *Jouchert* v. *Johnson,* 108 Ind. 436, 9 N. E. 413. Citing *Cupp* v. *Campbell,* 103 Ind. 213, 2 N. E. 565; *Vogel* v. *Leichner,* 102 Ind. 55.

[38] *Moses* v. *Hatfield,* 27 S. C. 324, 3 S. E. 538.

§ 337. Allegation as to claim.—In an action to foreclose a mortgage, the claim which the mortgage was given to secure, and upon which the action is founded, should be fully set out, and it must appear that the debt secured is due and owing to the complainant;[39] if the obligation secured is a bond, default in the performance of its conditions must be shown.[40] Where the complainant is the assignee of the claim, the assignment of the note and mortgage should be averred, but it is not necessary to set out a copy of the assignment,[41] because under such an averment the complainant may prove an indorsement, and the transfer and delivery of the note and mortgage to him in that manner.[42]

Whatever can be claimed by virtue of the mortgage must be set out in the complaint in foreclosure, for a demand can

[39] *Savings Bank of Southern California* v. *Asbury,* 117 Cal. 96, 48 P. 1081.

See *Cornelius* v. *Halsey,* 11 N. J. Eq. (3 Stockt.) 27. But see *Chesterman* v. *Eyland,* 81 N. Y. 401; *Brown* v. *Kahnweiler,* 28 N. J. Eq. (12 C. E. Gr.) 311; *O'Connor* v. *Stone,* 19 Ky. Law. Rep. 1929, 43 S. W. 483; *Luddy* v. *Pavkovich,* 137 Cal. 284, 70 P. 177; *Chesney* v. *Chesney,* 33 Utah 503, 94 P. 989.

See also *Newhall* v. *Sherman, Clay & Co.* 124 Cal. 509, 57 P. 387.

[40] *Coulter* v. *Bower,* 64 How. (N. Y.) Pr. 132.

In the supreme court of New York, in the case of *Davies* v. *New York Concert Company* (41 Hun (N. Y.) 492), a complaint by a bondholder in an action to foreclose a mortgage given to secure bonds stated the amount of the bonds and the times when they became payable, and that they were not paid at maturity; but did not allege that the company neglected or refused to pay them at the place, or in the manner provided; nor that it had been requested to pay them, or had neglected to comply with any such request, or that it was in any manner in default, and was held to be insufficient. In this case the action was brought by a bondholder upon the refusal of the trustee to bring such action, alleging that the company had neglected to perform the covenant to bear, pay, and discharge as soon as the same became due and payable, all taxes, charges, and assessments upon the mortgaged premises, and the court held this insufficient, as it appeared that the trustee was not informed of the default, or requested to commence the action to foreclose the mortgage. See *ante,* § 132.

[41] See *Green* v. *Marble,* 37 Iowa, 95; *Barthol* v. *Blakin,* 34 Iowa, 452; *Nichol* v. *Henry,* 89 Ind. 54; *Kurtz* v. *Sponable,* 6 Kan. 395; *Andrews* v. *McDaniel,* 68 N. C. 385.

[42] *Mundy* v. *Whittemore,* 15 Neb. 647.

not be split and made the basis of separate suits.[43] In those cases, however, where the indebtedness is not the foundation of the action, it need not be separately described.[44] Where there is a stipulation in a mortgage for the payment of taxes and assessments, the complaint in foreclosure must set forth the amount of taxes and assessments paid by the plaintiff for which judgment will be asked.[45] If any payments have been indorsed upon the mortgage, they should be fully set out in the complaint, because where no reference is made to them the averments cannot be aided by proof of such indorsements.[46]

§ 338. Allegation as to title and ownership of mortgage.—In a complaint to foreclose a mortgage, the plaintiff should show ownership of it either as mortgagee, assignee or otherwise.[47] It is not necessary to aver in so many words that the defendant has title to the mortgaged premises; it is sufficient to aver the making of the mortgage; [48] neither is it necessary to anticipate any defense.[49] A complaint by A in

[43] *Vincent* v. *Moore,* 51 Mich. 618.

[44] *Risk* v. *Hoffman,* 69 Ind. 138.

[45] *Hibernia Savings and Loan Society* v. *Conlin,* 67 Cal. 178.

[46] *Nichol* v. *Henry,* 89 Ind. 54.

[47] *Ward* v. *Branson,* 126 App. Div. 508, 110 N. Y. Supp. 335; *Sielbeck* v. *Grothman,* 248 Ill. 435, 94 N. E. 67. Sufficiency of averment as to assignment. *Caesar* v. *Capell,* 83 Fed. 403; *Worth* v. *Knickerbocker Trust Co.* 171 Ala. 621, 55 So. 144; *Buckheit* v. *Decatur Land Co.* 140 Ala. 216, 37 So. 75. Sufficiency of pleading assignment by executrix pursuant to order of court. *Wells Fargo & Co.* v. *McCarthy,* 5 Cal. App. 301, 90 P. 203. Where mortgage is assigned to trustee for collection, the legal title vests in him, and it is unnecessary to state in the complaint the means by which he acquired it. *Cortelyou* v. *Jones,* 132 Cal. 131, 64 P. 119. Plaintiff must show assignment of bond as well as mortgage. *Marine* v. *Carlson,* 49 App. Div. 276, 63 N. Y. Supp. 162. See also *Smith* v. *Thompson,* 118 App. Div. 6, 103 N. Y. Supp. 336. Sufficiency of allegation of ownership of bonds secured by trust deed. *Citizens' Bank* v. *Los Angeles Iron & Steel Co.* 131 Cal. 187, 63 P. 462, 82 Am. St. Rep. 341.

[48] *Bull* v. *Meloney,* 27 Conn. 560; *Frink* v. *Branch,* 16 Conn. 260, 268; *Graham* v. *Fitts,* 53 Fla. 1046, 43 So. 512.

[49] *Frink* v. *Branch,* 16 Conn. 260, 268; *Palmer* v. *Mead,* 7 Conn. 149, 157; *Spear* v. *Hadden,* 31 Mich. 265; *Cornelius* v. *Halsey,* 11 N. J. Eq. (3 Stockt.) 27.

the usual form, to foreclose a mortgage given to A. and B. to secure a note payable to A., is not bad for want of sufficient allegations, because, if objectionable at all, it is for want of proper parties plaintiff.[50] In an action to forclose a mortgage given to secure the perforamnce of the conditions of a bond, one of which conditions was that the obligor should pay the sum for which a note had previously been given to the plaintiff, it is not necessary to allege in the complaint that the plaintiff is still the holder of the note.[51]

The statute of Vermont providing for foreclosure by petition does not require the fullness required in a bill. A general and comprehensive statement of facts, constituting the ground of right and liability, is sufficient. Thus, where a petition for foreclosure by an assignee of a mortgage, after alleging the assignment to the petitioner and delivery to him of the note and mortgage, alleged that the note and mortgage had ever since been and still were his property, and that he was the holder, owner and bearer of the note, it was held that there was a sufficient allegation of title to present it for litigation on answer.[52]

While by a clerical error the name of a mortgagee is incorrectly given in the mortgage and in the notes secured thereby, it is not necessary to set out such error in the complaint and to ask to have the instrument reformed, because the mistake may be explained by evidence or disregarded as immaterial.[53]

§ 339. Allegation of execution and delivery of mortgage.—The complaint should show the execution and delivery of the mortgage,[54] its date and the amount due thereon,

[50] *Chrisman* v. *Chenoweth,* 81 Ind. 401.

[51] *Matteson* v. *Matteson,* 55 Wis. 450.

[52] *Sprague* v. *Rockwell,* 51 Vt. 401.

[53] *Germantown Farmers' Mut. Ins. Co.* v. *Dhein,* 57 Wis. 521. See also *Wilson* v. *Calder,* 8 Kan. App. 856, 55 P. 552.

[54] See *Bull* v. *Meloney,* 27 Conn. 560; *Frink* v. *Branch,* 16 Conn. 260, 268.

the parties to it and the place of record,[55] together with a description of the premises mortgaged. An allegation that the defendant executed the instrument sued upon, setting it out in full, is equivalent to an allegation that he made all the covenants and promises therein contained, and assumed all the liabilities thereby created.[56] And it has been held that an allegation in a complaint to foreclose, that the defendant "made, executed, acknowledged and delivered a certain deed of mortgage," is sufficient and can only be construed to mean that the mortgage was properly made and valid in its operation;[57] but that an allegation that "the defendant gave a mortgage" is simply a conclusion of law. If the mortgage is not set out in, or made a part of, the complaint, it will be insufficient to authorize a decree for the sale of the premises upon default in answering.[58]

In an action by a mortgagee, against the mortgagor and a subsequent purchaser, to foreclose a mortgage on real estate, the complaint alleged that the mortgage had been duly executed and recorded, setting out a copy of the mortgage, which did not show a certificate of acknowledgment. On demurrer it was held that the acknowledgment was no part of the cause of action, and a copy thereof was not necessary, and that the reasonable inference from the averments of the complaint was, that the mortgage had been duly acknowledged. If such was not the case, the want of an acknowledgment should have been set up affirmatively as a defence.[59]

§ 340. Description of note or bond.—If a bond has been given with the mortgage, it should be briefly set out in the

[55] It has been held that the complaint should allege that the mortgage was properly recorded at the proper office; *Magee* v. *Sanderson,* 10 Ind. 261; but that a failure to allege such recording of the mortgage will be cured by proof thereof at the trial without objection; *Lyon* v. *Perry,* 14 Ind. 515.

[56] *Budd* v. *Kramer,* 14 Kan. 101.

[57] *Moore* v. *Titman,* 33 Ill. 358; *McAllister* v. *Plant,* 54 Miss. 106. See *Laurent* v. *Lanning,* 32 Or. 11, 51 P. 80.

[58] *Hussey* v. *Hussey,* 1 Utah, 241.

[59] *Sturgeon* v. *Board of Commissioners,* 65 Ind. 302.

complaint, together with the terms and conditions of both instruments. If the note set out in the complaint does not correspond with that described in the mortgage, but the complaint shows that this is a mere error in description, and that the mortgage was designed to secure the note described in such complaint, it states a good cause of action.[60] And where the note secured by the mortgage is imperfectly described in the complaint, if such note be filed with the complaint, and alleged to be the note which the mortgage was given to secure, and this allegation is proved on the trial, the defective description will thereby be cured.[61] Where the variance between the note described in the mortgage and the note introduced in the suit is not due to a misdescription, but only to an imperfect description, the note will be sufficiently identified,[62] and such variance will be no objection to the introduction of the note in evidence.[63]

The note or bond and the mortgage securing the same, are usually made parts of the complaint in some manner, and control the allegations thereof.[64] Copies of them may be set out in the complaint or annexed thereto. It is not sufficient merely to file the originals or copies thereof with the complaint without referring to them and making them a part of it;[65] it will be sufficient, however, if the bill sets out the substance of the mortgage debt;[66] it should show that the mortgage was executed for a valuable consideration,[67] although it is not necessary that there be literal exactness in describing the debt

[60] *Dorsch* v. *Rosenthall,* 39 Ind. 209; *Merchants' Nat. Bank* v. *Raymond,* 27 Wis. 567.

[61] *Cleavenger* v. *Beath,* 53 Ind. 172. See *Hadley* v. *Chapin,* 11 Paige Ch. (N. Y.) 245; *Dorn* v. *Bissell,* 180 Ill. 73, 54 N. E. 167.

[62] *Boyd* v. *Parker,* 43 Md. 182.

[63] *Hough* v. *Bailey,* 32 Conn. 288.

[64] *Armstrong* v. *Douglas Park Bldg. Ass'c,* 176 Ill. 298, 52 N. E. 886.

[65] *Brown* v. *Shearon,* 17 Ind. 239. See *Dumell* v. *Terstegge,* 23 Ind. 397, 85 Am. Dec. 466; *Hiatt* v. *Goblt,* 18 Ind. 494; *Triplett* v. *Sayre,* 3 Dana (Ky.) 590; *Harlan* v. *Murrell,* 3 Dana (Ky.) 180.

[66] *Cecil* v. *Dynes,* 2 Ind. 266; *Jocelyn* v. *White,* 201 Ill. 16, 66 N. E. 327.

[67] *Withers* v. *Little,* 56 Cal. 370.

secured. A statement that the mortgage was given to secure notes amounting to a specified sum, drawing a certain named interest, and held by designated individuals, upon which notes persons named are sureties, has been said to be a sufficient description.[68] And where the plaintiffs have a joint or a several interest in the money advanced upon the mortgage, that fact should be alleged in the complaint and the decree should be made to conform therewith.[69] So, where a mortgage describes a note it secures by giving the date, the amount, the time of payment, and the rate of interest thereof, it seems that such description in the complaint will be sufficient without giving the name of the maker.[70] But a failure to set out the note or bond and the mortgage properly in the complaint, is a defect which will be cured by the verdict of a jury or the findings of a court.[71]

§ 341. Allegation against mortgagor, subsequent purchasers and co-defendants.—In a suit against the mortgagor alone, the complaint need not allege that such mortgagor has not conveyed the land, or that the mortgage has been duly acknowledged and recorded;[72] neither is it necessary to allege title to the mortgage, for the mortgagor is estopped as to title, as the only purpose of the action is to foreclose.[73] But where an action in foreclosure is brought against a subsequent purchaser of the fee, if the complaint fails to allege either that the mortgage was on record at the time of the defendant's purchase, or that he had actual notice of such mortgage, it will be defective,[74] unless it is averred that such subsequent purchaser assumed and agreed to pay

[68] *Ætna Life Ins. Co.* v. *Finch,* 84 Ind. 301. See *Ogborn* v. *Eliason,* 77 Ind. 393.

[69] *Higgs* v. *Hanson,* 13 Nev. 356.

[70] *Ogborn* v. *Eliason,* 77 Ind. 393.

[71] *Martin* v. *Holland,* 87 Ind. 105; *Galvin* v. *Woollen,* 66 Ind. 464.

[72] *St. Marks Ins. Co.* v. *Harris,* 13 How. (N. Y.) Pr. 95; *Martens* v. *Rawdon,* 78 Ind. 85; *Snyder* v. *Bunnell,* 64 Ind. 403; *Perdue* v. *Aldridge,* 19 Ind. 290; *Culph* v. *Phillips,* 17 Ind. 209.

[73] *Shed* v. *Garfield,* 5 Vt. 39.

[74] *Peru Bridge Co.* v. *Hendricks,* 18 Ind. 11. The supreme court of

the mortgage debt as a part of the purchase money.[75] In a foreclosure against a subsequent purchaser, a failure to allege the recording of the mortgage will be cured by proof thereof at the hearing without objection.[76]

Where in an action to foreclose a mortgage, parties other than the mortgagor or his grantee are made co-defendants, if the complaint contains an allegation that such co-defendants have or claim to have some interest in or lien upon the mortgaged premises, which, if any, is subsequent to the plaintiff's mortgage, a cause of action will be sufficiently stated without averring the character of the interests claimed.[77] But a mere averment in a complaint to foreclose against a person other than the mortgagor, that "he is now the owner

Indiana, in the case of *Hoes* v. *Boyer,* (108 Ind. 494, 9 N. E. 427), say that in those cases where it is shown by the complaint in a foreclosure suit that all the defendants are subsequent purchasers of the mortgaged premises, there must be an averment that they purchased with actual notice, or that the mortgage was recorded within the time fixed by the statute, or before the sale and conveyance of the mortgaged property; but where it does not appear from the allegations in the complaint in such a case that any of the defendants are subsequent purchasers, it is not necessary to the sufficiency of the complaint that it should contain an averment that the mortgage has been recorded. And in the same case, the court say that an answer, by one of the defendants in a foreclosure suit, that he was a subsequent purchaser for value and without notice of the mortgage, is a sufficient answer to a complaint in which there is no averment that the mortgage has been properly recorder. See *Martens* v. *Rawdon,* 78 Ind. 85.

[75] *Scarry* v. *Eldridge,* 63 Ind. 44.

[76] *Lyon* v. *Perry,* 14 Ind. 515. See *Martens* v. *Rawdon,* 78 Ind. 85; *Faulkner* v. *Overturf,* 49 Ind. 265.

[77] *Frost* v. *Koon,* 30 N. Y. 428, 448; *Drury* v. *Clark,* 16 How. (N. Y.) Pr. 424; *Anthony* v. *Nye,* 30 Cal. 401; *Poett* v. *Stearns,* 28 Cal. 226; *Woodworth* v. *Zimmerman,* 92 Ind. 349; *Marot* v. *Germania Assoc.* 54 Ind. 37; *Bowen* v. *Wood,* 35 Ind. 268; *Case* v *Bartholow,* 21 Kan. 300; *Nooner* v. *Short,* 20 Kan. 624; *Seager* v. *Burns,* 4 Minn. 141; *Rice* v. *Hall,* 41 Wis. 453.

A petition which alleges the making of a note and mortgage when the mortgagor was the owner and in possession of the mortgaged premises, and that defendants "claim some title or interest in said property under and through the grantees of the mortgagor" is sufficient. *Hohl* v. *Reed,* 8 Kan. App. 54, 53 P. 676.

of the land," has been held not to be sufficient to show that the mortgage constitutes a lien upon the land as against him, because he may have acquired title to the land by purchase before the mortgage was executed.[78] Where any of the defendants are infants, the complaint should allege the requisite facts to show the interests of such defendants.[79]

An allegation in a complaint that a mortgagor was seized or pretended to be seized in fee simple of the land when he executed the mortgage, is held a sufficient allegation that he was in possession.[80] And where the complaint to foreclose does not state the real consideration for, or the exact amount due upon, the mortgage, a decree of foreclosure will be authorized, although the proofs may show a less sum to be due than that which was claimed, or a state of facts not averred in the complaint, if the facts shown are not incompatible with the allegations in the complaint.[81]

§ 342. Complaint under New York practice.—Under the rules prescribed by the New York Code of Civil Procedure the facts constituting the cause of action, and not the evidence of the facts, should be stated in the complaint.[82] Under this rule it is improper to set out the mortgage and the bond or note it secures at length; and while the bond and mortgage should be correctly described in the complaint, a merely technical variance will be disregarded.[83] The breach of condition, which gives the right to foreclose the mortgage, as well as the amount of the plaintiff's debt due, must be fully alleged.[84] The assignment of a mortgage, which was executed without a bond or note, passes the title to the debt; and the

[78] *Nichol* v. *Henry*, 89 Ind. 54.

[79] *Aldrich* v. *Lapham*, 6 How. (N. Y.) Pr. 129, 1 Code Rep. (N. S.) 408. See *post*, § 348.

[80] *Hilman* v. *Bank of Norfolk*, 12 Ala. 369.

[81] *Collins* v. *Carlile*, 13 Ill. 254.

[82] *Floyd* v. *Dearborn*, 2 N. Y Code Rep. 17. See N. Y. Code Civ. Proc. § 481.

[83] See *Hadley* v. *Champin*, 11 Paige Ch. (N. Y.) 245.

[84] *Second American Building Association* v. *Platt*, 5 Duer (N. Y.) 675; *Cornelius* v. *Halsey*, 11 N. J. Eq. (3 Stockt.) 27.

complaint in an action to foreclose such a mortgage will be sufficient, if it alleges that the mortgage was given to secure the mortgage debt and sets out the conditions of the mortgage and its assignment to the plaintiff.[85]

§ 343. **Allegation by or against administrator, executor or trustee.**—The complaint in an action against an executor to enfore the lien of a mortgage executed by his decedent, need not aver that notice has been given to the creditors of the deceased, but it must aver that the mortgage claim has been duly presented to the administrator for allowance.[86] Where the mortgage sought to be foreclosed purports to be executed by an executor and trustee in his representative capacity,[87] the complaint need not allege that the defendant was in fact such executor and trustee, nor the facts relating to his appointment and authority to execute the mortgage,[88] because such executor and his grantees are estopped from denying his appointment and authority.[89]

But the rule is different where one sues as executor or administrator, in which case he must set forth in full his appointment and authority to bring the foreclosure.[90]

§ 344. **Allegation where money due on demand.**—In a complaint to foreclose a mortgage securing a note payable

[85] *Severance* v. *Griffith,* 2 Lans. (N. Y.) 38. See *Coleman* v. *Van Rensselaer,* 44 How. (N. Y.) Pr. 368; *Caryl* v. *Williams,* 7 Lans. (N. Y.) 416.

[86] *Harp* v. *Calahan,* 46 Cal. 222. Contra: *Noerr, as adm'r, etc.* v. *Schmidt, as trustee etc.* 151 Ind. 579, 51 N. E. 332.

[87] *Kingsland* v. *Stokes,* 25 Hun (N. Y.) 107.

[88] *White* v. *Joy,* 13 N. Y. 87; *Skelton* v. *Scott,* 18 Hun (N. Y.) 375.

[89] *Tefft* v. *Munson,* 57 N. Y. 97; *Kingsland* v. *Stokes,* 25 Hun (N. Y.) 107; *Skelton* v. *Scott,* 18 Hun (N. Y.) 375; *Jackson* v. *Parkhurst,* 9 Wend. (N. Y.) 209.

[90] *Kingsland* v. *Stokes,* 58 How. (N. Y.) Pr. 1, aff'd 25 Hun (N. Y.) 107, 61 How. (N. Y.) Pr. 494. See also *White* v. *Joy,* 13 N. Y. 83; *Peck* v. *Mallams,* 10 N. Y. 509; *Forrest* v. *Mayor of N. Y.* 13 Abb. (N. Y.) Pr. 350; *Wheeler* v. *Dakin,* 12 How. (N. Y.) Pr. 537; *Sheldon* v. *Hoy,* 11 How. (N. Y.) Pr. 11; *Beach* v. *King,* 17 Wend. (N. Y.) 197. As to forms in plead-

on demand generally, and not at a particular place, the mortgagee, having a right to foreclose the mortgage at any time,[91] need not allege a previous demand before commencement of the suit; the filing of the complaint is a sufficient demand.[92]

It is well settled where a demand note is made payable at a particular place and secured by mortgage, that in an action to foreclose such mortgage, it is not necessary to make or allege a demand of payment at the place designated for payment.[93] This rule is based upon the principle that where money is made payable by the agreement of the parties, upon demand, or at a specified time at a particular place, a demand at the time or place, prior to the commencement of the suit is not necessary. The commencement of the suit is itself a sufficient

ing by an executor, see *Moir* v. *Dodson,* 14 Wis. 279.

[91] *Wright* v. *Shumway,* 1 Biss. C. C. 23, 2 Am. L. Reg. (O. S.) 20.

[92] *Haxtun* v. *Bishop,* 3 Wend. N. Y.) 13. See *Locklin* v. *Moore,* 57 N. Y. 360; *Gillett* v. *Balcolm,* 6 Barb. (N. Y.) 370; *Harris* v. *Mulock,* 9 How. (N. Y.) Pr. 402; *Bank of Niagara* v. *McCracken,* 18 Johns. (N. Y.) 493; *Gammon* v. *Everett,* 25 Me. 66, 43 Am. Dec. 255; *McKenney* v. *Whipple,* 21 Me. 98; *Bryant* v. *Damariscotta Bank,* 18 Me. 241; *State Bank* v. *Van-Horn,* 4 N. J. L. (1 South.) 382; *Union Cent. Life Ins. Co.* v. *Curtis,* 35 Ohio St. 343, 357; *Smith* v. *Bythewood,* Rice (S. C.) L. 245, 33 Am. Dec. 111; *Rumball* v. *Ball,* 10 Mod. 38. See also *Henley* v. *Bush,* 33 Ala. 636; *Niemeyer* v. *Brooks,* 44 Ill. 77; *Pennington* v. *Clifton,* 10 Ind. 172; *Ross* v. *Lafayette & I. R. Co.* 6 Ind. 297; *Wood* v. *Barstow,* 27 Mass. (10 Pick.) 368; *Holden* v. *Eaton,* 24 Mass. (7 Pick.) 15; *Lent* v. *Padelford,* 10 Mass. 230, 6 Am. Dec. 119; *Watson* v. *Walker,* 23 N. H. (3 Frost.) 471; *Thurston* v. *Wolfborough Bank,* 18 N. H. 391, 45 Am. Dec. 382; *Darling* v. *Wooster,* 9 Ohio St. 517; *Hill* v. *Henry,* 17 Ohio, 9; *White* v. *Swift,* 1 Cr. C. C. 442; *Wyman* v. *Fowler,* 3 McL. C. C. 467.

[93] See *Wolcott* v. *VanSantvoord,* 17 Johns. (N. Y.)248, 8 Am. Dec 396; *Foden* v. *Sharp,* 4 Johns. (N. Y.) 183; *Haxtun* v. *Bishop,* 3 Wend. (N. Y.) 13; *Butterfield* v. *Kinzie,* 2 Ill. (1 Scam.) 445; *Gammon* v. *Everett,* 25 Me. 66, 43 Am. Dec. 255; *Bacon* v. *Dyer,* 12 Me. (3 Fairf.) 19; *Carley* v. *Vance,* 17 Mass. 389; *Washington* v. *Planters' Bank,* 2 Miss. (1 How.) 230, 28 Am. Dec. 333; *Eastman* v. *Fifield,* 3 N. H. 333, 14 Am. Dec. 371; *Adams* v. *Hackensack Improvement Co.* 44 N. J. L. (15 Vr.) 638, 43 Am. Rep. 406; *Wallace* v. *McConnell,* 38 U. S. 13 Pet.) 136, 10 L. ed. 95; *Bank of United States* v. *Smith,* 24 U. S. (11 Wheat.) 171, 6 L. ed. 443; *Nicholls* v. *Bowes,* 2 Campb. 498; *Lyons* v. *Sundius,* 1 Campb. 423.

demand.[94] But where the defendant was at the place designated, and was ready and offered to pay the money, he may plead such fact in exoneration of interest and the costs of the suit, provided he makes his tender good by payment of the amount of the debt into court.[95]

§ 345. Allegation as to assignment of mortgage.— Where the assignee of a mortgage brings an action for foreclosure he should set out in the complaint all the assignments thereof. A mere allegation, "that the plaintiff, by several mesne assignments, is the owner and holder of the note and mortgage," without other allegations showing title in the plaintiff, is defective, because it does not sufficiently show the assignments of the mortgage.[96] Where a complaint sets forth the indebtedness of the defendants to the complainant's assignor for the purchase money of lands, and the execution

[94] *Locklin* v. *Moore,* 57 N. Y. 360; *Hills* v. *Place,* 48 N. Y. 520, 8 Am. Rep. 568; *Caldwell* v. *Cassidy,* 8 Cow. (N. Y.) 271; *Nelson* v. *Bostwick* 5 Hill (N. Y.) 37; *Wolcott* v. *VanSantvoord,* 17 Johns (N. Y.) 248, 8 Am. Dec. 396; *Haxtun* v. *Bishop,* 3 Wend. (N. Y.) 13, 15; *Watkins* v. *Crouch,* 5 Leigh (Va.) 522.

[95] *Adams* v. *Hackensack Improvement Co.* 44 N. J. L. (15 Vr.) 638, 43 Am. Rep. 406. See also *Caldwell* v. *Cassidy,* 8 Cow. (N Y) 271; *Haxtun* v. *Bishop,* 3 Wend. (N. Y.) 13; *Wood* v. *Merchants' Saving, Loan and Trust Co.* 41 Ill. 267, 1 Am. Lead. Cas. 478; *Carley* v. *Vance,* 17 Mass. 389; *Ward* v. *Smith,* 74 U. S. (7 Wall.) 447, 19 L. ed. 207. See *ante,* § 52.

[96] See *Rose* v. *Meyer,* 7 N. Y. Civ. Proc. Rep. 219, 1 How. (N. Y.) Pr. N. S. 274; *Thomas* v. *Desmond,* 12 How. (N. Y.) Pr. 321; *Pattie* v. *Wilson,* 25 Kan. 326; *Lashbrooks* v. *Hatheway,* 52 Mich. 124; *Denton* v. *Cole,* 30 N. J. Eq. (3 Stew.) 244. It is held in some cases that in an action by the assignee to foreclose a mortgage, it is not necessary to set out the assignments whereby he acquired the title to the instrument, and that it is sufficient to allege in the complaint that the plaintiff is the assignee; *Ercanbrack* v. *Rich,* 2 Chand. (Wis.) 100, 2 Pin. (Wis.) 441. Yet it has been said that a complaint by an assignee to foreclose a mortgage, which merely avers that the mortgage was endorsed to him, without stating by whom, is not good as against a demurrer for defect of parties, because the mortgagee is not made a defendant; *Nichol* v. *Henry,* 89 Ind. 54. Sufficiency of allegation of assignment. See *Williams* v. *Cornell,* 137 App. Div. 795, 122 N. Y. Supp. 670.

by them of a mortgage to secure the payment thereof in installments, and its assignment to the plaintiff, it sufficiently shows the plaintiff to be the owner of the mortgaged debt and entitled to maintain an action to foreclose.[97] It has also been held, where the assignee of a mortgage files a complaint for foreclosure, alleging that the debt is due and owing to him and that he is ready to produce the note or obligation, which is the evidence of the debt the mortgage was given to secure, that this is sufficient without stating that the note or obligation has been assigned to the plaintiff.[98]

As a mortgage given to secure a note, is regarded as an incident thereto, and passes with every transfer of such note without a specific assignment of the mortgage, it is not necessary to aver an assignment of such mortgage in a foreclosure thereof.[99] The complaint need not aver the record of the assignment,[1] because the record of such assignment is not necessary to the validity of the plaintiff's claim.[2] The fact that the assignee holds the mortgage merely as a collateral security, does not affect his right to recover; it simply limits his interest in the proceeds of the sale.[3] A mortgage given to indemnify the mortgagee against a contingent liability is assignable, and an action thereon may be maintained by the

[97] *Severance* v. *Griffith,* 2 Lans. (N. Y.) 38. See also *Ercanbrack* v. *Rich,* 2 Chand. (Wis.) 100, 2 Pin. (Wis.) 441; *Barber* v. *Crowell,* 55 Neb. 571, 75 N. W. 1109.

[98] *Cornelius* v. *Halsey,* 11 N. J. Eq. (3 Stockt.) 27. See *Buckner* v. *Sessions,* 27 Ark. 219; *Babbitt* v. *Bowen,* 32 Vt. 437.

[99] *Johnson* v. *Johnson,* 81 Mo. 331; *Ord* v. *McKee,* 5 Cal. 515. See *Koch* v. *Briggs,* 14 Cal. 256, 73 Am. Dec. 651; *Haffley* v. *Maier,* 13 Cal. 13; *McMillan* v. *Richards,* 9 Cal. 365, 70 Am. Dec. 655; *Bennett* v. *Solomon,* 6 Cal. 134. See *Hagerman* v. *Sutton,* 91 Mo. 519; *Bell* v. *Simpson,* 75 Mo. 485; *Child* v. *Singleton,* 15 Nev. 461. The indorsement without recourse of a note secured by a deed of trust, carries with it the trust deed as a security; *Bell* v. *Simpson,* 75 Mo. 485.

[1] *King* v. *Harrington,* 2 Aik. (Vt.) 33, 16 Am. Dec. 675.

[2] *Fryer* v. *Rockefeller,* 63 N. Y. 268.

[3] *McKinney* v. *Miller,* 19 Mich. 142.

assignee, in his own name, upon the accruing of such liability.[4]

Where upon the settlement of an estate the residue consists in part of a note and mortgage, it may be assigned in that form to the persons entitled thereto.[5] The assignment will have the effect of an order of distribution, and transfer the title to the persons named, and they may foreclose the mortgage.[6]

§ 346. Allegation on mortgage securing several notes.— A mortgage constitutes a single cause of action, however many notes or installments it may secure.[7] It is said that in an action to foreclose such a mortgage, it is proper to embrace in a single paragraph of the complaint the mortgage and all the notes secured by it;[8] and if a copy of one note only is given, the complaint will nevertheless be good upon demurrer.[9] The joinder, in one paragraph of the complaint, of several matured and unmatured promissory notes, secured by a mortgage on real estate, in an action on the notes and to foreclose the mortgage, is not an error that can be taken advantage of after judgment.[10]

Where the holder of one of several notes secured by a mortgage, brings an action to foreclose for the payment of his note alone, he should state in his complaint whether the other notes have been paid, and if they have not been paid, he should give the names of the persons by whom they are held and the time when they mature, in order that the rights of such holders of other notes may be determined and protected by the court.[11] The foreclosure of such a mortgage

[4] *Carper* v. *Munger*, 62 Ind. 481.

[5] See Ind. Rev. Stat. §§ 3940, 3942.

[6] *Ford* v. *Smith*, 60 Wis. 222.

[7] *Hannon* v. *Hilliard*, 101 Ind. 310.

[8] *Seattle Trust Co.* v. *Kerry*, 19 Wash. 389, 53 P. 665. See also *McCauley* v. *Brady*, 123 Mo. App. 558, 100 S. W. 541.

[9] *Buck* v. *Axt*, 85 Ind. 512.

[10] *Firestone* v. *Klick*, 67 Ind. 309.

[11] *Hartwell* v. *Blocker*, 6 Ala. 581; *Levert* v. *Redwood*, 9 Port. (Ala.) 79.

by the holder of one note will not be a bar to a separate action and decree by the holder of other notes.[12] And it has been said, where a person holds all of the notes secured by a mortgage, that he will not be obliged to foreclose for all of them; but that he may enter a decree of foreclosure as to part of them, and recover in a suit at law on the others.[13]

Where a plaintiff holds several notes secured by the same mortgage, only a portion of which are due, he should ask in his complaint that so much of the debt as may become due before the final decree shall be entered in the case, shall be included in such decree.[14] It will be error to adjudge in favor of the plaintiff the foreclosure of a mortgage for the payment of a note which matures after the filing of the complaint, without some foundation being laid in the pleadings therefor.[15]

An action cannot be commenced to foreclose a mortgage securing several notes where none of them are yet due;[16] but where one or more are due and an action has been properly commenced, additional relief may be had under the decree for rights that may accrue after the commencement of the action.[17]

§ 347. Allegations as to proceedings at law—Rules in New York, Wisconsin and Nebraska.—The New York Code of Civil Procedure requires that the complaint in an action to foreclose a mortgage upon real property, must state whether any other action has been brought to recover any part of the mortgage debt, and if such an action has been brought, whether any part thereof has been collected;[18] and that "where final judgment for the plaintiff has been rendered,

[12] *Moffitt* v. *Roche,* 76 Ind. 75.

[13] *Langdon* v. *Paul,* 20 Vt. 217.

[14] *Malcolm* v. *Allen,* 49 N. Y. 448; *Williams* v. *Creswell,* 51 Miss. 817.

[15] *Williams* v. *Creswell,* 51 Miss. 817.

[16] *McCollough* v. *Colby,* 4 Bosw. (N. Y.) 603.

[17] *Bostwick* v. *Menck,* 8 Abb. (N. Y.) Pr. N. S. 169; *Candler* v. *Pettit,* 1 Paige Ch. (N. Y.) 168.

[18] N. Y. Code Civ. Proc. § 1629. Averment "that no other action

in an action to recover any part of the mortgage debt, an action shall not be commenced or maintained to foreclose the mortgage, unless an execution against the property of the defendant has been issued, upon the judgment, to the sheriff of the county where he resides, if he resides within the state, or, if he resides without the state, to the sheriff of the county where the judgment roll is filed; and has been returned wholly or partly unsatisfied."[19]

Where proceedings have been instituted for the collection of the debt, independent of the action for foreclosure, the complaint should state what those proceedings were and against whom instituted; and should show further that such proceedings have been discontinued, or that the remedy thereby has been exhausted.[20] But the proceedings to foreclose a mortgage will not be stayed because a suit at law has been comenced upon the bond, even though it appears that such suit has not been discontinued.[21] If it appears from the complaint in a foreclosure suit that judgment has been recovered for the mortgage debt, or that the mortgage was given as collateral security for the payment of a note which was already in judgment, the plaintiff must show that he has exhausted his remedy at law upon the judgment; otherwise the defendant in the foreclosure suit may demur to the complaint, or may raise the objection by his answer.[22]

The Wisconsin doctrine, however, would seem to be that a bill to foreclose a mortgage, which states that no proceedings have been had to collect the debt, will be held good on

has been had for the recovery of the said sum secured by the said bond and mortgage" is sufficient. *Schieck* v. *Donohue,* 77 App. Div. 321, 79 N. Y. Supp. 233.

[19] N. Y. Code Civ. Proc. § 1630.

[20] *Lovett* v. *German Reform Church* v. *Barb.* (N. Y.) 67; *Williamson* v. *Champlin,* Clarke Ch. (N. Y.) 9; *Pattison* v. *Powers,* 4 Paige Ch. (N. Y.) 549.

[21] *Williamson* v. *Champlin,* Clarke Ch. (N. Y.) 9.

[22] *Lovett* v. *German Reform Church,* 12 Barb. (N. Y.) 67; *Shufelt* v. *Shufelt,* 9 Paige Ch. (N. Y.) 137, 37 Am. Dec. 389; *North River Bank* v. *Rogers,* 8 Paige Ch. (N. Y.) 648.

demurrer for failure to state what part of the debt has been collected, because an allegation in that behalf is necessary only where proceedings have been had at law.[23] In this case the bill stated that the bond and collateral mortgage had been, for a valuable consideration, assigned to the complainant, and were held and owned by him. The court say: "This was enough to entitle him to sue. He was not bound to set forth the evidence of his right. The objection that it does not appear, that no part of the debt has been collected, is not applicable, as the bill states that no proceedings had been had at law, and it is only when such proceedings have been had, that it is necessary to show what has been collected." [24]

In Nebraska the requirements of the statute [25] are held to be mandatory and one seeking the foreclosure of a real estate mortgage must substantially comply therewith by making the proper averments in his petition.[26] Thus it is held that "whether any proceedings have been had at law for the recovery of the debt, or any part thereof, and whether such

[23] *Ercanbrack* v. *Rich,* 2 Chand. (Wis.) 100, 2 Pin. (Wis.) 441.

[24] *Ercanbrack* v. *Rich,* 2 Chand. (Wis.) 100, 2 Pin. (Wis.) 441.

[25] § 850 of the Code of Civil Proc. provides that "upon filing a petition for the foreclosure or satisfaction of a mortgage, the complainant shall state therein whether any proceedings have been had at law for the recovery of the debt secured thereby, or any part thereof, and whether such debt, or any part thereof, has been collected and paid."

[26] *Durland* v. *Durland,* 62 Neb. 813, 87 N. W. 1048. The court in this case held sufficient an averment that no proceedings at law had been commenced or maintained for the collection of the debt secured by the mortgage. See *Holt* v. *Rust-Owen Lumber Co.* 2 Neb. (Unof.) 170, 96 N. W. 613; *McDowell* v. *Markey,* 77 Neb. 141, 108 N. W. 152. An averment in a petition that no other proceedings have been had for the recovery of the debt secured by the mortgage, is a sufficient allegation to show that no action at law has been commenced. *Mundy* v. *Whittemore,* 15 Neb. 647.

As to sufficiency of complaint where action at law to collect has been instituted, see *Zug* v. *Forgan,* 3 Neb. (Unof.) 149, 90 N. W. 1129. *Montpelier Sav. Bank & Trust Co.* v. *Follett,* 68 Neb. 416, 94 N. W. 635. *Michigan Trust Co.* v. *City of Red Cloud,* 3 Neb. (Unof.) 722, 92 N. W. 900, 69 Neb. 585, 96 N. W. 140, 98 N. W. 413.

debt, or any part thereof, has been paid" are essential averments.[27]

§ 348. Allegation where there are infant defendants.— In an action to foreclose a mortgage, where some of the defendants are infants, the complaint must allege the requisite facts to show what the interests of such infant defendants in the premises are; and the facts entitling the complainant to a judgment for foreclosure and sale must be set up in the complaint and established by the proof, because they are never deemed admitted where there are infant defendants.[28]

§ 349. Allegation where mortgage collateral assigned.— In the foreclosure of a mortgage by a plaintiff to whom the mortgage has been assigned as collateral security, the complaint should set forth all the circumstances of such assignment and the respective interests of all parties; and in case of the sale of the mortgagee's interest in such action, the surplus, if any remains after satisfying the interest of the plaintiff, must be refunded to the mortgagee.[29] Any arrangement between the mortgagor and the collateral assignee of the mortgage, to discharge the mortgage of record to the injury of the mortgagee, will be void as to him, and he will be entitled to recover the balance of the mortgage debt due him after deducting the amount for which the mortgage was pledged.[30] The foreclosure of the mortgage by the collateral assignee thereof will not affect the relation existing between

[27] *Bing* v. *Morse, as adm'r. etc.* 51 Neb. 842, 71 N. W. 712.

[28] *Aldrich* v. *Lapham,* 6 How. (N. Y.) Pr. 129, 1 N. Y. Code Rep. N. S. 408. See also *Livingston* v. *Tanner,* 12 Barb. (N. Y.) 481.

[29] See *Johnson* v. *Blydenburgh,* 31 N. Y. 427; *Henry* v. *Davis,* 7 Johns. Ch. (N. Y.) 40, aff'd in *Clark* v. *Henry,* 2 Cow. (N. Y.) 324; *Coffin* v. *Loring,* 91 Mass. (9 Allen), 154; *Graydon* v. *Church,* 7 Mich. 36. See *ante,* §§ 104–106, 201, 202.

[30] *Hoyt* v. *Martense,* 16 N. Y. 231; *Slee* v. *Manhattan Co.* 1 Paige Ch. (N. Y.) 48, 78; *Cutts* v. *New York Manuf. Co.* 18 Me. (6 Shep.) 190, 201; *Solomon* v. *Wilson,* 1 Whart. (Pa.) 241. See *ante,* §§ 104, 201.

the mortgagor and the mortgagee, in respect to the debt between them.[31]

Where a mortgage has been assigned as collateral security for the debt of a third person, it may be foreclosed by the pledgee.[32] In a foreclosure by the assignee of the mortgage, the complaint should set out the fact of the assignment of the mortgage to him as collateral security for the debt of a third person, designating the person, and aver that the debt is due and has not been paid. The prayer should be for the sale of the mortgaged premises to pay the debt, which the mortgage was assigned to secure, and the costs of suit; and the decree should direct, after the payment of the debt set out and the costs of the suit, that the balance, if any, be brought into court to be disposed of as the interests and rights of the parties may require. Such foreclosure of a mortgage, by the party holding the same as collateral security for the payment of the debt of a third person, does not, as between the assignee and the party placing the mortgage in his hands, necessarily operate as a payment of the debt for which the mortgage was pledged. The debt, as between the pledgor and the pledgee, will not be considered paid until the property mortgaged has been actually sold and converted into money;[33] because on such foreclosures the land is substituted for the notes and mortgage as collateral security.[34]

In an action brought to foreclose a mortgage, given to secure a bond made by one of the mortgagors to secure the payment of certain notes, which notes were held by the mortgagees as collateral security for an over due indebtedness, it is not necessary for the complaint to allege that the notes held as collateral security have become due, for a failure to

[31] *Brown* v. *Tyler,* 74 Mass. (8 Gray), 135 138, 69 Am. Dec. 239.

[32] See *Stevens* v. *Dedham Inst. for Savings,* 129 Mass. 547.

[33] *Brown v. Tyler,* 74 Mass. (8 Gray), 135, 69 Am. Dec. 239. See *Stevens* v. *Denham Institution for Savings,* 129 Mass. 547, 549; *Montague* v. *Barton & A. R. R. Co.* 124 Mass. 242; *Whipple* v. *Blackington,* 97 Mass. 476, 478.

[34] *Montague* v. *Barton & A. R. R. Co.* 124 Mass. 242, 245.

comply with the conditions of the bond creates a sufficient cause of action.[35]

§ 350. Allegation as to recording mortgage and subsequent deeds.—The complaint in an action to foreclose a mortgage need not aver that the mortgage has been recorded,[36] or that the mortgage tax has been paid,[37] where the action is between the original parties to the mortgage, or their assignees or legal representatives;[38] but generally, in an action to foreclose a mortgage against a subsequent purchaser from the mortgagor, the complaint must allege that the mortgage was recorded at the time and place prescribed by the statute.[39]

In the foreclosure of a mortgage, where a party is made a defendant, who claims the mortgaged premises as a *bona fide* purchaser under a deed given subsequent to the mortgage, but recorded first, and the plaintiff claims that such deed is fraudulent, he must set forth in the complaint the facts and allegations which show the fraud; and in such a case, where the only allegation was that the defendant claimed an interest in the premises "as subsequent purchaser, incumbrancer or otherwise," it was held that the court could not consider the evidence taken to show the fraudulent character of the deed, as such an allegation did not place the defendant's rights in issue.[40]

§ 351. Allegation to bar dower.—In an action to foreclose a mortgage executed by the husband alone, during coverture, the widow's dower will not be barred where she is

[35] *Troy City Bank* v. *Bowman*, 19 Abb. (N. Y.) Pr. 18.

[36] See *ante*, § 341.

[37] *Moore* v. *Lindsay*, 61 Misc. 176, 114 N. Y. Supp. 684.

[38] *Snyder* v. *Bunnell*, 64 Ind. 403. See *South Side Planing Mill Assoc.* v. *Cutler & Savage Lumber Co.* 64 Ind. 560.

[39] *Stockwell* v. *State*, 101 Ind. 1.

[40] *Wurcherer* v. *Hewitt*, 10 Mich. 453. See also *Peck* v. *Mallams*, 10 N. Y. 509; *Thomas* v. *Stone*, Walk. Ch. (Mich.) 117; *Godfroy* v. *Disbrow*, Walk. Ch. (Mich.) 260.

made a defendant, and the complaint simply alleges that she claims some interest in the premises "as a subsequent purchaser, or incumbrancer or otherwise," for in such a case the record bars only whatever interest, if any, she acquired subsequent to the mortgage;[41] a prior right of dower in such a case will not be cut off, if the complaint merely alleges that her interest is subsequent to the mortgage, and an objection is properly taken.[42] The dower provided by law in behalf of the wife who survives her husband is paramount to all conveyances, contracts, incumbrances, debts or liabilities of the husband executed or incurred by him during coverture,[43] unless there has been some forfeiture, release, bar or satisfaction thereof by the wife.[44]

If the plaintiff desires to cut off the widow's dower by foreclosure of the mortgage and sale of the property, the complaint should state the facts upon which the question arises, as he believes they exist, according to the rules of equity pleading.[45]

§ 352. Allegation as to defendants' interests.—Where parties other than those directly liable for the mortgage debt are made defendants to a foreclosure, it is necessary for the plaintiff to show that they have some interest in the equity

[41] *Lewis* v. *Smith,* 9 N. Y. 502, 61 Am. Dec. 706, 11 Barb. (N. Y.) 152, 12 Leg. Obs. 193. See *Lee* v. *Parker,* 43 Barb. (N. Y.) 611, 614.

[42] *Jordan* v. *VanEpps,* 85 N. Y. 427, 436. See *Emigrant Industrial Sav. Bank* v. *Goldman,* 75 N. Y. 127; *Frost* v. *Koon,* 30 N. Y. 428, 448; *Lewis* v. *Smith,* 9 N. Y. 502, 61 Am. Dec. 706; *Keeler* v. *McNierney,* 6 N. Y. Civ. Proc. Rep. 363; *Payn* v. *Grant,* 23 Hun (N. Y.) 134. See *ante,* §§ 155, 156.

[43] *Higginbotham* v. *Cornwell,* 8 Gratt. (Va.) 83, 56 Am. Dec. 130.

[44] *O'Brien* v. *Elliott,* 15 Me. 125, 32 Am. Dec. 137. As to when dower is barred, see *Church* v. *Bull,* 2 Den. (N. Y.) 430, 43 Am. Dec. 754; *Hitchcock* v. *Harrington,* 6 Johns. (N. Y.) 290, 5 Am. Dec. 229; *Catlin* v. *Ware,* 9 Mass. 218, 6 Am. Dec. 57; *Pompkin* v. *Bumstead,* 8 Mass. 491, 5 Am. Dec. 491; *English* v. *English,* 3 N. J. Eq. (2 H. W. Gr.) 504, 29 Am. Dec. 730; *Gordon* v. *Stevens,* 2 Hill (S. C.) Eq. 46, 27 Am. Dec. 445.

[45] *Lewis* v. *Smith,* 9 N. Y. 502, 515, 61 Am. Dec. 706.

of redemption which makes them proper parties to the action.[46] This may be done by the general allegation that such defendants have or claim some interest in, or lien upon, the mortgaged premises which is subsequent to the plaintiff's mortgage.[47] The fact that the interest of such defendants are in separate portions of the mortgaged premises, or that the relief asked for does not affect all of them alike, is immaterial and will not invalidate the general allegation of a subsequent interest in the mortgaged premises.[48]

Where subsequent incumbrancers are made parties, the general practice is to aver that they have or claim some interest in the premises sought to be foreclosed, by mortgage, judgment or otherwise, as the case may be, which interest, if any, is junior and subordinate to the claim of the plaintiff; but the more correct practice is to allege, on information and belief if preferred, the nature of the interest of each defendant, as, for instance, that he claims to have an incumbrance by mortgage, judgment or otherwise, setting forth all of the particulars of the same. If, however, the plaintiff in his complaint misstates the interests or rights of the different defendants, who are by reason thereof unneces-

[46] For sufficiency of allegations, see *Yorn* v. *Bracken,* 153 Ind. 492, 55 N. E. 257; *Dunham* v. *Doremus,* 55 N. J. Eq. 511, 37 A. 62; *Selph* v. *Cobb,* 47 Fla. 292, 36 So. 761; *Vought, as trustee, etc.* v. *Levin,* 142 App. Div. 623, 127 N. Y. Supp. 479.

[47] *Drury* v. *Clark,* 16 How. (N. Y.) Pr. 424; *Aldrich* v. *Lapham,* 6 How. (N. Y.) Pr. 129, 1 N. Y. Code Rep. N. S. 408; *Woodworth* v. *Zimmerman,* 92 Ind. 349; *Ulrich* v. *Drischell,* 88 Ind. 354; *Clay* v. *Hildebrand,* 34 Kan. 694; *Wardlow* v. *Middleton,* 156 Cal. 585, 105 P. 738; *Henderson* v. *Williams,* 57 S. C. 1, 35 S. E. 261; *International Kaolin Co.* v. *Vause,* as trustee, etc. 55 Fla. 641, 46 So. 3; *Horton* v. *Haines,* 23 Okl. 878, 102 P. 121; *Petteys* v. *Comer,* 34 Or. 36, 54 Pac. 813. See *Kizer* v. *Caufield,* 17 Wash. 417, 49 P. 1064. But such allegation does not constitute an admission that defendant had an interest in land. *Foster, as trustee, etc.* v. *Bowles,* 138 Cal. 449, 71 P. 495.

[48] *See Middletown Savings Bank* v. *Bacharach,* 46 Conn. 513; *Waters* v. *Hubbard,* 44 Conn. 340; *Wells* v. *Bridgeport Hydraulic Co.* 30 Conn. 316, 79 Am. Dec. 250; *Mix* v. *Hotchkiss,* 14 Conn. 32.

sarily compelled to answer in order to protect their interests, the costs of such defendants will be charged against the plaintiff personally.[49]

§ 353. Default in answering by prior incumbrancer.—Where a prior incumbrancer by judgment or otherwise, on being made a party to a foreclosure suit, under an allegation in the complaint that he has or claims an interest in the premises subsequent to the mortgage, makes no defense to the foreclosure, but allows judgment to be taken against him by default, and permits the surplus moneys to be distributed to other claimants, his neglect will not be deemed equivalent to an admission upon the report, that he has no lien upon the premises older than, or superior to, that of the mortgage, so as to be an estoppel upon him in another action, brought by a different plaintiff, for the foreclosure of a prior mortgage, and will not prevent him from asserting in the latter suit a legal priority to the surplus moneys to which he is apparently entitled by virtue of his lien; the parties to the record not being identical nor the subject in controversy the same.[50]

Where the plaintiff in an action to foreclose a mortgage makes a prior judgment creditor, or a prior mortgagee whose mortgage is due, a party to the action, he should set forth in his complaint the date and the amount of the incumbrance and state that it is a prior incumbrance. In a case where the prior incumbrance is a mortgage, the plaintiff should aver that it is due and payable, in order that the judgment may make proper provision for its payment.[51] In a case where a junior mortgagee filed a bill of foreclosure, making the holder of a prior mortgage a party defendant and requiring him to answer as to the amount due upon such prior mortgage, the prior

[49] *Union Ins. Co.* v. *VanRensselaer,* 4 Paige Ch. (N. Y.) 85.

[50] *Frost* v. *Koon,* 30 N. Y. 428. See also *Lewis* v. *Smith,* 9 N. Y. 502, 61 Am. Dec. 706, 11 Barb. (N. Y.) 156; *Bank of Orleans* v. *Flagg,* 3 Barb. Ch. (N. Y.) 318; *Holcomb* v. *Holcomb,* 2 Barb. (N. Y.) 20; *Elliott* v. *Pell,* 1 Paige Ch. (N. Y.) 263.

[51] *Holcomb* v. *Holcomb,* 2 Barb. (N. Y.) 20.

mortgagee was held entitled to the costs of his answer as well as other costs to be first paid out of the proceeds of the sale, or to be charged upon the plaintiff personally in the discretion of the court.[52]

§ 354. Prayer of complaint.—The relief to which the plaintiff believes himself entitled must be fully set out in the complaint, for the reason that the judgment, in case of default, cannot be more favorable to the plaintiff than the relief demanded in the prayer of the complaint,[53] although in nearly every other kind of an action the court may grant any relief consistent with the cause of action set forth in the complaint and embraced within its issues.[54]

[52] *Boyd* v. *Dodge,* 10 Paige Ch. (N. Y.) 42. See *ante,* § 211.

[53] *Bullwinker* v. *Ryker,* 12 Abb. (N. Y.) Pr. 311; N. Y. Code Civ. Proc. § 1207. But where a mortgage, which had been assigned by an assignment that was not recorded, was subsequently discharged by the mortgagee, and the mortgagor thereupon executed another mortgage on the same property to secure an antecedent debt, which latter mortgage was transferred to a *bona fide* purchaser for value, who in time procured a decree of foreclosure and sale against the mortgagor and a judgment for deficiency against his assignor, it was held in a foreclosure by the first mortgagee that while the second mortgage was entitled to priority, yet the plaintiff was entitled to be subrogated to the rights of the assignee thereof, and that it was not essential to the granting of such relief that it should be demanded in the complaint; nor was it an objection that defendant's assignors were not parties. *Clark* v. *Mackin,* 95 N. Y. 346. See *Murphy* v. *Robinson,* 50 La. Ann. 213, 23 So. 323.

The relief to which plaintiff is entitled under the pleadings will be granted under prayer for general relief. *Hennessy* v. *Clough,* 40 S. W. 157 (Tex. Civ. App.) But he is not entitled to counsel fees under general terms of prayer. *Brooks* v. *Forington,* 117 Cal. 219, 48 P. 1073.

A prayer for excessive relief does not render the complaint demurrable. *Citizens Loan & Trust Co. as ad'mr etc.* v. *Witte,* 110 Wis. 545, 86 N. W. 173.

[54] *Simonson* v. *Blake,* 12 Abb. (N. Y.) Pr. 331, 29 How. (N. Y.) Pr. 484. See also *Bullwinker* v. *Ryker,* 12 Abb. (N. Y.) Pr. 311; *Edson* v. *Girvan,* 29 Hun (N. Y.) 425. A prayer for foreclosure and sale, as an independent remedy, however, is inconsistent with a bill framed to aid proceedings in ejectment, and makes the bill multifarious and demurrable; and if it contains no other requisites of a complaint in foreclosure, it will not be sufficient to support a foreclosure

Thus, where the plaintiff is entitled to and intends to move for an injunction, this relief should be asked for in the prayer of the complaint;[55] otherwise the court will not grant the restraint desired, except in those cases where the facts rendering such restraint necessary arise after the suit has been commenced. Where the cause for restraint arises after the commencement of the action, an injunction will be granted on the presentation of affidavits setting forth facts which render the restraint necessary or proper.[56]

And where there are taxes which are unpaid, or where by the terms of the mortgage the mortgagee was to pay the taxes and to be reimbursed by the mortgagor, the complaint must set out the amount of taxes due and unpaid, or paid by the mortgagee, or the plaintiff will not be entitled to a finding of such amount in the decree.[57]

In an action to foreclose a mortgage, the complaint, if sufficient to maintain the action, is not demurrable because the relief demanded is greater than, or different from, that to which, upon the facts stated, the plaintiff is entitled.[58] And where by statutory provisions an heir or devisee taking real estate subject to a mortgage is required to pay the mortgage out of his own property, no additional allegation is required in a complaint, which seeks to charge the personal representatives of a deceased mortgagor with any deficiency.[59]

A judgment in a suit to foreclose a mortgage granting relief broader than a prayer in the complaint concerning the barring of rights and claims of parties defendant is not void, but merely irregular and is amendable.[60]

decree. *Livingston* v. *Hayes,* 43 Mich. 129.

[55] N. Y. Code Civ. Proc. § 603. See *Sebring* v. *Lant,* 9 How. (N. Y.) Pr. 346; *Hovey* v. *McCrea,* 4 How. (N. Y.) Pr. 31.

[56] N. Y. Code Civ. Proc. § 604.

[57] *Harris* v. *McCrossen,* 31 Kan. 402. See *McKelvey* v. *Wagy,* 157 Cal. 406, 108 Pac. 268.

[58] *Basse* v. *Gallegger,* 7 Wis. 442, 76 Am. Dec. 225; distinguished in *Scheibe* v. *Kennedy,* 64 Wis. 564.

[59] *Glacius* v. *Fogel,* 88 N. Y. 434.

[60] *Brenen* v. *North,* 7 App. Div. 79, 39 N. Y. Supp. 975. In this case, the prayer of the complaint was that the defendant, Luke Clark, and all persons claiming under him subsequent to the commencement of

§ 355. Demand for judgment of deficiency.—A personal judgment for deficiency can be rendered only when it is demanded in the complaint.[61] But where the complaint asks for a judgment on the note, that the mortgage be foreclosed, that the mortgaged property be sold to pay the debts and costs of the action, and that execution issue for the balance, it will be sufficient to sustain a personal judgment for deficiency,[62] and is sufficient to authorize any relief to which the facts pleaded may entitle the plaintiff.[63] If the complaint to foreclose a mortgage does not contain a prayer for the sale of the premises, it will be held insufficient, upon the coming in and confirmation of the report of the amount due, to authorize a sale, and is clearly demurrable.[64]

Under a statute which provides for the entry of a judg-

the action be barred and foreclosed of all right, claim, lien and equity of redemption of said premises. At the time the suit was begun Clark had no interest or estate in the premises, for they had been conveyed by him to the Brodies. The complaint did not pray for any relief barring any other of the defendants than Luke Clark and those claiming under him. The court say: "It is now urged that, under the provisions of the Code of Civil Procedure, (N. Y. Code Civ. Proc. § 1207), the judgment could be no broader than the demand for relief, as the other defendants did not answer in the suit. This defect in the complaint does not render the judgment of foreclosure and sale void. The precise question was considered in the case of *Naughton* v. *Vion*, (91 Hun (N. Y.) 360) where it was held the judgment in a foreclosure action where the relief was broader than the prayer concerning the barring and foreclosing of the rights and claims of parties defendant was not void, but was merely irregular, and that the irregularity could be covered by amendment.

[61] *Eichbredt* v. *Angerman*, 80 Ind. 208; *Long* v. *Herrick*, 26 Fla. 356, 8 So. 50.

[62] *Foote* v. *Sprague*, 13 Kan. 155. See *Shotts* v. *Boyd*, 77 Ind. 223. Where the complaint contains no graver defect than the one set forth in the text, it may be amended at any time without costs, so as to make it formally perfect; and upon petition in error, it will be considered as amended; *Foote* v. *Sprague*, 13 Kan. 155. See also *Armstrong* v. *Ross*, 20 N. J. Eq. (5 C. E. Gr.) 109; *Iowa Co.* v. *Mineral Point R. R. Co* 24 Wis. 93.

[63] *Shotts* v. *Boyd*, 77 Ind. 223. See *Van Cleef* v. *Britton*, 45 Ind. App. 388, 90 N. E. 1034.

[64] *Santacruz* v. *Santacruz*, 44 Miss. 714.

ment for deficiency, only where the complaint contains a demand therefor, a prayer in the complaint "that the plaintiff may have execution for any balance remaining unpaid," should, under a liberal construction, be held sufficient to authorize the entry of a judgment for any deficiency.[65] Ordinarily the relief demanded by the plaintiff is, that the mortgaged premises be sold for the payment of the debt; that the defendants and all persons claiming under them subsequent to the commencement of the suit, be barred and foreclosed of all right, claim, lien and equity of redemption in the mortgaged premises; that on sale of the premises the moneys arising therefrom be brought into court; that the plaintiff be paid his debt, interest and costs out of such moneys, and that the mortgagor and all other parties personally liable for its payment, specifying their names, be adjudged to pay the deficiency, if any. In a case, where judgment for deficiency was entered upon the default of the defendants, although the complaint did not ask for such relief, it was held that the judgment was unauthorized and void.[66]

In an action to foreclose a mortgage, where one of the defendants is not personally liable for the debt, the complaint should demand a decree of foreclosure and sale of the land against both mortgagors, and a judgment for deficiency against that debtor only who is personally liable for the debt.[67] Thus, where a wife joins her husband in the execution of a mortgage to secure the husband's debt, on complaint in foreclosure the court may properly render a personal judgment against the husband alone on the note, and a decree of foreclosure and sale against both.[68] The entry of a personal judg-

[65] *Olinger* v. *Liddle,* 55 Wis. 621.

[66] *Peck* v. *New York & N. J. R. R. Co.* 85 N. Y. 246. See *Simonson* v. *Blake,* 12 Abb. (N. Y.) Pr. 331, 20 How. (N. Y.) Pr. 484; *Swart* v. *Boughton,* 35 Hun (N. Y.) 281; *Hansford* v. *Holdam,* 14 Bush (Ky.) 210.

[67] *Rollins* v. *Forbes,* 10 Cal. 299.

[68] *Rollins* v. *Forbes,* 10 Cal. 299; *Wright* v. *Langly,* 36 Ill. 381. See *Skinner* v. *Southern Home Bldg. & Loan Ass'c.* 46 Fla. 547, 35 So. 67.

ment against the wife would be a great error and absolutely void.[69] The only reason for making a wife, who joined her husband in the execution of a mortgage, a party to proceedings for foreclosure, is to bar her right of dower in the equity of redemption, or to give an opportunity, before foreclosure, to redeem and prevent a sale of the property.[70]

§ 356. Allegation for personal judgment against grantee assuming payment.—Where the purchaser of land subject to a mortgage covenants with the vendor to pay the mortgage debt, the mortgagee is, in equity, entitled to a personal decree against such purchaser for any deficiency upon foreclosure and sale of the mortgaged premises.[71] An allegation in the complaint that the grantee of the mortgaged premises, at the time of his purchase, covenanted and agreed to pay the mortgage debt, and to discharge the mortgage lien, is sufficient to sustain a personal judgment against such grantee for the deficiency.[72] While it is true in some states, that the privies to a contract of assumption may rescind it at any time before notice of its acceptance by the holder of the mortgage debt, yet after notice or knowledge of such acceptance there can be no rescission.[73] Although such acceptance must, in equity as in law, precede the bringing of an action upon the promise by the holder of the debt, yet the complaint need not contain an averment either of the acceptance or notice thereof to the defendant; neither is it necessary to aver against such a grantee, that he still holds the mortgaged land or any part thereof. The mortgagor, his grantee and successive grantees, who have agreed to pay the debt, may be sued upon their respective promises in the same action; in such a case, they will be held severally liable in the inverse order of their respective promises.[74]

[69] See *Brown* v. *Orr*, 29 Cal. 120.

[70] *Wright* v. *Langly*, 36 Ill. 381.

[71] *Halsey* v. *Reed*, 9 Paige Ch. (N. Y.) 446. See *ante*, § 242.

[72] *Pellier* v. *Gillespie*, 67 Cal. 582.

[73] See *ante*, §§ 250, 251.

[74] *Carnahan* v. *Tousey*, 93 Ind. 561. But see *ante*, §§ 250, 251, and the cases cited.

§ 357. Allegation as to property mortgaged.—The complaint and decree in a mortgage foreclosure should accurately describe the mortgaged property which it is sought to sell.[75] This may be done by setting out the description in full in the complaint, or by referring to the mortgage or other paper annexed and filed therewith, which contains a full description; but it would seem that any other description will not be sufficient. Thus, in a case where the mortgage, instead of describing the lands covered, referred for a description to a deed, and the complaint and decree in foreclosure followed the description in the mortgage, referring also to the deed for a fuller description, the court held that the description was insufficient, and that no title was acquired at a sale made in the foreclosure proceedings.[76] The purpose of a description in a complaint in a mortgage foreclosure is to furnish the means of identifying the property, and a complaint which does this will be sufficient.[77] There is as much necessity for a correct description of mortgaged property in a complaint for foreclosure, as there is in the complaint in an action, the object of which is to recover possession of property.[78] In an action

[75] See *McCartney* v. *Dennison,* 101 Cal. 252, 35 Pac. 766; *Kemp* v. *Moir,* 45 Ill. App. 490; *Sherman* v. *Hanno,* 66 N. H. 160, 28 Atl 18; *Birdseye* v. *Rogers* (Tex. Civ. App.) 26 S. W. 841; *Thynne* v. *Sare* [1891] 2 Ch. 79.

[76] *Crosby* v. *Dowd,* 61 Cal. 557, 603. See *Emeric* v. *Tams,* 6 Cal. 155; *Buck* v. *Axt,* 85 Ind. 512; *Hosford* v. *Johnson,* 74 Ind. 479, *White* v. *Hyatt,* 40 Ind. 385; *Whittelsey* v. *Beall,* 5 Blackf. (Ind.) 143; *Triplett* v. *Sayre,* 3 Dana (Ky.) 590. *Compare Deitrich* v. *Lang,* 11 Kan. 636; *Howe* v. *Towner,* 55 Vt. 315. A mistake in the complaint in describing the mortgaged property may be corrected, and a decree of foreclosure may be entered in the same action after the correction; *Davis* v. *Cox,* 6 Ind. 481; *Palmer* v. *Windrom,* 12 Neb. 494. But it has been said that a reference to a deed for a description of the premises, in the pleadings and process in a mortgage foreclosure, is effective on collateral attack, against a party who admits its sufficiency by filing a plea not denying it, or allowing judgment to go by default. (*Sherman* v. *Hanno,* 66 N. H. 160, 28 Atl. 18.)

[77] *Thompson* v. *Madison Build. and Aid Asso.* 103 Ind. 279. See *Crosby* v. *Dowd,* 61 Cal. 603.

[78] *Crosby* v. *Dowd,* 61 Cal. 603.

to foreclose a mortgage on a homestead, it seems that the complaint need not describe the property as a homestead.[79]

Where the description of the mortgaged premises is correct in the complaint, a decree entered by default cannot be avoided by the defendant's showing that the mortgage, as recorded, described the premises incorrectly.[80] And where the complaint in an action to foreclose a mortgage, covering several distinct parcels of land, describes some of such tracts insufficiently, if the remaining tracts are sufficiently described, such insufficient description of some of the tracts will not render the complaint defective.[81]

§ 358. Referring to mortgage or other instruments for description.—The complaint should so describe the property mortgaged, that in case a sale is ordered the officer may know upon what lands to execute the order of the court.[82] If the complaint does not contain a sufficient description of the property, but refers to an annexed copy of the mortgage for such description, and such mortgage in turn refers therefor to another instrument, the complaint will be fatally defective.[83] It has been held, however, that it is generally sufficient to describe the premises as they are described in the

[79] *Van Sickles* v. *Town,* 53 Iowa, 259.

[80] *Deitrich* v. *Lang,* 11 Kan. 636.

[81] *Rapp* v. *Thie,* 61 Ind. 37. See *Buck* v. *Axt,* 85 Ind. 512. See also *Birdseye* v. *Rogers* (Tex. Civ. App.) 26 S. W. 841. A description on foreclosure of a legal subdivision in a United States government survey as "south 10 acres," has been said to be sufficient between private persons, although the term "quarter" is ordinarily used by the government in patents of land. *McCartney* v. *Dennison,* 101 Cal. 252, 35 Pac. 766. It seems, however, that a description of the land as "one hundred acres off the east side of the southeast quarter," of a designated section, where the land is described in the mortgage as "the east side of the southeast quarter," is erroneous. *Kemp* v. *Moir,* 45 Ill. App. 490.

[82] *Struble* v. *Neighbert,* 41 Ind. 344; *White* v. *Hyatt,* 40 Ind. 385; *Nolte* v. *Libbert,* 34 Ind. 163; *Davis* v. *Cox,* 6 Ind. 481; *Whittelsey* v. *Beall,* 5 Blackf. (Ind.) 143; *Triplett* v. *Sayre,* 3 Dana (Ky.) 590.

[83] *Struble* v. *Neighbert,* 41 Ind. 344. But see *Emeric* v. *Tams,* 6 Cal. 155. See also *ante,* § 357.

mortgage itself; and that the inaccuracy of such a description is no ground for refusing a decree of sale, although it may affect the title to the premises when sold;[84] but it is believed that this is bad practice and not to be encouraged. It is certain that if a purchaser should object to the title offered, because of a defective and insufficient description in the complaint and decree, he would not be compelled to complete the purchase.

While it is generally sufficient to describe the premises as they are described in the mortgage itself, this proposition is true only when the mortgage contains a description, and not a mere reference therefor to other instruments from which a description may or may not be obtained.[85]

A reference in a complaint to maps on file or to public records for a full description of the mortgaged premises has been held to be sufficient. Thus, where a complaint alleged that the mortgage was duly recorded in the office of the recorder of the county, and described the mortgaged premises as lot G. in block number 93, in Horton's addition to San Diego, as per maps on file in the county recorder's office, made by James Pascoe, the court held that this sufficiently described the property as situated in San Diego county; and that, judicial notice being taken of the fact that there is but one county of San Diego in the state, the superior court of that county had jurisdiction of the subject of the action.[86]

§ 359. **Defective description.**—The description of real estate in a mortgage may be sufficiently correct to make a valid conveyance as against the mortgagor, but, unaided by proper averments in a complaint for foreclosure, be insuffi-

[84] See *Schmidt* v. *Mackey*, 31 Tex. 659.

[85] *Crosby* v. *Dowd*, 61 Cal. 603. But where the description in the complaint, though defective, is the same as that contained in the mortgage, the mortgagor cannot complain of it. *German Loan Society* v. *Kern*, 38 Or. 232, 62 Pac. 788.

[86] *Graham* v. *Stewart*, 68 Cal. 374. See also *Peachy* v. *Winter*, 131 Cal. 316, 63 Pac. 468; *Striegel* v. *Harding*, 12 S. D. 342, 81 N. W. 635, 76 Am. St. Rep. 607.

cient to authorize a decree and order of sale.[87] Where such a description is so defective as to render the mortgage void, no averments in the complaint can make valid a decree rendered thereon.[88]

Where it appeared from the allegations in a complaint for the foreclosure of a mortgage, that certain pieces of real estate, together with two mills and "all and singular the hereditaments and appurtenances thereunto belonging," were mortgaged, and it also appeared from the pleadings and the admission of the defendants and mortgagors, that a certain mill-dam and water-power were appurtenant to said mills and real estate, but it did not appear whether such dam and water-power were situated on said real estate or not, such allegations were held to support a judgment that the mortgage was a lien upon such dam and water-power, as well as upon the real estate more particularly described in the mortgage.[89] A description of the land in a school-fund mortgage, as "the north-east part" of a specified tract "containing ninety acres," has been held to be insufficient, and to render invalid an auditor's sale made thereunder.[90] But a description as "lots 9 and 10 in block 51, in Rice and Irvine's addition," has been held to describe the whole of the lots sufficiently, though lying partly in "Dayton and Irvine's addition."[91] And in describing a parcel of land as being north of the "ground of the C., C., C. & I. R. R.," the use of the word "ground" instead of the words "right of way," does not render such description void.[92]

[87] *Halstead* v. *Board of Commissioners of Lake Co.* 56 Ind. 363. See also *German Loan Society* v. *Kern,* 38 Or. 232, 62 Pac. 788. Where no one could have been misled by the defective description it will be disregarded. *Striegel* v. *Harding,* 12 S. D. 342, 81 N. W. 635, 76 Am. St. Rep. 607.

[88] *Halstead* v. *Board of Commissioners of Lake Co.* 56 Ind. 363; *Slater* v. *Breese,* 36 Mich. 77.

[89] *Lanoue* v. *McKinnon,* 19 Kan. 408.

[90] *Buck* v. *Axt,* 85 Ind. 512.

[91] *Rochat* v. *Emmett,* 35 Minn. 420.

[92] *Pence* v. *Armstrong,* 95 Ind. 191.

Where the lands are described by section, township and range, not giving the county or state where situated, it will be presumed that the lands are in the state where the court is located, and from the description the court will judicially know the county.[93] The fact that a complaint in foreclosure describes the premises mortgaged in different terms from those used in the mortgage itself, is of no consequence where the mortgage is sufficiently well identified, and the premises described in the complaint are the same as those described in the mortgage.[94]

It has been held that a foreclosure decree and a deed in pursuance thereof are void for uncertainty where the description of the property makes exceptions of portions previously sold, without showing what such portions are.[95] But a judgment and order of sale on foreclosure describing the entire tract sold, the number of acres, the county in which situated, the name of the tract, the adjoining survey, and the beginning corner, is sufficient.[96]

§ 360. Allegation as to breach of contract and right of action.—The allegations in a complaint must set out a breach of the conditions of the mortgage, in order to give the court jurisdiction to foreclose the mortgage and to sell the property.[97] Thus, where it appears from the complaint that the personal estate of a deceased mortgagor is liable for the payment of the mortgage debt, and that the suit was brought

[93] *Brown* v. *Ogg,* 85 Ind. 234. See *Parker* v. *Teas,* 79 Ind. 235.

[94] *Shepard* v. *Shepard,* 36 Mich. 173.

[95] *Bowen* v. *Wickersham,* 124 Ind. 404, 19 Am. St. Rep. 106, 24 N. E. 983.

[96] *Thompson* v. *Jones* (Tex.) 12 S. W. 77.

[97] *Davies* v. *New York Concert Co.* 41 Hun (N. Y.) 492. In this case the allegations of the complaint, as to the default of the defendant, stated that among the interest coupons which were held and owned by the plaintiff's assignor, were twelve coupons for fifteen dollars each, payable on January 1, 1884, and twelve coupons for fifteen dollars each, payable on April 1, 1884, and that said coupons were not paid at maturity, nor were any of them paid, or any part thereof. It was not alleged that the com-

before the expiration of the time allowed for the payment of the debt after the issuing of letters of administration, and the giving of notice thereof, the complaint is defective and must be dismissed on demurrer for want of sufficient facts.[98] And where the complaint alleges the giving of a bond, conditioned for the payment of a sum of money, and that the mortgage was given as collateral security therefor and contained the same condition, it must also allege a default in the performance of the condition of the bond.[99] Thus, in an action to foreclose a mortgage given to secure the performance of a bond, conditioned for the payment of certain indebtedness of a suspended bank out of its assets, the complaint which failed to show the character of such indebtedness, the several amounts constituting it, the persons to whom it was due, the

pany had neglected or refused to pay them, at the place or in the manner provided in the mortgage, nor that it had been in any form requested to pay them, nor that it had neglected to comply with any such request, nor that it was in any manner in default. The court held that it was apparent from the provisions contained in the mortgage, that more than the mere fact of the non-payment of the coupons was required to be shown to authorize an action to be brought for its foreclosure, and that a demurrer interposed to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, should be sustained. See *Bumpus* v. *Willett,* 55 Misc. 94, 106 N. Y. Supp. 366. (Breach of covenant to insure.) *Sun & Evening Sun Bldg. Mutual Loan & Accumulating Fund Ass'c* v. *Buck,* 36 App. Div. 637, 55 N. Y. Supp. 262. (Breach of condition as to payment of installments.) *Patten* v. *Pepper Hotel Co.* 153 Cal. 460, 96 Pac. 296; *White* v. *Gracey,* 45 Fla. 657, 34 So. 223; *Wheeler* v. *Foster,* 82 Ill. App. 153. (Default in payment of interest.) *Creech* v. *Abner,* 106 Ky. 239, 50 S. W. 58. (Failure to pay mortgage debt.) *Equitable Savings & Loan Ass'c.* v. *Hewitt,* 55 Or. 329, 106 Pac. 447. (Breach of covenant to keep property free from all liens.) *Durland* v. *Durland,* 62 Neb. 813, 87 N. W. 1048; *Miller* v. *McConnell,* 118 Ky. 293, 80 S. W. 1103; *Salomon* v. *Stoddard,* 107 Ill. App. 227. (Breach of covenants generally.)

On necessity for averring election to declare whole amount due on default, see *Barney* v. *McClancy,* 15 Colo. App. 63, 60 Pac. 948; *San Gabriel Valley Bank* v. *Lake View Town Co.* 4 Cal. App. 630, 89 Pac. 360.

[98] *Lovering* v. *King,* 97 Ind. 130.

[99] *Coulter* v. *Bower,* 11 Daly (N. Y.) 203; *Harvey* v. *Truby,* 62 App. Div. 503, 71 N. Y. Supp. 86.

nominal value of the assets of the bank, the amount realized out of them and applicable to such payment, or in what respect or particulars, or in what specific sum the obligors were in default, was held bad on demurrer.[1]

The right to foreclose accrues upon any breach of the conditions of a mortgage;[2] and if there are several breaches, it is necessary to prove only one of them to be entitled to a decree.[3] Where suit is brought to foreclose a mortgage given to secure a bond for the support of a husband and wife during their natural lives, a breach of such bond must be shown, but such breach need not be shown to have occurred during the life-time of the husband, who died first. If there has been a breach of the bond since the death of the husband, and before the commencement of the suit, it will be sufficient to maintain the action;[4] because in such a case the mortgage was given as a security for the support not only of the deceased mortgagor, but of his wife also, and constitutes an obligation continuing as long as either lives,[5] for a bond and mortgage given to a husband and wife belongs to the survivor.[6]

Where the mortgagee's right to foreclose is dependent upon a condition precedent, the complaint should distinctly aver the performance of such condition.[7] But where the action is founded upon a note payable on demand, a demand need not be alleged in the complaint.[8] If no particular time for payment is mentioned in a mortgage, it is to be paid within a reasonable time, and if not so paid the mortgagee will be en-

[1] *Seely* v. *Hills,* 49 Wis. 473.

[2] See *Davies* v. *New York Concert Co.* 41 Hun (N. Y.) 492.

[3] *Beckwith* v. *Windsor Manuf. Co.* 14 Conn. 594.

[4] *Plummer* v. *Doughty,* 78 Me. 341.

[5] See *Plummer* v. *Doughty,* 78 Me. 341, 344; *Merrill* v. *Bickford,* 65 Me. 119; *Pike* v. *Collins,* 33 Me. 38, 43.

[6] *Pike* v. *Collins,* 33 Me. 38, 43; *Draper* v. *Jackson,* 16 Mass. 480. See *ante* § 98.

[7] *Curtis* v. *Goodenow,* 24 Mich. 18.

[8] See *ante,* §§ 52, 53, 344. See also *Gillett* v. *Balcom,* 6 Barb. (N. Y.) 370; *Haxtun* v. *Bishop,* 3 Wend. (N. Y.) 13; *Austin* v. *Burbank,* 2 Day (Conn.) 474, 2 Am. Dec. 119; *Rumball* v. *Ball,* 10 Mod. 38.

titled to foreclose,[9] although the interest may have been paid regularly.[10] The same is true where the debt secured is past due.[11]

§ 361. Allegation in foreclosure of indemnity mortgage.—Although a mortgage may purport to have been given to secure the payment of a note, it may be shown to have been given for indemnity only.[12] In an action to foreclose a mortgage given as an indemnity merely, the complaint must allege a payment on account of the liability for which the mortgage was given as security; because a surety who has taken a mortgage to indemnify him is not entitled to a foreclosure thereof, until he has paid the debt of the principal or otherwise suffered an injury.[13] The complaint must set out the exact amount paid on account of the liability;[14] and where an indemnity mortgage is given to secure more than one note, it must specifically state on which note the payment was made.[15] But where the aggregate sum paid is stated in the complaint, it is not necessary to set up in detail the several distinct sums constituting such amount.[16]

Where a mortgage is given to secure the sureties on an official bond, it is immaterial that a bill to foreclose it does not correctly state the date of the appointment of the offi-

[9] *Triebert* v. *Burgess,* 11 Md. 452; *Farrell* v. *Bean,* 10 Md. 233.

[10] *Austin* v. *Burbank,* 2 Day (Conn.) 474, 2 Am. Dec. 119.

[11] *Wright* v. *Shumway,* 1 Biss. C. C. 23, 2 Am. L. Reg. (O. S.) 20.

[12] *Morrill* v. *Morrill,* 53 Vt. 74, 38 Am. Rep. 659.

[13] *Shepard* v. *Shepard,* 6 Conn. 37; *Francis* v. *Porter,* 7 Ind. 213; *Lewis* v. *Richey,* 5 Ind. 152. See *Collier* v. *Ervin,* 2 Mont. 335. See *ante,* § 67.

In those cases where a surety has a mortgage on the property of his principal to secure him for signing notes of the latter, after the maturity of the debt, he is not bound to wait until he has actually paid as surety, but may foreclose the mortgage at once; and if the principal is insolvent he may retain any funds in his hands to apply to the discharge of his liability. *Bates* v. *Wiggin,* 37 Kan. 47, 1 Am. St. Rep. 234, 14 Pac. 442.

[14] *Seely* v. *Hills,* 44 Wis. 484, 488, 49 Wis. 473, 482.

[15] *Shepard* v. *Shepard,* 6 Conn. 37.

[16] *Shepard* v. *Shepard,* 6 Conn. 37; *Dye* v. *Mann,* 10 Mich. 291.

cer, if it correctly recites the mortgage and the breach, and the evidence makes out a full cause of action.[17]

§ 362. Allegation as to defendant's interest.—A complaint in foreclosure necessarily puts the defendant's title in controversy; he can be impleaded only on the ground that he has or claims title. The foreclosure would fail of its purpose, if one who claims title should be omitted as a defendant.[18] And where the complaint to foreclose a mortgage joins a third party as a co-defendant, it should state the interest of such third party, and show that his interest is inferior to the mortgage lien of the plaintiff.[19]

An allegation in a complaint for the foreclosure of a mortgage, that a defendant has or claims to have some interest in the premises, by mortgage, judgment, tax lien or otherwise, but that such interest or lien, if any, has accrued subsequent to the lien of the mortgage, is not an admission of any claim or lien paramount to the mortgage.[20] A general allegation that such third party has or claims an interest in the mortgaged premises, which, if any, is subsequent to the plaintiff's mortgage, sufficiently shows that he is a proper defendant,[21] although his interest is not set out specifically,[22] and is sufficient on demurrer;[23] it is not necessary, in a complaint for the foreclosure of a mortgage, to describe specifically the interest which each defendant has, or may claim to have, in the real estate covered by the mortgage.[24] The mere averment, however, in a complaint to foreclose a mortgage against

[17] *Shelden* v. *Warner,* 45 Mich. 638.

[18] *McDonald* v. *McDonald,* 45 Mich. 44. See *ante,* §§ 87, 136.

[19] *Frost* v. *Koon,* 30 N. Y. 428, 448; *Drury* v. *Clark,* 16 How. (N. Y.) Pr. 424; *Neitzel* v. *Hunter,* 19 Kan. 221; *Short* v. *Nooner,* 16 Kan. 220, 20 Kan. 624.

[20] *Newton* v. *Marshall,* 62 Wis. 8.

[21] *Bowen* v. *Wood,* 35 Ind. 268. See *Aldrich* v. *Lapham,* 6 How. (N. Y.) Pr. 129.

[22] *Woodworth* v. *Zimmerman,* 92 Ind. 349.

[23] *Bradford* v. *Russell,* 79 Ind. 64.

[24] *Hoes* v. *Boyer,* 108 Ind. 494.

a person other than the mortgagor, that "he is now the owner of the land," is not sufficient to show that the mortgage constitutes a lien upon the land as against him, as he may have acquired the land before the mortgage was executed.[25]

Where a third party is joined as a defendant upon the allegation that he has or claims some interest adverse to the plaintiff, of the nature and amount of which the plaintiff is ignorant, and he demands in his complaint that the defendant may be compelled to disclose such interest to the court, a judgment barring and foreclosing all the right, title and interest of such defendant in and to the mortgaged premises, adverse to the plaintiff, will be binding upon him if he files only a general answer.[26]

§ 363. Dismissal of complaint on payment before judgment.—The Code provides that where an action is brought to foreclose a mortgage upon real property upon which a portion of the principal or interest is due, and another portion of either is to become due, the complaint must be dismissed without costs against the plaintiff, upon the defendants paying into court, at any time before the final judgment directing a sale is rendered, the sum due, together with the plaintiff's costs.[27] But a tender of the amount due on a mortgage and all expenses incurred in reference to a sale will not prevent the sale, when other conditions in the mortgage have been broken.[28] Where the mortgage contains a stipulation for attorney fees in case of foreclosure, should the mortgage be placed in the hands of an attorney for foreclosure, and notice is drawn by him and set up in type, the mortgagor cannot stop the foreclosure by paying simply the mortgage; he

[25] *Nichol* v. *Henry,* 89 Ind. 54.

[26] *Blandin* v. *Wade,* 20 Kan. 251.

[27] 27 N. Y. Code Civ. Proc. § 1634. See *Long* v. *Lyons,* 54 How. (N. Y.) Pr. 129; *Malcolm* v. *Allen,* (N. Y. Supr. Ct.) 5 Alb. L. J. 334. Payment to the referee upon trial before him is not payment into court; the referee is not a court for that purpose. *Becker* v. *Boon,* 61 N. Y. 317.

[28] *Roberts* v. *Loyola Perpetual Bldg. Asso.* 74 Md. 1, 21 Atl. 684.

must also pay the attorney's fees and printer's bills.[29] Where money is paid into court, unless the court otherwise directs, it must be paid either directly, or by the officer who is required by law first to receive it, to the county tresaurer of the county where the action is triable; and if the case is pending in New York city, it must be paid to the chamberlain.[30]

[29] *Mjones* v. *Yellow Medicine County Bank*, 45 Minn. 335, 47 N. W. 1072.

[30] N. Y. Code Civ. Proc. § 745

CHAPTER XIV.

LIS PENDENS—NOTICE OF PENDENCY OF ACTION.

§ 364. Definition and Bacon's ordinances.
§ 365. Nature and functions of a *lis pendens.*
§ 366. When *lis pendens* becomes operative.
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§ 368. History of the doctrine in New York.
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§ 377. Effect of omission to file notice of *lis pendens.*
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§ 379. Defective and amended notice of *lis pendens.*
§ 380. Dormant *lis pendens.*
§ 381. Cancelling notice of *lis pendens.*

§ 364. Definition and Bacon's ordinances.—The phrase *lis pendens* means literally "suit pending;" [31] the phrase, as well as its legal doctrine, comes to us from the civil law,[32] where a suit was not considered as pending until it had reached the stage called *litis contestatio.*[33] By some, however, it has been supposed that the rule of *lis pendens* was adopted by analogy from a proceeding at common-law; thus, in an early realty case,[34] the court said: "This is in imitation of the proceedings in a real action at common-law, where, if the

[31] 2 Kent, 122; 2 Bouv. L. Dict. (15th ed.) 120.

[32] See Bennett on *Lis Pendens,* § 9.

[33] 1 Mack. C. L. 205, § 203.

[34] *Sorrell* v. *Carpenter,* 2 P. Wms. 482.

defendant aliens after the pendency of the writ, the judgment in the action will over-reach such alienation."

Lord Chancellor Bacon, while a member of the early English court of Chancery, promulgated a number of ordinances or rules [35] "for the better and more regular administration of justice in the chancery, to be daily observed, saving the prerogative of the court." In these ordinances we have many rules which originated with Bacon, but the main body of them, it is thought, previously existed in some form, written or unwritten; but it is beyond the scope and ambition of this work to settle the much discussed questions of the extent to which Bacon altered the existing practice, or for the first time established it, and how far he merely collated and published rules previously in force.

The twelfth of Bacon's ordinances or rules was as follows: "No decree bindeth any that cometh in *bona fide* by conveyance from the defendant before the bill exhibited, and is made no party, neither by bill nor the order; but where he comes in *pendente lite,* and while the suit is in full prosecution, and without any color of allowance or privity of the court, there regularly the decree bindeth; but if there were any intermission of suit, or the court made acquainted with the conveyance, the court is to give order upon the special matter according to justice." [36]

The correct doctrine of *lis pendens* has been said to be, that the law will not allow a defendant to transfer to others, pending a litigation, rights to the property in dispute, so as to prejudice a recovery by the plaintiff.[37] Another form of statement is, that where a litigation is pending between a plaintiff and a defendant, as to the ownership of a particular estate, the necessities of mankind require that the decision of the court

[35] Adopted 1618.

[36] See vii. Bacon's Works, 761, (ed. of Spedding, Ellis & Heath, London.) See also Bennett on *Lis Pendens,* appx. 446.

[37] *Bellamy* v. *Sabine,* 1 DeG. & J. 566.

shall be binding, not only on the litigating parties, but also on those who derive title under them by transfers made pending the suit. If this were not true, there could be no certainty that a litigation would ever come to an end. The rule had its roots largely in public policy, and does not rest, as is sometimes supposed, on the equitable doctrine of notice binding on the conscience. The doctrine is not peculiar to courts of equity. In actions *in rem* the judgment bound the lands, notwithstanding an alienation by the defendant *pendente lite.* Were it not for the doctrine in question, the plaintiff in every action would be liable to be defeated in his recovery by the defendant's alienating the property in litigation before judgment or decree, so that he would be compelled to commence proceedings *de novo,* subject to be defeated again by similar conduct of the defendant.[38]

§ 365. Nature and functions of a lis pendens.—Under the methods of legal procedure and practice of the present day, a *lis pendens* is a notice of the actual pendency of a suit or other judicial proceeding.[39] It has been said that the sole object of a *lis pendens* is, to keep the subject in controversy within the jurisdiction of the court until the judgment has been entered, so that it will be effective and binding on the parties to the action and on all parties dealing with them, and on the subject-matter of the controversy.[40] The principal doctrine of a notice of pendency of action is, that a purchaser or assignee of the subject-matter of a litigation will be as

[38] See *Lamont* v. *Cheshire,* 65 N. Y. 30, 36; *Murray* v. *Lylburn,* 2 Johns. Ch. (N. Y.) 441; *Hayden* v. *Bucklin,* 9 Paige Ch. (N. Y.) 513; *Gaskell* v. *Durdin,* 2 Ball & B. 167. In Maine, the doctrine of *lis pendens* has been abrogated by statute. *Snow* v. *Russell,* 94 Me. 322, 47 A. 536.

[39] *City Bank of New Orleans* v. *Walden,* 1 La. An. 46; *Bennett* v. *Chase,* 21 N. H. (1 Fost.) 582. See *Alabama & Vicksburg Ry. Co.* v. *Thomas,* 86 Miss. 27, 38 So. 770.

[40] See Co. Litt. 344 b. *Bond Realty Co.* v. *Pounds,* 128 App. Div. 91, 112 N. Y. Supp. 433. See *Wingfield* v. *Neal, as trustee, etc.,* 60 W. Va. 106, 54 S. E. 47, 10 L.R.A. (N.S.) 443, 116 Am. St. Rep. 882.

fully bound by the final judgment in the action or proceeding, though not made a party thereto, as would the original owner and party to the action, if he had continued to own the subject-matter in dispute.[41]

The modern doctrine of *lis pendens* is based, not upon the theory that a pending suit is constructive notice to all the world, like a recorded deed, but upon the ground that the law will not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the rights of contesting parties and to defeat the execution of the decree to be entered in the cause.[42]

The function of a *lis pendens* has been said to be the enforcement of the well known legal maxim *pendente lite nihil innovetur.* The rule rested in its origin upon the presumption that every man was attentive to what was passing in the courts of his country, and is founded upon the broad principle of public policy. It was necessary in order to prevent the fraudulent alienation and transfer of property, pending the adjudication of rights which might be affected thereby.[43] In the growth of the procedure and practice of the courts it was early found necessary, to the effectual administration of justice, that the decisions of courts of equity should in some way be made binding, not only on the litigant parties, but also on all parties who might derive title from them *pendente lite,* whether with or without actual notice of the suit.[44] The notice of pendency of action or *lis pendens* thus came into use as a matter of necessity. It is purely a rule of practice and is designed to make the decrees of a court bind-

[41] *Jones* v. *Williams,* 155 N. C. 179, 36 L.R.A.(N.S.) 426, 71 S. E. 222. See *Gilman* v. *Carpenter,* 22 S. D. 123, 115 N. W. 659.

[42] *Dovey's Appeal,* 97 Pa. St. 158.

[43] See *Leitch* v. *Wells,* 48 N. Y. 608; *Hopkins* v. *M'Laren,* 4 Cow. (N. Y.) 667; *Murray* v. *Ballou,* 1 Johns. Ch. (N. Y.) 566; *White* v. *Carpenter,* 2 Paige Ch. (N. Y.) 217; *Jackson* v. *Losee,* 4 Sandf. Ch. (N. Y.) 381; *Jackson* v. *Andrews,* 7 Wend. (N. Y.) 152; *Murray* v. *Blatchford,* 1 Wend. (N. Y.) 583; *Swett* v. *Poor,* 11 Mass. 549.

[44] *Lamont* v. *Cheshire,* 65 N. Y. 30, 36.

ing upon all parties who may acquire rights from or under the parties to the suit pending the action.[45]

§ 366. **When lis pendens becomes operative.**—A notice of pendency of action does not become operative until the summons has been served in some manner;[46] neither will the notice become effective until the filing of the complaint.[47] A subsequent order directing the filing of a *lis pendens nunc pro tunc* will not affect the rights of an intervening creditor.[48] A *lis pendens* becomes effective as to third persons from the earliest service of the process on any defendant;[49] and service on one of two defendants is sufficient to create a *lis pendens*.[50] But the notice provided for by statute will be of no effect until filed.[51] Yet where a party appears and is heard, notice will be presumed.[52]

Notice in a foreclosure suit will be good from the service of the summons in the action on any of the defendants, although the owner of the equity of redemption may not yet have been served.[53] A *lis pendens* filed in an original suit to foreclose a mortgage affords, as to all defendants, construc-

[45] *Bishop of Winchester* v. *Paine*, 11 Ves. 194.

[46] *Grant* v. *Bennett*, 96 Ill. 513; *Games* v. *Stiles*, 39 U. S. (14 Pet.) 322, 10 L. ed. 476; *Armstrong Cork Co.* v. *Merchants' Refrigerating Co.* 184 Fed. 199, 107 C. C. A. 93; *Hansen* v. *Klicka*, 78 Ill. App. 177; *H. L. Spencer Co.* v. *Koell*, 91 Minn. 226, 97 N. W. 974; *Humphrey* v. *Beaumont Irrigating Co.* 41 Tex. Civ. App. 308, 93 S. W. 180.

[47] *Sherman* v. *Bemis*, 58 Wis. 343. See *Grant* v. *Bennett*, 96 Ill. 513.

[48] *Weeks* v. *Tomes*, 16 Hun (N. Y.) 349.

[49] *Hayden* v. *Bucklin*, 9 Paige Ch. (N. Y.) 512. In this case the court held, that personal service of the subpœna is not necessary to create a *lis pendens*, which is constructive notice to third persons of the commencement of a suit in chancery; and where the subpœna cannot be served personally, a service upon the defendant's wife or other member of his family, of suitable age and discretion, at the defendant's place of residence, will be sufficient. See *Williamson* v. *Williams*, 11 Lea (Tenn.) 355.

[50] *Myrick* v. *Selden*, 36 Barb. (N. Y.) 15, 22.

[51] *Leitch* v. *Wells*, 48 N. Y. 585.

[52] See *Odell* v. *DeWitt*, 53 N. Y. 643.

[53] *Fuller* v. *Scribner*, 76 N. Y. 190, affirming 16 Hun (N. Y.) 130.

tive notice of all cross-suits.[54] A writ of error is a new suit, and a *lis pendens* therein will not become effective until the service of the summons.[55]

§ 367. **Duration and extent of a lis pendens.**—The operation of a *lis pendens* as a notice continues, if the suit is not abandoned, until it is closed by a final decree,[56] provided it is prosecuted with reasonable diligence and in good faith; otherwise, a purchaser who has no actual notice, will not be bound by it.[57] A notice of *lis pendens* has in no case an extra territorial application, and is not effective beyond the jurisdiction of the court in which the venue of the action is laid.[58]

A notice of *lis pendens* relates only to the voluntary alienation and incumbrance of the property by a defendant pending a suit in respect to it, and does not affect other parties asserting rights adverse to the defendant;[59] nor is it notice to one who rents the premises from a person not a party to the suit.[60] But it is notice to a tenant of the mortgagor who rents and plants the land after the commencement of the foreclosure action and filing of the *lis pendens,* and the crops so

[54] *Hall Lumber Co.* v. *Gustin,* 54 Mich. 624.

[55] *Wooldridge* v. *Boyd,* 13 Lea (Tenn.) 151.

[56] *Lis pendens* does not necessarily terminate upon the rendition of a judgment, but may continue for a reasonable time thereafter to perfect appeal or remedy to set it aside; and this as to time must depend upon the facts of the particular case. *McLean* v. *Stith,* 50 Tex. Civ. App. 323, 112 S. W. 355.

[57] *Hammond* v. *Paxton,* 58 Mich. 393. See *Durand* v. *Lord,* 115 Ill. 610.

[58] *Holbrook* v. *New Jersey Zinc Co.* 57 N. Y. 616. See *Jeffres* v. *Cochrane,* 48 N. Y. 671; *Shelton* v. *Johnson,* 4 Sneed (Tenn.) 672

Change of venue as affecting *lis pendens,* see *Jones* v. *Robb,* 35 Tex. Civ. App. 263, 80 S. W. 395.

[59] *Becker* v. *Howard,* 4 Hun (N. Y.) 359, 6 T. & C. (N. Y.) 603, aff'd 66 N. Y. 5; *Stuyvesant* v. *Hall,* 2 Barb. Ch. (N. Y.) 151; *Harrington* v. *Slade,* 22 Barb. (N. Y.) 161. See *Sears* v. *Hyer,* 1 Paige Ch. (N. Y.) 483; *Merrill* v. *Wright,* 65 Neb. 794, 91 N. W. 697, 101 Am. St. Rep. 645. See also *Johnson* v. *Irwin,* 16 Wash. 652, 48 Pac. 345. See *post,* § 314.

[60] *Thompson* v. *Clark,* 4 Hun (N. Y.) 164, 6 T. & C. (N. Y.) 510.

planted pass to the purchaser at the foreclosure sale.[61] The notice of *lis pendens,* after the complaint has been filed and the summons has been issued in an action, is notice only of what those papers contain. It cannot extend beyond, nor in any way affect property not the subject of the action, which must be specifically described.[62]

It is now generally conceded that, independent of statutory regulations, the mere commencement of an action in a court of law, or the filing of a bill in equity affecting the title to real estate, is notice to all the world[63] and creates a *lis pendens;*[64] any one purchasing property, pending a litigation, takes the title charged with notice of the suit,[65] and subject to the determination thereof.[66] Such an action is usually

[61] *Tittle* v. *Kennedy,* 71 S. C. 1, 50 S. E. 544.

[62] *Griffith* v. *Griffith,* Hopk. Ch. (N. Y.) 155, affirming 9 Paige Ch. (N. Y.) 315. See *Fitzgerald* v. *Blake,* 42 Barb. (N. Y.) 513, 28 How. (N. Y.) Pr. 110.

[63] One is not charged with notice of a suit concerning a collateral matter not necessarily appearing to affect his rights, especially where the complaint has not been filed. *Zoeller* v. *Riley,* 100 N. Y. 102, 53 Am. Rep. 157. See *Bridger* v. *Exchange Bank,* 126 Ga. 821, 8 L.R.A.(N.S.) 463, 115 Am. St. Rep. 118, 56 S. E. 97.

[64] See *Stern* v. *O'Connell,* 35 N. Y. 104, 106; *Jackson* v. *Dickenson,* 15 Johns. (N. Y.) 309, 315, 8 Am. Dec. 236; *Murray* v. *Ballou,* 1 Johns. Ch. (N. Y.) 566, 576; *Hayden* v. *Bucklin,* 9 Paige Ch. (N. Y.) 512; *Center* v. *Planters' and Merchants' Bank,* 22 Ala. 743; *Green* v. *White,* 7 Blackf. (Ind.) 242; *Allen* v. *Mandaville,* 26 Miss. 399; *Herrington* v. *Herrington,* 27 Mo. 560; *Shelton* v. *Johnson,* 4 Sneed. (Tenn.) 672, 70 Am. Dec. 265.

[65] Although a purchaser *pendente lite* is chargeable with notice of the rights of a party claiming adversely to his vendor, yet the purchaser is not bound by a judgment rendered in a subsequent suit, based on the same cause of action, to which he was not made a party. *Randall* v. *Snyder,* 64 Tex. 350.

[66] *Cleveland* v. *Boerum,* 23 Barb. (N. Y.) 201, 27 Barb. (N. Y.) 252, 3 Abb. (N. Y.) Pr. 294; *Harrington* v. *Slade,* 22 Barb. (N. Y.) 161, 166; *Griswold* v. *Miller,* 15 Barb. (N. Y.) 520; *Zeiter* v. *Bowman,* 6 Barb. (N. Y.) 133; *Murray* v. *Lylburn,* 2 Johns. Ch. (N. Y.) 441; *Murray* v. *Ballou,* 1 Johns. Ch. (N. Y.) 566; *Hayden* v. *Bucklin,* 9 Paige Ch. (N. Y.) 512; *Jackson* v. *Losee,* 4 Sandf. Ch. (N. Y.) 381; *Fash* v. *Ravesies,* 32 Ala. 451; *Gilman* v. *Hamilton,* 16 Ill. 225; *Kern* v. *Hazlerigg,* 11 Ind. 443, 71 Am. Dec. 360; *Watson* v. *Wilson,* 2 Dana (Ky.) 406, 26 Am. Dec. 459; *Debell* v. *Foxworthy's Heirs,*

deemed commenced from the service of the summons,[67] but a *lis pendens* does not operate so as to affect the conscience or legal rights of a purchaser, until the court has acquired jurisdiction of the subject-matter of the action.[68] A pending suit is not notice of anything beyond the matters that can be tried therein.[69]

§ 368. History of the doctrine in New York.—The history and principles of the general doctrine of *lis pendens* are fully set forth by Chancellor Kent in Murray v. Ballou,[70] and in Murray v. Lylburn.[71] The whole law on the subject, it has been said, may be found in these two cases, subsequent cases having merely exemplified and applied the law as there expounded by the learned chancellor.[72]

9 B. Mon. (Ky.) 228; *Talbott's Exrs.* v. *Bell's Heirs,* 5 B. Mon. (Ky.) 320, 43 Am. Dec. 126; *Masson* v. *Saloy,* 12 La. An. 776; *Shotwell* v. *Lawson,* 30 Miss. 27, 64 Am. Dec. 145; *Hersey* v. *Turbett,* 27 Pa. St. 418.

[67] *Harrington* v. *Slade,* 22 Barb. (N. Y.) 161; *Murray* v. *Ballou,* 1 Johns. Ch. (N. Y.) 566, 576; *Griffith* v. *Griffith.* Hoff. Ch. (N. Y.) 153; *Weber* v. *Fowler,* 11 How. (N. Y.) Pr. 458; *Hovey* v. *Hill,* 3 Lans. (N. Y.) 167, 170; *Parks* v. *Jackson,* 11 Wend. (N. Y.) 442.

In Michigan it is held that a suit and a cross-suit constitute but one action, and that notice of the suit is notice of the cross-suit also. Thus, where in an original action to foreclose, a *lis pendens* was filed, but was not filed with a cross-complaint, it was held that the *lis pendens* in the original action was constructive notice to all of the defendants under the cross-complaint also: *The Hall Lumber Co.* v. *Gustin,* 54 Mich. 625. But it is held in Kentucky that where a mortgagee has sued to foreclose his mortgage, and made another mortgagee a defendant, an action by the latter will not constitute a *lis pendens* until he files his cross-petition and causes a process to be issued. *Hart* v. *Hayden,* 79 Ky. 346.

[68] *Carrington* v. *Brents,* 1 McL. C. C. 167. See *Murray* v. *Ballou,* 1 Johns. Ch. (N. Y.) 566; *Worsley* v. *Scarborough,* 3 Atk. 392; *Bishop of Winchester* v. *Paine,* 11 Ves. 194; *Sorrell* v. *Carpenter,* 2 P. Wms. 482.

[69] *Weiler* v. *Dreufus,* 26 Fed. 824.

[70] 1 Johns. Ch. (N. Y.) 566.

[71] 2 Johns. Ch. (N. Y.) 441.

[72] See *Leitch* v. *Wells,* 48 N. Y. 585; *Winston* v. *Westfeldt,* 22 Ala. 760, 58 Am. Dec. 278; *Mims* v. *West,* 38 Ga. 18; *Stone* v. *Elliott,* 11 Ohio St. 252; *Diamond* v. *Lawrence Co.* 37 Pa. St. 353, 78 Am. Dec. 429; *Kieffer* v. *Ehler,* 18 Pa. St. 388; *City of Lexington* v. *Butler,* 81 U. S. (14 Wall.) 282, 20 L. ed. 809; *Durrant* v. *Iowa Co.* Woolw. C. C. 69.

Prior to the enactment of any statute in New York, the pendency of an action in equity was, of itself, notice to all parties who had any interest in it, or in the subject-matter of the controversy. Since the adoption of the Code the time of filing the notice has been frequently changed. Prior to 1851 the notice of *lis pendens* could be filed only at the time of commencing the action; by an amendment of that year the time of filing the notice was made to depend upon the time of filing the complaint, and another amendment in 1862 provided that the action should be deemed commenced, for the purposes of that section only, from the time of filing the notice of the pendency of the action.

The early doctrine and practice of *lis pendens,* though seemingly necessary to give effect to chancery decrees and to obviate the inconvenience of a constant change of parties, at times worked great injustice to innocent persons. To remedy this evil many of the states early passed statutes,[73] which generally provided in substance, that, in order to render the filing of a bill in chancery constructive notice to a purchaser of real estate pending a suit affecting it, the complainant must at the same time file with the clerk of the court in the county in which the land was situated, a notice of the pendency of the suit.[74] The notice is always required to be filed with the officer who is charged by law with the duty of keeping the records of transfers, whether that officer be the "clerk of the court," as in New York, the "register of deeds," as in Wisconsin, or the "county recorder," as in Ohio.

§ 369. Contents of notice of lis pendens.—The notice of *lis pendens* in New York must contain (1) the names of the parties to the action; (2) a statement of the object of the action; (3) a description of the property in the county where the notice is filed, affected by the action; (4) the date of the mortgage; (5) the parties to the mortgage; (6) the time of

[73] See N. Y. Act 1823 (L. 1823, chap. 182, § 11).

[74] See N. Y. Code Civ. Proc. §§ 1670, 1673.

recording the mortgage, and (7) the place where the mortgage is recorded.[75] But it is not absolutely necessary to the validity of the notice that all these particulars, when required, should be given with minuteness and entire accuracy. For instance, the names of the parties are always required, yet if the name of a defendant should be misspelled, or if a middle letter should be erroneously inserted in his name,[76] the notice would not be affected thereby, because of the well settled and well known rule of law that middle letters, although descriptive, are not essential parts of a name;[77] even the addition or omission of the whole middle name would not vary the rule.[77a]

One of the requisites of a *lis pendens* is that it shall state where the mortgage is recorded; but if the notice describes the premises, giving the ward and county in which they are situated, and states that the mortgage was recorded, without stating in what county, it would seem to be a sufficient compliance with the statute,[78] because the statutes of the various states, regulating the recording of transfers and incumbrances, designate where all such instruments shall be recorded, which is always in the county where the premises are situated; and

[75] N. Y. Code Civ. Proc. §§ 1631, 1670, N. Y. Supreme Court Rule 60; *Freedman* v. *Safran,* 131 App. Div. 675, 116 N. Y. Supp. 113.

[76] In the case of *Weber* v. *Fowler,* 11 How. (N. Y.) Pr. 458, the name of a defendant was indexed "John F. Fowler" in the notice of *lis pendens,* instead of "John Fowler," his true name; the court held that the notice was sufficient to put the purchaser *pendente lite* on inquiry, and to charge him with all knowledge to which the inquiry, if made, would have led, and therefore to be a substantial compliance with the requirements of the statute. See also *Reed* v. *Gannon,* 50 N. Y. 345; *Williamson* v. *Brown,* 15 N. Y. 362; *Brumfield* v. *Boutall,* 24 Hun (N. Y.) 451; *Jones* v. *Smith,* 1 Hare, 43, 55; *Taylor* v. *Baker,* 5 Price, 306; *Benson* v. *Heathorn,* 1 Younge & Col. Ch. 328.

[77] *Roosevelt* v. *Gardinier,* 2 Cow. (N. Y.) 463; *Milk* v. *Christie,* 1 Hill (N. Y.) 102; *Weber* v. *Fowler,* 11 How. (N. Y.) Pr. 458; *People* v. *Collins,* 7 Johns. (N. Y.) 549; *Franklin* v. *Talmadge,* 5 Johns. (N. Y.) 84.

[77a] *Roosevelt* v. *Gardinier,* 2 Cow. (N. Y.) 463; *Milk* v. *Christie,* 1 Hill (N. Y.) 102; *Franklin* v. *Talmadge,* 5 Johns. (N. Y.) 84.

[78] *Potter* v. *Rowland,* 8 N. Y. 448.

since every person is bound to take notice of public statutes, the notice being filed in the office where the mortgage is recorded, no one reading the notice and having a knowledge of the statute can be misled. The New York Court of Appeals say,[79] that the object of the statute was to require such a description of the mortgage as to apprise individuals, having liens by judgment on the mortgaged premises, where they could find the record of the mortgage, and that, this being effectually done, the notice was sufficient, although it did not follow the prescribed form, which is said to be merely directory.

§ 370. Description of premises.—The mortgaged premises should be fully and properly described in a *lis pendens;* there will not even be a constructive notice, where the property is not specified in the proceedings.[80] A notice which describes the premises simply as "all the real property of the defendant Brown, or in which she may have an interest, situated in Chenango county, New York," has been held void for indefiniteness.[81] If the notice of *lis pendens*, filed in a mortgage foreclosure suit, describes the premises incorrectly, the mortgagor, it has been said, will be entitled to have a judgment rendered against him on default set aside.[82] The notice of *lis pendens* should describe only the property actually to be affected by the judgment.[83]

§ 371. When notice of lis pendens to be filed.—The New York Code provides that a notice of *lis pendens* may

[79] See *Potter* v. *Rowland,* 8 N. Y. 448, 450.

[80] *Gardner* v. *Peckham,* 13 R. I. 102; *Russell* v. *Kirkbride,* 62 Tex. 455; *George D. Mashburn & Co.* v. *Dannenberg Co.* 117 Ga. 567, 44 S. E. 97. See *Morton* v. *Jones,* 136 Ky. 797, 125 S. W. 247. See also as to chattels, *Hillebrand* v. *Nelson, as sheriff,* 95 N. W. 1068, 1 Neb. (Unof.) 783.

[81] *Jaffray* v. *Brown,* 17 Hun (N. Y.) 575.

[82] *Spraggon* v. *McGreer,* 14 Wis. 439; *Manning* v. *McClurg,* 14 Wis. 350.

[83] *Fitzgerald* v. *Blake,* 42 Barb. (N. Y.) 513, 28 How. (N. Y.)

be filed by the plaintiff when he files his complaint or at any time afterwards, but at least twenty days before final judgbent.[84] Where the notice is required to be filed at, or subsequently to, the time of filing the complaint and issuing the summons thereon, as in New York, a notice filed before the issuance or service of the summons has been said to be a nullity;[85] the better opinion, however, seems to be that a notice so filed is not a nullity, but that it will simply be inoperative until the summons is actually served, at which time it will become operative.[86]

The court say, in Tate v. Jordan,[87] that "to hold the notice invalid forever, because there may have been some interval of time, however short, when it was not true in point of fact, and was therefore null, is to make a rule of law superior to and independent of the reason on which it is founded. The maxim *cessante ratione, cessat quoque lex,* applies." And where a notice is filed without the complaint, even though the action has been previously commenced by service of the summons, it is not valid,[88] but will become operative when the complaint is filed.[89]

Where a notice of *lis pendens* is not filed within the time required, it may be filed *nunc pro tunc;* but inasmuch as the notice is effective only from the date when it is actually filed,[90]

Pr. 110; *Griffith* v. *Griffith,* Hoff. Ch. (N. Y.) 153, aff'd 9 Paige Ch. (N. Y.) 315.

[84] N. Y. Code Civ. Proc. §§ 1631, 1670.

[85] *Benson* v. *Sayre,* 7 Abb. (N. Y.) Pr. 472, note; *Burroughs* v. *Reiger,* 12 How. (N. Y.) Pr. 171.

[86] *Farmers' Loan & Trust Co.* v. *Dickson,* 9 Abb. (N. Y.) Pr. 61; *Waring* v. *Waring,* 7 Abb. (N. Y.) Pr. 472; *Tate* v. *Jordan,* 3 Abb. (N. Y.) Pr. 392; *Brenen* v. *North,* 7 App. Div. 79, 39 N. Y. Supp. 975.

[87] 3 Abb. (N. Y.) Pr. 392.

[88] *Weeks* v. *Tomes,* 76 N. Y. 601, aff'g 16 Hun (N. Y.) 349; *Leitch* v. *Wells,* 48 N. Y. 585; *Stern* v. *O'Connell,* 35 N. Y. 104; *Burroughs* v. *Reiger,* 12 How. (N. Y.) Pr. 171.

[89] *Benson* v. *Sayre,* 7 Abb. (N. Y.) Pr. 472, note. See *Farmers' Loan & Trust Co.* v. *Dickson,* 9 Abb. (N. Y.) Pr. 61, 17 How. (N. Y.) Pr. 477; *Tate* v. *Jordan,* 3 Abb. (N. Y.) Pr. 392; *Butler* v. *Tomlinson,* 38 Barb. (N. Y.) 641; *Burroughs* v. *Reiger,* 12 How. (N. Y.) Pr. 171.

[90] *Lockwood* v. *Noble,* 113 Mich. 418, 71 N. W. 856.

such *nunc pro tunc* filing will not affect the rights of third parties acquired prior to the date of actual filing.[91]

§ 372. Who may file notice of lis pendens.—The right to file a *lis pendens,* being statutory, is an absolute right and not in any way dependent on judicial discretion,[92] and can not be impaired by the order of any court.[93] A notice of *lis pendens* in a foreclosure suit is required, under the statute, to be filed by the plaintiff,[94] and may be filed by a defendant, where he sets up in his answer a counter-claim, alleging a joint interest of parties in certain real property, and demands a judgment affecting the title thereto.[95] In such a case the defendant filing the notice is regarded as a plaintiff, and the plaintiff as a defendant.[96] And where the defendant sets out and claims the protection of certain rights in the land involved in the suit, it becomes necessary for him to file a *lis pendens,* in order to protect or to preserve such rights as he may be adjudged to have; because a purchaser is not chargeable with constructive notice of infirmities in his vendor's title, by reason of an equitable owner's assertion of his rights in his answer in a foreclosure suit, if by the judgment therein it appeared that a sale of the premises had been regularly authorized, and title in that manner acquired by his vendor, who was the purchaser of the premises on the foreclosure

[91] *Weeks* v. *Tomes,* 76 N. Y. 601, aff'g 16 Hun (N. Y.) 349; *Morton* v. *Jones,* 136 Ky. 797, 125 S. W. 247.

[92] *Mills* v. *Bliss,* 55 N. Y. 139; *Niebur* v. *Schreyer,* 10 N. Y. Civ. Proc. Rep. 72.

[93] *Platt* v. *Mathews,* 13 Rep. (U. S. C. C. 2d Ct. N. Y.) 581, Fed. Cas. No. 11,218a. The right to file and to cancel a notice of *lis pendens* being statutory, the court cannot direct it to be canceled unless some one of the events specified in the statute has taken place. *Willis* v. *Bellamy,* 53 N. Y. Supr. Ct. (21 J. & S.) 94.

[94] In Washington the notice may be signed by the plaintiff's attorney. *Eldridge* v. *Stenger,* 19 Wash. 697, 54 P. 541.

[95] N. Y. Code Civ. Proc. § 1631, 1673. See *Niebur* v. *Schreyer,* 10 N. Y. Civ. Proc. Rep. 72, 1 N. Y. St. Rep. 626.

[96] New York Code Civ. Proc. § 1673.

sale. The purchaser is not bound to look so far into the pleadings as to inform himself of the contents of such answer, but is only required to consult the judgment itself.[97]

Where a defendant sets up in his answer a counter-claim, upon which he demands an affirmative judgment affecting the title to, or the possession, use or enjoyment of, real property, he may, at the time of filing his answer, or at any time afterwards before final judgment, file a notice of the pendency of the suit similar to that filed by the plaintiff in such action. The rules governing the filing of a *lis pendens* by a defendant, are the same as those applicable to a like notice filed by a plaintiff. For the purposes of such an application, the defendant filing a notice is regarded as a plaintiff, and the plaintiff is regarded as a defendant.[98]

§ 373. Recording and indexing lis pendens.—The New York Code of Civil Procedure,[99] requires each county clerk, with whom a notice of *lis pendens* is filed, on the payment of his fee, to record and index such notice immediately, in a book kept in his office for that purpose. The party filing a notice of pendency of action is required to indicate at the foot thereof, the name of the defendants against whom he wishes to have the notice indexed.[1] Some attorneys require the notice to be indexed only against the names of the owners of the fee title; but the safer practice is thought to be to require it to be indexed against the names of all the defendants.

§ 374. Effect of notice of lis pendens.—The proper filing of a notice of *lis pendens* is constructive notice of the

[97] *Miller* v. *McGuckin,* 15 Abb. (N. Y.) N. C. 204.

[98] See *Niebur* v. *Schreyer,* 10 N. Y. Civ. Proc. Rep. 72, 1 N. Y. St. Rep. 626, N. Y. Code Civ. Proc. § 1673.

[99] N. Y. Code Civ. Proc. § 1672. See *Isaacs* v. *Isaacs,* 61 How. (N. Y.) Pr. 369.

[1] See N. Y. Code Civ. Proc. § 1672. As to what constitutes proper indexing under this section, see *Hartwell* v. *Riley,* 47 App. Div. 154, 62 N. Y. Supp. 317.

pendency of the action to all subsequent purchasers or incumbrancers of the land affected thereby, and is a substitute for actual notice;[2] it is as effective against a valid transfer or incumbrance[3] of the property described in it as an injunction would be.[4] Any subsequent sale or incumbrance of the property pending the suit, will be invalid as against the party filing the notice,[5] because anyone purchasing after the notice becomes operative, takes the property subject to the claims of the plaintiff.[6] The effect of filing a notice of *lis pendens* will not be defeated by its having been lost from the files, or not having been properly entered, through no fault of the plaintiff.[7] The notice of *lis pendens* binds all parties to the action, together with all purchasers from them, and all parties claiming under them, subsequently to the filing of the same.[8] All who are in privity with the parties to the action will also be bound.[9]

[2] *Chapman* v. *West,* 17 N. Y. 125, 10 How. (N. Y.) Pr. 367; *Hall* v. *Nelson,* 14 How. (N. Y.) Pr. 32, 23 Barb. (N. Y.) 88; *Stuyvesant* v. *Weil,* 26 Misc. 445, 57 N. Y. Supp. 592 See *Bridger* v. *Exchange Bank,* 126 Ga. 821, 115 Am. St. Rep. 118, 56 S. E. 97.

[3] Pending a bill of foreclosure filed by the mortgagee, the mortgagor cannot, by a contract with a mechanic, not sanctioned by the mortgagee, create a lien which shall be detrimental to the interests of the mortgagee; *Hards* v. *Connecticut Mut. L. Ins. Co.* 8 Biss. C. C. 234, 6 Rep. 420.

[4] *Stevenson* v. *Fayerweather,* 21 How. (N. Y.) Pr. 449.

[5] *Grider* v. *Payne,* 9 Dana (Ky.) 190.

[6] *Chapman* v. *West,* 17 N. Y. 125; *Zeiter* v. *Bowman,* 6 Barb. (N. Y.) 133; *Edmonds* v. *Crenshaw,* 1 McC. (S. C.) Eq. 264; *Holly Realty Co.* v. *Wortmann,* 121 N. Y. Supp. 572; *Holman* v. *Lewis,* 107 Me. 28, 76 Atl. 956.

[7] *Heim* v. *Ellis,* 49 Mich. 241. See *Latta* v. *Wiley,* 92 S. W. 433 (Tex. Civ. App.)

[8] *Cleveland* v. *Boerum,* 23 Barb. (N. Y.) 201, 3 Abb. (N. Y.) Pr. 294, aff'd 27 Barb. (N. Y.) 252, 24 N. Y. 613; *Harrington* v. *Slade,* 22 Barb. (N. Y.) 162. See *Patterson* v. *Brown,* 32 N. Y. 81; *Chapman* v. *West,* 17 N. Y. 125, aff'g 10 How. (N. Y.) Pr. 367; *People ex rel.* v. *Connolly,* 8 Abb. (N. Y.) Pr. 128; *Griswold* v. *Miller,* 15 Barb. (N. Y.) 520; *Zeiter* v. *Bowman,* 6 Barb. (N. Y.) 133; *Thompson* v. *Clark,* 4 Hun (N. Y.) 164, 6 T. & C. (N. Y.) 510; *Stern* v. *O'Connell,* 35 N. Y. 104; *Bridger* v. *Exchange Bank,* 126 Ga. 821, 115 Am. St. Rep. 118, 56 S. E. 97.

[9] *Craig* v. *Ward,* 1 Abb. Ct. App. Dec. (N. Y.) 454, aff'g 36 Barb.

A *lis pendens* binds a purchaser with constructive notice of all the facts which are apparent on the face of the pleadings at the time he takes his deed, and of such other facts as those facts necessarily put him upon inquiry for, and as such inquiry, pursued with ordinary diligence and prudence, would bring to his knowledge.[10]

The notice of a suit affects only proper parties to the suit and those claiming under them, and no act of the plaintiff in improperly inserting other names and in filing the notice so framed can affect the rights of prior purchasers or incumbrancers not properly parties to the action.[11] Thus, where a purchaser by contract is in possession of the land, he is not chargeable with a notice of *lis pendens,* and payments made by him to the vendor will be held valid.[12] Neither will a person who claims title under a sale for taxes be bound by the notice.[13]

§ 375. Who regarded as subsequent incumbrancers.— An assignee in bankruptcy of a mortgagor pending a foreclosure is an incumbrancer within the meaning of the statute, and will be bound by a notice of *lis pendens;*[14] so also is an assignee in bankruptcy in a suit commenced subsequently to filing the notice, and he will be bound thereby.[15] Likewise,

(N. Y.) 377, 3 Abb. (N. Y.) Pr. N. S. 235, 3 Keyes (N. Y.) 387.

[10] *Jones* v. *McNarrin,* 68 Me. 334.

[11] *People ex rel.* v. *Connolly,* 8 Abb. (N. Y.) Pr. 128, aff'g *sub nom. Chapman* v. *Draper,* 10 How. (N. Y.) Pr. 367; *Stuyvesant* v. *Hone,* 1 Sandf. Ch. (N. Y.) 419, aff'd *sub nom. Stuyvesant* v. *Hall,* 2 Barb. Ch. (N. Y.) 151. See *Jaycox* v. *Smith,* 17 App. Div. 146, 45 N. Y. Supp. 299.

[12] *Moyer* v. *Hinman,* 13 N. Y. 180; *Dwight* v. *Phillips,* 48 Barb. (N. Y.) 116; *Smith* v. *Gage,* 41 Barb. (N. Y.) 61; *Parks* v. *Jackson,* 11 Wend. (N. Y.) 442, 25 Am. Dec. 656.

[13] *Becker* v. *Howard,* 4 Hun (N. Y.) 359; *Boykin* v. *Jones,* 67 Ark. 571, 57 S. W. 17; *Security Trust Co.* v. *Rost,* 72 Ohio St. 535, 74 N. E. 1077. See also *Wilson* v. *California Bank,* 121 Cal. 630, 54 Pac. 119. But see *Hicks* v. *Porter,* 38 Tex. Civ. App. 334, 85 S. W. 437.

[14] *Hovey* v. *Hill,* 3 Lans. (N. Y.) 167. See *Lamont* v. *Cheshire,* 65 N. Y. 30, aff'g 6 Lans. (N. Y.) 234.

[15] *Cleveland* v. *Boerum,* 23 Barb.

a judgment creditor will be bound by the notice, where his judgment was entered after filing the *lis pendens,* although the summons was served before the *lis pendens* was filed;[16] and in a suit to reform and to foreclose an unsealed mortgage, a notice of *lis pendens,* filed prior to the recording of a deed by the mortgagor to a grantee, against whom a judgment had been docketed, will save the plaintiff his prior lien as against such judgment.[17] It will be otherwise, however, where the judgment is docketed after the filing of a *lis pendens,* but before the filing of the complaint in a foreclosure suit, because notice of the pendency of an action to foreclose a mortgage, though duly filed, is inoperative before the filing of the complaint, and judgment cannot be entered in the action until twenty days after the complaint has been filed.[18] A notice of *lis pendens,* filed in an equitable action for the dissolution of a partnership, is ineffective against a mortgagee whose mortgage antedated the notice, though it was not recorded until after the notice was filed.[19]

It was held in an early case[20] in New York, that a judgment lien is not a subsequent incumbrance within the meaning of the New York Code;[21] but in a later case[22] it was said, that a judgment creditor is a subsequent incumbrancer within

(N. Y.) 201, aff'd 24 N. Y. 613. See *Griswold* v. *Fowler,* 6 Abb. (N. Y.) Pr. 113.

[16] See *Fuller* v. *Scribner,* 76 N. Y. 190.

[17] *Lebanon Savings Bank* v. *Hollenbeck,* 29 Minn. 322. The effect of properly filing a *lis pendens* will be avoided by proof of actual notice of the unrecorded deed. See *Slattery* v. *Schwannecke,* 44 Hun (N. Y.) 75.

[18] *Olson* v. *Paul,* 56 Wis. 30.

[19] *Hammond* v. *Paxton,* 58 Mich. 394.

[20] *Rodgers* v. *Bonner,* 45 N. Y. 379. In this case the court say that a judgment is not a specific lien upon any specific real estate of the judgment debtor, but a general lien upon all his real estate, subject to all prior liens, both legal and equitable, irrespective of any knowledge of the judgment creditor as to the existence of such liens.

[21] N. Y. Code Civ. Proc. § 1671.

[22] *Fuller* v. *Scribner,* 76 N. Y. 190, aff'g 16 Hun (N. Y.) 130. See *Prescott* v. *Trueman,* 4 Mass. 627, 630, 3 Am. Dec. 246. See also *Bridger* v. *Exchange Bank,* 126 Ga. 821, 115 Am. St. Rep. 118, 56 S. E. 97.

the meaning of the Code, and that where a judgment is docketed subsequently to the filing of a *lis pendens* in a foreclosure suit, and to the service of the summons on one of the defendants, the judgment creditor will be bound by the decree, although not made a party to the action.

§ 376. Effect of lis pendens on holders of unrecorded conveyances.—Every party whose conveyance is executed or recorded subsequently to the operation of a notice of *lis pendens,* is considered a subsequent purchaser or incumbrancer. Thus, it has been held, that where the purchaser of mortgaged premises omitted to record his deed, although previously executed, until after the filing of the notice of *lis pendens* in a foreclosure suit, he was precluded from all rights under such deed, as against the purchaser under the judgment in the foreclosure suit, to the same extent as though he had been a party to the action.[23] The contrary doctrine prevails, however, where the mortgagee had notice of such unrecorded deed when the mortgage was executed.[24] And a mortgage given before, but recorded after, a *lis pendens* is filed, will be barred thereby.[25]

The filing of a notice of *lis pendens* can have no greater effect against the holder of an unrecorded conveyance or incumbrance than making him a party to the suit would have had, and where no relief could be obtained against him in the action, had he been made a party, no rights will be acquired against him by filing such a notice.[26]

[23] *Ostrom* v. *McCann,* 21 How. (N. Y.) Pr. 431; *People's Trust Co.* v. *Tonkonogy,* 144 App. Div. 333, 128 N. Y. Supp. 1055. See also *Simmons* v. *Fleming,* 72 S. E. 1082 (N. C.).

Rights of holder of unrecorded deed are not affected however until judgment. *West Missabe Land Co.* v. *Berg,* 92 Minn. 2, 99 N. W. 209.

The same rule applies to an action to enforce a vendor's lien. *Holland* v. *Cofield,* 27 Okl. 469, 112 Pac. 1032.

[24] *Eldridge* v. *Stenger,* 19 Wash. 697, 54 P. 541. See also *Lamont* v. *Cheshire,* 65 N. Y. 30.

[25] *Ayrault* v. *Murphy,* 54 N. Y. 203; *Kindberg* v. *Freeman,* 39 Hun (N. Y.) 466.

[26] *Lamont* v. *Cheshire,* 65 N. Y. 30, aff'g 6 Lans. (N. Y.) 234. See *Porter* v. *Pico,* 55 Cal. 165, 175

§ 377. Effect of omission to file notice of lis pendens.—Where a notice of *lis pendens* is required by statute, its object is to give constructive notice of the pendency of the suit to all parties dealing with the defendant in regard to the land, the title to, or the possession of, which is to be affected by the suit, and to bind them by the judgment in the same manner as though they had originally been made parties to the action. Failure to file such a notice will simply render the judgment inoperative to bind subsequent purchasers or incumbrancers; and since the rights of such persons only can be affected, they alone may be heard to take advantage of the omission to file a notice of *lis pendens*.[27]

A person who parts with nothing of value on receiving a conveyance of real property, pending an action affecting the title thereto, cannot be injured by not receiving notice of the existence of such an action, and he will be bound by the results of the action without notice either actual or constructive of its pendency.[28]

It was held by the supreme court of Wisconsin in 1860,[29] that a failure to file a notice of *lis pendens*, where required by the statute, is not such an irregularity as will vitiate the judgment or cause it to be reversed on appeal. The same court said in another case[30] of that year that "the purpose and object of filing a *lis pendens* manifestly is, to give to all persons not parties to the suit, notice of the pendency of the same, and to make it operate as constructive notice to any one who may become interested in the property during the litiga-

[27] *Potter* v. *Rowland*, 8 N. Y. 448; *White* v. *Coulter*, 1 Hun (N. Y.) 357, 3 T. & C. (N. Y.) 608; *Curtis* v. *Hitchcock*, 10 Paige Ch. (N. Y.) 399; *Wesley* v. *Tindal*, 81 Fed. 612; *Vance* v. *Wesley*, 85 Fed. 157.

[28] *Leavitt* v. *Tylee*, 1 Sandf. Ch. (N. Y.) 207, aff'd in *Shaw* v. *Leavitt*, 3 Sandf. Ch. (N. Y.) 163. See *Brouwer* v. *Harbeck*, 9 N. Y. 589, 595; *Ogden* v. *Jackson*, 1 Johns. (N. Y.) 370; *Gorham* v. *Stearns*, 42 Mass. (1 Metc.) 366; *Gibson* v. *Muskett*, 3 Man. & G. 158; *Flook* v. *Jones*, 4 Bing. 20.

[29] *Boyd* v. *Weil*, 11 Wis. 58.

[30] *Boyd* v. *Weil*, 11 Wis. 58, 60. See *Potter* v. *Rowland*, 8 N. Y. 448; *Curtis* v. *Hitchcock*, 10 Paige Ch. (N. Y.) 399; *Houghton* v. *Mariner*, 7 Wis. 244.

tion. But we can see no good reason for holding that the judgment is void as to the mortgagors, because this notice was not filed, or proof thereof duly made to the circuit court." But the following year the same court reached an opposite conclusion,[31] overruling Boyd v. Weil, in so far as that case may be supposed to sanction a contrary doctrine,[32] and holding that when it appears from the record in a foreclosure suit that no notice of *lis pendens* was filed as required by the statute, it will be an irregularity for which the judgment will be reversed on the application of the mortgagor, or of any one interested in the funds arising from the sale of the premises.

§ 378. Proof of filing notice of lis pendens.—Under the New York practice in all foreclosure cases, the plaintiff, when he moves for judgment, must show that a proper notice of the pendency of the action was filed at the time of filing the complaint, or afterwards, and at least twenty days before the motion for judgment is made, as required by the Code.[33] The Wisconsin statute and practice are substantially the same.[34] The proof of filing the notice may be made by affidavit of the plaintiff's attorney, or by the certificate of the clerk of the court in the county in which the mortgaged premises are situated.[35]

The language of the New York Code is imperative, and the filing of the proper notice in foreclosure proceedings is an indispensable prerequisite to obtaining judgment.[36] And the supreme court requires the plaintiff, when he moves for judgment, to show by affidavit or the certificate of the clerk

[31] See *Manning* v. *McClurg,* 14 Wis. 350; *Spraggon* v. *McGreer,* 14 Wis. 439. See also *Catlin* v. *Pedrick,* 17 Wis. 88.

[32] See *Catlin* v. *Pedrick,* 17 Wis. 88.

[33] N. Y. Code Civ. Proc. § 1631. N. Y. Supreme Court Rule 60.

[34] See *Catlin* v. *Pedrick,* 17 Wis. 88; *Spraggon* v. *McGreer,* 14 Wis. 439; *Manning* v. *McClurg,* 14 Wis. 350.

[35] In Wisconsin proof may be made by the certificate of the register of deeds; *Manning* v. *McClurg,* 14 Wis. 350; *Boyd* v. *Weil,* 11 Wis. 58.

[36] N. Y. Code Civ. Proc. § 1631.

of the county in which the mortgaged premises are situated, that a proper notice of the pendency of the action has been duly filed as directed by its rules.[37] But this requirement is merely a rule of practice and does not affect the validity of the judgment. If no proof of filing the notice of the pendency of the suit is furnished, the judgment will be irregular, but not void;[38] yet the irregularity is such as will vitiate the judgment or cause it to be reversed on appeal.[39] Where a proper notice of *lis pendens* has been duly filed, and there is no objection to the proof of such filing, the fact that the affidavit of filing is defective, will not render the judgment void; it is a mere irregularity which may be disregarded or amended,[40] in the absence of any wrong to the defendant.[41] Proof of the filing of a notice of *lis pendens* may be permitted by the court to be made *nunc pro tunc*.[42]

§ 379. Defective and amended notice of lis pendens.— A substantial compliance with the statute will be sufficient in a notice of *lis pendens;*[43] but the property must be sufficiently and correctly described.[44] It has been held that if a notice of *lis pendens* describes the premises incorrectly, the mortgagor will be entitled to have a judgment rendered against him on default set aside.[45] But where all the parties having an interest in the property are before the court, and

[37] N. Y. Supreme Court Rule 60.

[38] *Potter* v. *Rowland,* 8 N. Y. 448; *White* v. *Coulter,* 1 Hun (N. Y.) 357, 3 T. & C. (N. Y.) 608; *Curtis* v. *Hitchcock,* 10 Paige Ch. (N. Y.) 399; *Catlin* v. *Pedrick,* 17 Wis. 88.

[39] *Spraggon* v. *McGreer,* 14 Wis. 439, overruling *Boyd* v. *Weil,* 11 Wis. 58; *Manning* v. *McClurg,* 14 Wis. 350.

[40] N. Y. Code Civ. Proc. § 723.

[41] *White* v. *Coulter,* 1 Hun (N. Y.) 357, 3 T. & C. (N. Y.) 608.

[42] *White* v. *Coulter,* 1 Hun (N. Y.) 357, 365, 3 T. & C. (N. Y.) 608.

[43] *Potter* v. *Rowland,* 8 N. Y. 448; *Weber* v. *Fowler,* 11 How. (N. Y.) Pr. 458.

[44] *Jaffrey* v. *Brown,* 17 Hun (N. Y.) 575. See *McLean* v. *Baldwin,* 136 Cal. 565, 69 P. 259.

[45] *Spraggon* v. *McGreer,* 14 Wis. 439.

have been properly made parties to the action, it is said that there can be no objection to a defective *lis pendens,* because no one can be prejudiced thereby.[46] Where the original notice of *lis pendens* is defective and ineffectual, and an amended *lis pendens* is filed with or after the filing of an authorized amended summons and complaint, it will be good.[47]

The court has power to amend a notice of *lis pendens* by inserting therein a specific description of a portion of the premises which was omitted by mistake,[48] or by striking out portions thereof descriptive of property not properly included in such notice.[49]

Where, after filing a notice of *lis pendens,* the complaint is amended by striking out or adding parties, altering the description of the premises, or extending the claim, a new notice of *lis pendens* will be absolutely necessary to conform the notice to the complaint in order to enable proof of its proper filing to be made, and to cut off the rights of judgment creditors of such new parties, as well as to make the amended bill constructive notice to the subsequent purchasers and incumbrancers dealing with such new parties in relation to the mortgaged premises.[50] But where the amendment consists simply in adding new parties to the action, without extending the claim or varying the description, a new or amended notice will be necessary only to charge such new parties and those claiming under them with notice; the grantees of the original parties will be bound by the first notice.[51]

Should the complaint be amended by making new parties or by striking out those already parties, or by adding a new

[46] *Totten* v. *Stuyvesant,* 3 Edw. Ch. (N. Y.) 500, 505.

[47] *Daly* v. *Burchell,* 13 Abb. (N. Y.) Pr. N. S. 264.

[48] *Vanderheyden* v. *Gary,* 38 How. (N. Y.) Pr. 367.

[49] *Fitzgerald* v. *Blake,* 42 Barb. (N. Y.) 513, 28 How. (N. Y.) Pr. 110.

[50] *Clark* v. *Havens,* Clarke Ch. (N. Y.) 560, 563; *Curtis* v. *Hitchcock,* 10 Paige Ch. (N. Y.) 399, 2 N. Y. Leg. Obs. 363. See *Hulen* v. *Chilcoat,* 79 Neb. 595, 126 Am. St. Rep. 681, 113 N. W. 122.

[51] *Waring* v. *Waring,* 7 Abb. (N. Y.) Pr. 475; *Curtis* v. *Hitchcock,* 10 Paige Ch. (N. Y.) 399.

description of the premises, the attorney for the plaintiff will not be able to make the necessary proof of the proper filing of a notice of *lis pendens,* as required by the Code and practice, unless a new or an amended notice is filed.[52]

§ 380. Dormant lis pendens.—Where a party is to be affected by a pending suit, there should be a "close and continued prosecution" of the same to a final determination;[53] the *lis pendens* becomes void or dormant, if the action is not diligently pursued.[54] But only unreasonable or unusual laches in the prosecution of a suit will take away the benefit of a *lis pendens.*[55]

§ 381. Canceling notice of lis pendens.—A notice of *lis pendens* properly filed under the provisions of the Code, in an action to foreclose a mortgage on real property, can-

[52] N. Y. Code Civ. Proc. §§ 1631, 1670; N. Y. Supreme Court Rule 60.

[53] *Preston* v. *Tubbin,* 1 Vern. 286. In order to constitute a *litis pendentia,* it is said, there must be a continuance of *litis contestatio,* and something must be done to keep it alive and in force. *Kinsman* v. *Kinsman,* 1 Russ. & Myl. 617. See *Morton* v. *Jones,* 136 Ky. 797, 125 S. W. 247.

[54] See *Sheridan* v. *Andrews,* 49 N. Y. 478; *Myrick* v. *Selden,* 36 Barb. (N. Y.) 15; *Kinsman* v. *Kinsman,* 1 Russ. & Myl. 617.

Tinsley v. *Rice,* 105 Ga. 285, 31 S. E. 174; *Bridger* v. *Exchange Bank,* 126 Ga. 821, 115 Am. St. Rep. 118, 56 S. E. 97; *Woodward* v. *Johnson,* 122 Ky. 160, 90 S. W. 1076; *Kelley* v. *Culver's Adm'r.* 116 Ky. 241, 75 S. W. 272. See *Taylor, as adm'r. etc.* v. *Carroll,* 89 Md. 32, 44 L.R.A. 479, 42 A. 920.

[55] *Gossom* v. *Donaldson,* 18 B. Mon. (Ky.) 230, 237, 68 Am. Dec. 723. See *Jones* v. *Robb,* 35 Tex. Civ. App. 263, 80 S. W. 395. See also *Latta* v. *Wiley,* 92 S. W. 433 (Tex. Civ. App.)

Under N. Y. Code Civ. Proc. § 1670, the filing of the notice must be followed within 60 days by the service of the summons either personally or by commencing publication. A failure to do this within the prescribed time has been held to constitute such an unreasonable neglect as to justify a court in the exercise of the discretion given it by § 1674, to direct cancellation of the notice. *Levy* v. *Kon,* 114 App. Div. 795, 100 N. Y. Supp. 205; *Brown* v. *Mando,* 125 App. Div. 380, 109 N. Y. Supp. 726; *Lipschitz* v. *Watson,* 113 App. Div. 408, 99 N. Y. Supp. 418; *Lipschutz* v. *Horton,* 55 Misc. 44, 104 N. Y. Supp. 850. See also *Cohen, as trustee, etc.* v.

not be removed or canceled until after the action has been settled, discontinued or abated.[56] After the action has been settled, discontinued or abated, or a final judgment has been rendered therein against the party filing the notice,[57] and the time within which to appeal therefrom has expired, or if the plaintiff unreasonably neglects to proceed, then the cancellation rests in the discretion of the court.[58]

After a *lis pendens* has been cancelled a new one cannot be filed so long as the order of cancellation remains in force.[59] The question whether an action is sustainable cannot be considered on a motion to cancel a *lis pendens*.[60]

Levy, 43 App. Div. 196, 59 N. Y. Supp. 344; *Cohen* v. *Biber*, 123 App. Div. 528, 108 N. Y. Supp. 249.

[56] *Mills* v. *Bliss*, 55 N. Y. 139; *Parks* v. *Murray*, 2 N. Y. St. Rep. 135; *Willis* v. *Bellamy*, 53 N. Y. Supr. Ct. (21 J. & S.) 94; *Wilmont* v. *Meserole*, 41 N. Y. Supr. Ct. (9 J. & S.) 274; *Niebur* v. *Schreyer*, 10 N. Y. Civ. Proc. Rep. 72; *Little* v. *Rawson*, 8 Abb. (N. Y.) N. C. 253, 259, and note; *Pratt* v. *Hoag*, 5 Duer (N. Y.) 631, 12 How. (N. Y.) Pr. 215; *Joslyn* v. *Schwend*, 89 Minn. 71, 93 N. W. 705.

[57] The supreme court of Illinois, in the case of *Cochran* v. *Folger*, (116 Ill. 194, 5 N. E. 383), say that it cannot be objected that a case is no longer *lis pendens* after a decree and sale on foreclosure of mortgage and a conveyance executed.

[58] N. Y. Code Civ. Proc. § 1674; *Willis* v. *Bellamy*, 53 N. Y. Supr. Ct. (21 J. & S.) 94; *Lyle* v. *Smith*, 13 How. (N. Y.) Pr. 104, N. Y. Code Civ. Proc. § 1674; *Fitzsimons* v. *Drought*, 15 App. Div. 413, 44 N. Y. Supp. 453; *Jarvis* v. *American Forcite Powder Mfg Co.* 93 App. Div. 234, 87 N. Y. Supp. 742; *Shandley* v. *Levine*, 44 Misc. 23, 89 N. Y. Supp. 717. See *M. Lindheim & Co.* v. *Central National Realty & Construction Co.* 111 App. Div. 275, 97 N. Y. Supp. 619; *Rosenthal* v. *Friedman*, 60 Misc. 553, 112 N. Y. Supp. 449; *St. Regis Paper Co.* v. *Santa Clara Lumber Co.* 62 App. Div. 538, 71 N. Y. Supp. 82; *Madden* v. *Lennon*, 23 Misc. 79, 50 N. Y. Supp. 690; *Breen* v. *Lennon*, 10 App. Div. 36, 41 N. Y. Supp. 705.

[59] *Cohen* v. *Levy*, 43 App. Div. 196, 59 N. Y. Supp. 344.

[60] *Mills* v. *Bliss*, 55 N. Y. 139. See *Pratt* v. *Hoag*, 5 Duer (N. Y.) 631, 12 How. (N. Y.) Pr. 215; *Lawler* v. *Densmore-Compton Bldg. Co.* 60 Misc. 555, 112 N. Y. Supp. 435.

CHAPTER XV.

ANSWERS AND DEFENSES—WHO MAY ANSWER—DEFECT IN PARTIES—ACTION AT LAW ON BOND—DEFECTIVE EXECUTION OF MORTGAGE—INFANCY, INSANITY, IGNORANCE, ALTERATION.

§ 382. Generally.
§ 383. Answer by creditor of mortgagor.
§ 384. Right of prior incumbrancers to answer.
§ 385. Claimants of interest in equity of redemption may answer.
§ 386. Same—Subsequent judgment creditors.
§ 387. When action ready for trial.
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§ 389. Objection of defect in parties—How made.
§ 390. Parties personally liable for debt may object to defect in parties.
§ 391. Objection of pendency of action at law on note or bond.
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§ 394. Denial of execution and delivery of mortgage.
§ 395. Allegation of infancy.
§ 396. Foreclosure of infant's purchase money mortgage.
§ 397. Allegation of insanity of mortgagor.
§ 398. Defect in execution and record of mortgage.
§ 399. Allegation of alteration of instrument.
§ 400. Allegation of illiteracy and negligence.

§ 382. Generally.—The answer of a defendant in an action brought to foreclose a mortgage, is regulated in respect to its form by the provisions of the Code of Civil Procedure, the same as an answer in any other civil action.[61] In such an action a defendant may plead the same matters in defence against the mortgage, except only the statute of limitations, that he could against the note or bond which the mortgage was given to secure.[62] A defendant should not serve a gen-

[61] N. Y. Code Civ. Proc. § 500. See *Alexander* v. *Aronson*, 65 App. Div. 174, 72 N. Y. Supp. 640.

[62] *Vinton* v. *King*, 86 Mass. (4 Allen, 562. See *Hannan* v. *Hannan*, 123 Mass. 441, 25 Am. Rep.

eral answer, merely admitting that the several rights and interests alleged in the complaint are correctly set forth, without at the same time setting up new matter constituting a defence, counter-claim or set-off. Where the defence consists of new matters, by way of avoidance, the defendant must set forth the facts of his defence in full and prove them as alleged.[63]

Where an answer setting up no new matter constituting a defence, counter-claim or set-off is filed, the plaintiff may move at a special terms of the court to strike it out as sham or frivolous, and at the same time apply for judgment; or he may, upon previous notice, apply to the court for judgment upon the pleadings as they stand.[64]

A mortgagor or his grantee may defend a foreclosure, and is entitled, moreover, to reply to the affirmative matter set up in the respective answers of his co-defendants, shownig liens in their favor upon the mortgaged property, and to have the validity of the same determined. As to such matter his co-defendants are to be deemed plaintiffs and their answers as complaints.[65]

The well-established rule is that any one who is interested in the equity of redemption may answer;[66] yet it is held that under the New Jersey statute,[67] in an action to foreclose a mortgage given by husband and wife for his debt, the wife cannot answer separately without leave of the court first duly obtained.[68]

§ 383. Answer by creditor of mortgagor.—It is well settled that a mere general creditor without any specific lien,

121; *Freeland* v. *Freeland,* 102 Mass. 475; *Holbrook* v. *Bliss,* 91 Mass. (9 Allen), 69; *Kilpatrick* v. *Henson,* 81 Ala. 464, 1 So. 188.

[63] *Post* v. *Springsted,* 49 Mich. 90.

[64] *Bowman* v. *Marshall,* 9 Paige Ch. (N. Y.) 78, N. Y. Code Civ. Proc. §§ 537, 545, N. Y. Supreme Court Rule 60.

[65] *Ladd* v. *Mason,* 10 Oreg. 308. See N. Y. Code Civ. Proc. § 521.

[66] See *post,* § 385.

[67] N. J. Rev. Stat. p. 638, §§ 10, 11.

[68] *Pidcock* v. *Melick,* 43 N. J. Eq. 294, 14 Atl. 811.

although made a party defendant in a suit to foreclose a mortgage on the debtor's property, for the determination of a lien claimed by him, cannot question the validity of the mortgage.[69] The mortgage cannot be legally questioned by such defendant until he clothes himself with a judgment and execution, or some legal process against the debtor's property; for the reason that creditors cannot interfere with the property of their debtors without process.[70]

§ 384. Right of prior incumbrancers to answer.—Where the rights of prior incumbrancers are correctly stated in the complaint, it is not necessary for them to appear and answer in order to protect their rights;[71] but where one holds a mortgage upon property which is of insufficient value to satisfy all the liens upon it, he is entitled to contest the existence or the validity of prior mortgage liens asserted by others, although his debt may not be due, and although his mortgage may not have been executed until after the prior mortgagees had instituted suit to enforce their liens.[72] Where prior incumbrancers are made parties defendant, it is not necessary for them to answer and to set up the priority of their respective liens, because the entry of the usual judgment of foreclosure and sale will not cut off nor in any way affect their liens, if they are actually prior to the mortgage under foreclosure.[73]

[69] *Wolcott* v. *Ashenfelter* (N. M.), 8 L.R.A. 691, 23 Pac. 780.

[70] *Thompson* v. *Van Vechten*, 27 N. Y. 582. See *Wolcott* v. *Ashenfelter* (N. M.), 23 Pac. 780, 8 L.R.A. 691.

[71] *Merchants' Ins. Co.* v. *Marvin*, 1 Paige Ch. (N. Y.) 557.

But it is held that a lien-holder made defendant in a foreclosure suit, duly served, and failing to appear, but permitting a decree of foreclosure to be taken, in which the lien is not recognized, cannot, after a sale under the decree, answer setting up his lien, unless he shows sufficient cause for delay. *Graves* v. *Fritz*, 24 Neb. 375, 38 N. W. 819.

[72] *Hart* v. *Hayden*, 79 Ky. 346.

[73] *Payn* v. *Grant*, 23 Hun (N. Y.) 134. See *ante*, §§ 209–211.

In California, a prior incumbrancer who has been made a defendant, may file a cross complaint to foreclose his interest. *Van*

In those cases where prior mortgagees becoming parties to an action of foreclosure upon a junior mortgage, by filing cross-complaints for the foreclosure of their mortgages, are entitled to priority in rents received by a receiver appointed in the action before they became parties thereto, without asking such relief in their complaint.[74]

§ 385. Claimants of interest in equity of redemption may answer.—Defendants whose claims are against the equity of redemption only, can not file answers and litigate their claims to the surplus as between themselves, until it is ascertained that there will be a surplus; unless their liens are upon different parcels of the mortgaged premises, or their rights are of such a nature as to require them to be passed upon previous to the entry of a decree of sale.[75] But such defendants will always be permitted to set out their respective rights in their answers, so far as may be necessary to enable the court to make a proper decree for the sale of the mortgaged premises in parcels, so as to protect the rights of the several defendants upon the sale and upon the reference for the distribution of the surplus moneys.[76] And they may also set up in their answers any claims they have to the equity of redemption, as incumbrancers or otherwise, as against the complainant.[77]

Where a conveyance of mortgaged premises is not made

Loben Sels v. *Bunnell,* 131 Cal. 489, 63 P. 773.

[74] *Jefferson* v. *Edrington,* 53 Ark. 576, 14 S. W. 903.

[75] *Union Ins. Co.* v. *Van Rensselaer,* 4 Paige Ch. (N. Y.) 85. See N. Y. Code Civ. Proc. § 521; *Farmers' Loan & Trust Co.* v. *Seymour,* 9 Paige Ch. (N. Y.) 538. Prior to the adoption of rules 132 and 136 by the Court of Chancery in 1830, defendants who were junior incumbrancers were not only authorized to litigate their claims with the complainant, but also with their several co-defendants previous to a decree of sale. And as a general rule they were required to do so; *Renwick* v. *Macomb,* Hopk. Ch. (N. Y.) 277; *Tower* v. *White,* 10 Paige Ch. (N. Y.) 395, 397.

[76] *Tower* v. *White,* 10 Paige Ch. (N. Y.) 397.

[77] *Tower* v. *White,* 10 Paige Ch. (N. Y.) 395. See also *Kehm* v. *Mott,* 187 Ill. 519, 58 N. E. 467.

by its terms subject to a mortgage, but purports to convey the whole title, and especially if it contains full covenants of warranty, the grantee, not having assumed the payment of the mortgage debt and the amount thereof not having been deducted from the purchase money, may interpose the same defenses to the mortgage that the mortgagor might have interposed.[78]

A defendant who is entitled to relief against the complainant or a co-defendant, can obtain it only by filing a cross-bill for that purpose.[79] As a general rule a defendant will not be allowed by his answer to assail the subsequent mortgage of a co-defendant, although he alleges in his answer that such mortgage is fraudulent and void; and his co-defendant, to whom such subsequent mortgage belongs, will not be required to reply to such answer; nor will such answer be taken as confessed by him because of his failure to reply. If one defendant wishes to assail the mortgage of another, he must file a cross-bill for that purpose.[80]

A junior mortgagee, in order to foreclose his own mortgage, cannot, by cross-bill or otherwise, make himself a party to a suit brought for foreclosure of a prior mortgage.[81]

The United States circuit court for the southern district of Iowa,[82] hold that a company which has succeeded to the redemption right of the original mortgagor, and is entitled to perfect its title to the property by paying off the amount due

[78] *Bennett* v. *Keehn*, 57 Wis. 582, distinguishing *Bensley* v. *Homier*, 42 Wis. 631; *Crocker* v. *Bellangee*, 6 Wis. 645, 70 Am. Dec. 489, and *Milwaukee M. & M. R. R. Co.* v. *Milwaukee & W. R. R. Co.* 20 Wis. 174, 88 Am. Dec. 735.

[79] *Brinkerhoff* v. *Franklin*, 21 N. J. Eq. (6 C. E. Gr.) 334; *Vanderveer's Admrs.* v. *Holcomb*, 21 N. J. Eq. (6 C. E. Gr.) 105. But a cross-bill is not necessary to entitle a junior incumbrancer to participate in the distribution of the surplus. *Wallen* v. *Moore*, 187 Ill. 190, 58 N. E. 392, 187 Ill. 388, 58 N. E. 1095. See *Gardner* v. *Cohn*, 191 Ill. 553, 61 N. E. 492; *Powell* v. *Starr*, 100 Ill. App. 105.

[80] *Brinkerhoff* v. *Franklin*, 21 N. J. Eq. (6 C. E. Gr.) 334. See *Camp* v. *Peacock, Hunt & West Co.* 129 Fed. 1005, 64 C. C. A. 490.

[81] *Newton* v. *Gage*, 155 Fed. 598.

[82] *Simmons* v. *Taylor*, 38 Fed. 682.

upon another mortgage, has a direct interest in the amount due upon the latter, and may be heard as to the validity of any bonds on which a claim is made under the latter mortgage.

It is said that a devisee of the mortgaged property, or his creditor, whose whole interest is derived from the will of the mortgagor, cannot attack a mortgage made to a city in consideration of its canceling certificates of the sale to it of the property for taxes, on the ground that it had no power to take such a mortgage.[83] But in a foreclosure proceeding by a legatee of a mortgagee against a purchaser of the equity of redemption at a sale by the mortgagor's assignee in bankruptcy, any defense may be made that would be admissible in a foreclosure suit between the original parties to the note and mortgage.[84]

The supreme court of Louisiana hold that a purchaser of property subject to a mortgage containing the *pact de non alienando* stands, with regard to the mortgagee, in the position of a mortgagor, and can make no objection to the seizure and sale, on the ground of its non-acceptance, which could not have been made by the mortgagor.[85]

§ 386. Same—Subsequent judgment creditors.—The supreme court of Alabama say that subsequent judgment creditors, made parties in an action to foreclose a mortgage constituting a first lien on the mortgaged lands, have no such interest as will entitle them to compel the mortgagee to exhaust his lien on personal property also covered by the mortgage before proceeding to foreclose it upon the lands, where all of the property covered thereby is insufficient to pay in full the various paramount mortgage liens;[86] neither have they an interest therein entitling them to set up a homestead right in the lands, where the claim of homestead is not raised by the

[83] *Buffalo* v. *Balcom*, 134 N. Y. 532, 32 N. E. 7, 47 N. Y. S. R. 907.

[84] *Clark* v. *Clark*, 62 N. H. 267.

[85] *Citizens' Bank of Louisiana* v. *Webre*, 44 La. Ann. 334, 10 So. 728.

[86] *Moses* v. *Home Bldg. & L. Ass'c.* 100 Ala. 465, 14 So. 412.

mortgagor or any of the mortgagees.[87] It is said, in a New Jersey case,[88] and the rule is thought to be sound in principle, that the holder of a lien subsequent to a junior mortgage has no standing to move to dismiss a bill to foreclose the junior mortgage because the bill seeks to have the junior mortgage given a preference in payment over the prior mortgage.

§ 387. When action ready for trial.—Where a defendant raises substantial objections to a complaint by demurrer, or where his answer sets up any matter which raises an issue, the plaintiff will not be permitted to proceed against the other defendants until the issue is ready for trial. A foreclosure is notice for trial, placed upon the calendar and brought on for trial, the same as any other equity cause. To entitle the cause to be placed upon the calendar, the demurrer or answer to the complaint must have been interposed in good faith. If it is frivolous, the plaintiff may apply for judgment on motion, without noticing the case for trial.[89] A defendant in a suit to foreclose a mortgage can defend only on the grounds set up in his answer.[90]

Besides special defences or such defences as arise out of the circumstances of each particular case, there are a number of general defenses to an action for foreclosure which will be considered separately in this and in the following four chapters.

[87] *Moses* v. *Home Bldg. & L. Assoc.* 100 Ala. 465, 14 So. 412.

[88] *Sergeant* v. *Mettler,* 43 N. J. Eq. 418, 6 Atl. 662.

[89] *Bowman* v. *Marshall,* 9 Paige Ch. (N. Y.) 78, N. Y. Code Civ. Proc. § 537, N. Y. Supreme Court Rule 60.

[90] *Higman* v. *Stewart,* 38 Mich. 513. See *James* v. *McKernon,* 6 Johns. (N. Y.) 548, 565; *Beach* v. *Fulton,* 3 Wend. (N. Y.) 573, 584; *Philbrooks* v. *McEwen,* 29 Ind. 347; *Matteson* v. *Morris,* 40 Mich. 52; *Van Dyke* v. *Davis,* 2 Mich. 144; *Hendrix* v. *Gore,* 8 Oreg. 406; *Irnham* v. *Child,* 1 Bro. Ch. 92, 94; *Smith* v. *Clarke,* 12 Ves. 477, 480; *Clarke* v. *Turton,* 11 Ves. 240; Gilbert's Roman Forum, 218.

§ 388. Insufficiency of service on another defendant.—While a defendant may take advantage of a want of service or of a defective service of the summons upon himself, by a special appearance and a plea in the suit, or while he may in such a case take no notice of the suit, because he will not be bound by the decree; yet, as a general rule, he cannot object to a want of service or to a defective service of the summons upon another defendant, who is not a necessary party to the suit.[91] But the rule is otherwise, if the defendant who was defectively served, is a necessary defendant.[92] And a junior incumbrancer, who is a codefendant with the mortgagor in a foreclosure, cannot, on appeal, complain of the judgment against such mortgagor, on the ground that it was rendered without sufficient notice or service upon him.[93]

But a person, who stands in the relation of a surety for the mortgage debt, is entitled to have the entire equity of redemption applied in the first place to the payment of the debt, and may require all persons claiming an interest in the mortgaged premises to be made parties defendant, in order to make the title offered at the sale perfect against all equities, and may therefore object to a want of service, or to a defective or insufficient service, upon any of such parties.[94]

§ 389. Objection of defect in parties—How made.—It is the right of every person, who is liable for any deficiency that may arise upon the sale of the premises on foreclosure to require that the whole equity of redemption be sold, and to demand that all persons necessary to be joined to accomplish that object be made parties to the action, because his ultimate liability for any deficiency makes it of the highest importance to him that the whole title to the premises be sold, in order that the largest sum possible may be realized.[95] And the objection that there is a want of proper parties defendant

[91] *Mims* v. *Mims,* 35 Ala. 23; *Semple* v. *Lee,* 13 Iowa, 304. See *ante,* § 148.

[92] See *ante,* § 148.

[93] *Semple* v. *Lee,* 13 Iowa, 304.

[94] *Kortright* v. *Smith,* 3 Edw. Ch. (N. Y.) 402, 404.

[95] *Hall* v. *Nelson,* 23 Barb. (N.

is available to the mortgagor who is liable for any deficiency that may arise on the sale of the premises, even though he may have parted with his interest in the equity of redemption.[96]

Where there is a defect of parties apparent upon the face of the complaint, the objection may be taken by demurrer,[97] but where the defect does not appear upon the face of the complaint, the objection must be taken by answer.[98] In those cases where the objection of a want of parties is made out of season,[99] the want of parties may be supplied by a supplemental bill.[1]

Y.) 88, 91, 14 How. (N. Y.) Pr. 32. See *ante*, §§ 148, 180. See *Franklin* v. *Beegle*, 102 App. Div. 412, 92 N. Y. Supp. 449.

[96] *Hall* v. *Nelson*, 23 Barb. (N. Y.) 88, 14 How. (N. Y.) Pr. 32.

[97] *Johnes* v. *Outwater*, 55 N. J. Eq. 398, 36 Atl. 483. See also, *Hardy* v. *Swigart*, as trustee, etc. 25 Colo. 136, 53 Pac. 380.

Failure to demur to the complaint because the mortgagee was not made a party defendant is a waiver of the objection. *Green* v. *McCord, as trustee, etc.*, 30 Ind. App. 470, 66 N. E. 494.

[98] N. Y. Code Civ. Proc. § 498; *Dawley* v. *Brown*, 79 N. Y. 397; *Fox* v. *Moyer*, 54 N. Y. 125; *Morris* v. *Wheeler*, 45 N. Y. 708; *Fulton Ins. Co.* v. *Baldwin*, 37 N. Y. 648; *Pittman* v. *Johnson*, 15 Abb. (N. Y.) N. C. 477; *Dillaye* v. *Parks*, 31 Barb. (N. Y.) 132; *Scofield* v. *Van Syckle*, 23 How. (N. Y.) Pr. 97; *Browning* v. *Marvin*, 22 Hun (N. Y.) 547, 551; *Hall* v. *Richardson*, 22 Hun (N. Y.) 446; *Remington* v. *Walker*, 21 Hun (N. Y.) 326; *Holbrook* v. *Baker*, 16 Hun (N. Y.) 176; *Marshall* v. *Lippman*, 16 Hun (N. Y.) 111; *Barclay* v. *Quicksilver Mining Co.* 6 Lans. (N. Y.) 25; *Kittle* v. *VanDyck*, 1 Sandf. Ch. (N. Y.) 76; *Zimmerman* v. *Schoenfeldt*, 6 T. & C. (N. Y.) 142, 3 Hun (N. Y.) 692; *Hees* v. *Nellis*, 1 T. & C. (N. Y.) 118; *Biden* v. *James*, 25 Week. Dig. (N. Y.) 141; *Hamburger* v. *Baker*, 21 Week. Dig. (N. Y.) 213. See *ante*, 148; *Thompson* v. *Richardson*, 74 App. Div. 62, 77 N. Y. Supp. 202.

In Alabama, objection to defeat of parties may be made at the hearing on error, or it may be taken by the court *ex mero motu*. *Langley* v. *Andrews, as adm'r., etc.* 132 Ala. 147, 31 So. 469.

[99] As in *Jones* v. *Jones*, 3 Atk. 110, 217, where the case had been once heard, and was brought on again upon the equity reserved, when the objection was raised. See also *Holdsworth* v. *Holdsworth*, 2 Dick. 799, where parties appeared to be wanting on an appeal from the decree at the Rolls, and the case was ordered to stand over with liberty for the plaintiffs to file a supplemental bill, merely to add parties.

[1] *Ensworth* v. *Lambert*, 4 Johns. Ch. (N. Y.) 605.

§ 390. **Parties personally liable for debt may object to defect in parties.**—Every party personally liable for a debt is entitled to have all persons who have, or claim, an interest in the mortgage, made parties to the suit. In those cases where the ownership appears doubtful, the court will order all parties appearing to be interested, to be brought within its jurisdiction.[2] And where a complainant makes a mere surety of the mortgagor for the payment of the debt, a party to the bill to foreclose, for the purpose of obtaining a decree against such surety or his property, in the event the proceeds of the mortgaged premises are found to be insufficient to satisfy the debt and costs, such surety will have a right to insist that the principal debtor shall be made a party to the suit, if he is within the jurisdiction of the court; but where the principal debtor is an absentee, and has assigned all his right and interest in the equity of redemption in the mortgaged premises, such facts will be a sufficient reason for not making him a party to the foreclosure, even where the surety is made a party for the purpose of obtaining a decree over against him for any deficiency.[3] Where the mortgagor conveys the equity of redemption absolutely, without warranty, the mortgaged premises thereby become the primary fund for the payment of the mortgage debt, and the grantee thereof will have no right to object that the mortgagor is not made a party to a bill to foreclose.[4]

The real party in interest must be plaintiff in an action to foreclose a mortgage. Where the mortgagee has parted with his title to the mortgage before suit, or disposed of his interest therein after suit is instituted, the defendant will have a right to object that the proper party in interest is not before the court, and if this objection is sustained, it will be a bar to the action.[5]

[2] See *Kortright* v. *Smith,* 3 Edw. Ch. (N. Y.) 402, 404.

[3] *Bigelow* v. *Bush,* 6 Paige Ch. (N. Y.) 343.

[4] *Bigelow* v. *Bush,* 6 Paige Ch. (N. Y.) 343.

[5] See *Mills* v. *Hoag,* 7 Paige Ch (N. Y.) 18, 31 Am. Dec. 271; *Field*

§ 391. Objection of pendency of action at law on note or bond.—The pendency of an action at law for the recovery of a debt secured by a mortgage, if no judgment has been recovered in such action, will not prevent the filing of a complaint to foreclose the mortgage.[6] But the filing of such complaint for foreclosure will prevent the plaintiff from proceeding in his action at law, without the permission of the court.[7] The fact that a suit at law has been instituted by another party on the note, will not be a bar to the filing of a complaint in foreclosure by the holder of the mortgage. Thus, where a respondent answered among other things, that an action at law was pending in the name of the original payee of the notes mentioned in the mortgage, which the complainant, as the assignee thereof and the holder of the legal title, was seeking to foreclose, a demurrer to the answer was sustained. The court said: "The simple pendency of an action in the name of another plaintiff was no bar to the complainant's recovery." [8]

§ 392. Objection of recovery of judgment on note or bond.—The recovery of a judgment on a note secured by mortgage cannot be set up as a defense to an action of foreclosure, if the judgment has not been satisfied,[9] because the

v. *Maghee,* 5 Paige Ch. (N. Y.) 539; *Wallace* v. *Dunning,* Walk Ch. (Mich.) 416; *Smith* v. *Bartholomew,* 42 Vt. 356.

[6] *Williamson* v. *Chaplin,* Clarke Ch. (N. Y.) 9; *Suydam* v. *Bartle,* 9 Paige Ch. (N. Y.) 294; *Guest* v. *Byington,* 14 Iowa, 30; *Tappan* v. *Evans,* 11 N. H. 311. It is thought that where the holder of a note secured by mortgage sues upon the note without asking a foreclosure and obtains a writ of attachment against the debtor's property upon affidavit that the mortgage has become nugatory, which affidavit is made necessary by statute to warrant an attachment, he thereby waives his mortgage lien. (*Bacon* v. *Raybould,* 4 Utah, 357, 10 Pac. 481, 11 Pac. 510.)

[7] *Suydam* v. *Bartle,* 9 Paige Ch. (N. Y.) 294.

[8] *Guest* v. *Byington,* 14 Iowa, 30, 32.

[9] *Vansant* v. *Allmon,* 23 Ill. 30; *Severson* v. *Moore,* 17 Ind. 231; *Jenkinson* v. *Ewing,* 17 Ind. 505; *Goenen* v. *Schroeder,* 18 Minn. 66; *St. Paul Fire & Marine Ins. Co.* v. *Dakota Land & Live Stock Co.* 10 S. D. 191, 72 N. W. 460.

merger of a note in a judgment does not extinguish the debt;[10] the land is liable, and the lien of the mortgage will continue until the debt is paid, or the judgment is barred by the statute of limitations.[11] And this is true, whether the note upon which the judgment was obtained, is secured by a mortgage or a trust deed,[12] and whether the judgment be for the whole or only a part of the mortgage debt.[13]

It has been held in New York, that a decree for the foreclosure of a mortgage extinguishes the lien of the mortgage, although such decree is merely enrolled and not docketed;[14] but the prevailing doctrine is that the mortgage lien is not impaired either by a decree in foreclosure,[15] a judgment on *scire facias*,[16] or the taking of a recognizance in the place of the sum due on the mortgage note,[17] for even after the taking

[10] *Priest* v. *Wheelock*, 58 Ill. 114; *Rossiter* v. *Merriman*, 80 Kan. 739, 24 L.R.A.(N.S.) 1095, 104 Pac. 858; *Sis* v. *Boarman*, 11 App. D. C. 116. See *Gilman* v. *Heitman*, 137 Iowa 336, 113 N. W. 932; *Hanna* v. *Kasson*, 26 Wash. 568, 67 Pac. 271.

[11] See *Butler* v. *Miller*, 1 N. Y. 496, questioning 1 Den. (N. Y.) 407; Peck's Appeal, 31 Conn. 215; *Darst* v. *Bates*, 51 Ill. 439; *Hewitt* v. *Templeton*, 48 Ill. 367; *Hamilton* v. *Quimby*, 46 Ill. 90; *Wayman* v. *Cochrane*, 35 Ill. 152; *Vansant* v. *Allmon*, 23 Ill. 30; *Cissna* v. *Haines*, 18 Ind. 496; *Jenkinson* v. *Ewing*, 17 Ind. 505; *O'Leary* v. *Snediker*, 16 Ind. 404; *Hensicker* v. *Lamborn*, 13 Ind. 468; *Applegate* v. *Mason*, 13 Ind. 75; *Markle* v. *Rapp*, 2 Blackf. (Ind.) 268; *Morrison* v. *Morrison*, 38 Iowa, 73; *Shearer* v. *Mills*, 35 Iowa, 499; *Jordan* v. *Smith*, 30 Iowa, 500; *Hendershott* v. *Ping*, 24 Iowa, 134; *State* v. *Lake*, 17 Iowa, 215; *Wahl* v. *Phillips*, 12 Iowa, 81; *Jewett* v. *Hamlin*, 68 Me. 172; *Torrey* v. *Cook*, 116 Mass. 163; *Ely* v. *Ely*, 72 Mass. (6 Gray) 439; *Thornton* v. *Pigg*, 24 Mo. 249; *Riley* v. *McCord*, 21 Mo. 285; *Lewis* v. *Conover*, 21 N. J. Eq. (6 C. E. Gr.) 230; *Flanagan* v. *Westcott*, 11 N. J. Eq. (3 Stockt.) 264.

[12] *Hamilton* v. *Quimby*, 46 Ill. 90.

[13] *Appelgate* v. *Mason*, 13 Ind. 75.

[14] *People* v. *Beebe*, 1 Barb. (N. Y.) 379. See *Gage* v. *Brewster*, 31 N. Y. 218.

[15] *Peck's Appeal*, 31 Conn. 215; *Priest* v. *Wheelock*, 58 Ill. 114; *Evansville Gas Light Co.* v. *State*, 73 Ind. 219, 38 Am. Rep. 129; *Teal* v. *Hinchman*, 69 Ind. 379; *Lapping* v. *Duffy*, 47 Ind. 51; *Stahl* v. *Roost*, 34 Iowa, 475; *Hendershott* v. *Ping*, 24 Iowa, 134; *Riley* v. *McCord*, 21 Mo. 285; *Helmbold* v. *Man*, 4 Whart. (Pa.) 410.

[16] *Rockwell* v. *Servant*, 63 Ill 424; *Helmbold* v. *Man*, 4 Whart. (Pa.) 410.

[17] *Davis* v. *Maynard*, 9 Mass. 242.

of such recognizance the mortgagee may foreclose his mortgage.[18] Where a judgment has been taken on a note, its only effect is to establish the validity of the note, and that of the mortgage securing it.[19] But satisfaction of the judgment may be set up as a defense;[20] the fact that the premises have been taken on execution,[21] and sold in satisfaction of the judgment, will also be a good defense.[22]

The effect of the commencement of a foreclosure is to work the discontinuance of every other action or proceeding on the note, except by leave of the court in which the foreclosure is pending.[23] Under the former New York practice, however, where an action at law was brought for the collection of a debt secured by mortgage, whether against a party to the action for foreclosure or against a third party, all proceedings in the foreclosure suit were stayed until the remedy in the action at law had been exhausted.[24]

§ 393. Objection under the codes.—Under the New York Code, and under all codes modeled after it, the pendency of proceedings on a note or bond for the recovery of a mortgage debt, will constitute no objection and cannot be set up as a defense to the prosecution of a foreclosure, pro-

[18] *Thornton* v. *Pigg,* 24 Mo. 249.

[19] *Morris* v. *Floyd,* 5 Barb. (N. Y.) 130; *Hosford* v. *Nichols,* 1 Paige Ch. (N. Y.) 220; *Clarke* v. *Bancroft,* 13 Iowa, 320.

[20] *Farmers' Loan and Trust Co.* v. *Reid,* 3 Edw. Ch. (N. Y.) 414.

[21] *Applegate* v. *Mason,* 13 Ind. 75.

[22] *People* v. *Beebe,* 1 Barb. (N. Y.) 379, 388.

It has been held in the Pennsylvania court of common pleas (*Atkinson* v. *Mackey,* 3 Pa. Dist. Rep. 634), that a plea alleging a foreign attachment was previously issued against the owner of the mortgage, and that defendant was summoned as garnishee, thereby preventing him from paying the debt, is not a good defense upon a *scire facias* on the mortgage, although such facts will be considered by the court in controlling the judgment and protecting the garnishee from the multiplicity of processes.

[23] *Williamson* v. *Champlin,* Clarke Ch. (N. Y.) 9, aff'd 8 Paige Ch. (N. Y.) 70; *Suydam* v. *Bartle,* 9 Paige Ch. (N. Y.) 294. See N. Y. Code Civ. Proc. §§ 1628–1630.

[24] *Pattison* v. *Powers,* 4 Paige Ch. (N. Y.) 549.

viding a judgment has not been obtained; but if a judgment on the note has been obtained, the remedy upon such judgment must be first exhausted by execution.[25] An action on the note will be suspended by the proceedings to foreclose,[26] and cannot be proceeded with further, without leave first obtained from the court in which the foreclosure proceedings are pending.[27]

If it appears from the complaint to foreclose a mortgage, that the plaintiff has recovered a judgment for the mortgage debt, or that the mortgage was given as a collateral security for a demand which was already in judgment, it must also appear that an execution has been issued upon the judgment and returned unsatisfied, or it will be defective; the objection that such fact does not appear may be taken by answer or demurrer; or the defendant, without answering, may oppose the application for judgment.[28] If the defect does not appear upon the face of the complaint, it may be set up by answer.[29]

§ 394. Denial of execution and delivery of mortgage.— In his answer to a bill filed to foreclose a mortgage, the defendant may deny the execution and delivery of the mortgage.[30] But the answer of a mortgagor, denying the execu-

[25] *Shufelt* v. *Shufelt,* 9 Paige Ch. (N. Y.) 137, 37 Am. Dec. 381; *North River Bank* v. *Rogers,* 8 Paige Ch. (N. Y.) 648; N. Y. Code Civ. Proc. §§ 1628, 1629, 1630. See also *Stegeman* v. *Fraser,* 161 Mich. 35, 125 N. W. 769. (Comp. Laws 1897, § 521.)

[26] *Williamson* v. *Champlin,* Clarke Ch. (N. Y.) 9, aff'd 8 Paige Ch. (N Y.) 70.

[27] *Suydam* v. *Bartle,* 9 Paige Ch. (N Y.) 294; *Williamson* v. *Champlin,* Clarke Ch. (N. Y.) 9, aff'd 8 Paige Ch. (N. Y.) 70; N. Y. Code Civ. Proc. § 1628.

[28] *Grosvenor* v. *Day,* Clarke Ch. (N. Y.) 109; *Shufelt* v. *Shufelt,* 9 Paige Ch. (N. Y.) 137, 37 Am. Dec. 381; N. Y. Code Civ. Proc. §§ 488, 1630.

[29] *North River Bank* v. *Rogers,* 8 Paige Ch. (N. Y.) 648; N. Y. Code Civ. Proc. § 498.

[30] *Ault* v. *Blackman,* 8 Wash. 624, 36 Pac. 694.

In Delaware a plea of *non est factum* is sufficient to put in issue the execution of the mortgage on *scire facias. Malsberger* v. *Parsons,* 75 Atl. 698 (Del.)

tion and delivery of the mortgage, will not be sufficient to overcome the presumption of delivery, arising from the mortgagee's possession of the mortgage duly executed, acknowledged and recorded.[31] An answer which denies only the execution of the notes, is insufficient, in an action on the notes and mortgage security.[32] Where a mortgage has not been acknowledged, that fact must be set up affirmatively as a defense, if the party wishes to avail himself of the defect.[33] In an action to enforce a written instrument, in the form of a real estate mortgage purporting to have been executed and acknowledged as required by statute, an answer alleging that the defendant never acknowledged the execution of such instrument, will plead a good defense.[34]

It is thought that in a suit to foreclose a mortgage given by a corporation, a judgment creditor of such corporation cannot set up as a defense that there was no resolution of the stockholders for its issuance, or that it was not recorded, particularly where such creditor did not obtain judgment until after the foreclosure suit was begun.[35]

§ 395. Allegation of infancy.—A mortgage executed by an infant is not void,[36] but merely voidable at his elec-

[31] *Long* v. *Kinkel,* 36 N. J. Eq. (9 Stew.) 359; *Commercial Bank of N. J.* v. *Reckless,* 5 N. J. Eq. (1 Halst.) 650.

[32] *King* v. *Wright, as executor, etc.* 27 Ind. App. 600, 61 N. E. 796.

[33] *Sturgeon* v. *Board of Commissioners,* 65 Ind. 302.

[34] *Williamson* v. *Carskadden,* 36 Ohio St. 664. In this case the court say: "If it is true, as alleged by the defendants joining in the answer, that they never appeared before the officer or acknowledged the execution of such mortgage, the certificate of acknowledgment is, as to them, fraudulent; and in availing themselves of that defence, it is not necessary to show that the mortgagee had notice of such fraud. In fact the governing principle is very broad. Thus it has been held that in an action on the recognizance, which is regarded as a record, a plea in bar that the defendant did not acknowledge the recognizance is sufficient." *State* v. *Daily,* 14 Ohio, 91; and see *Callen* v. *Ellison,* 13 Ohio St. 446, 454, 82 Am. Dec. 448.

[35] *Farmers' Loan & T. Co.* v. *Chicago & N. P. R. Co.* 68 Fed. 412.

[36] *Chapin* v. *Shafer,* 49 N. Y. 407. See *Randall* v. *Sweet,* 1 Den. (N.

tion.[37] If the infant has committed some act, within a reasonable time after attaining his majority, clearly showing his intention not to be bound by the mortgage, it will be held void,[39] and the plea of infancy will constitute a good defense to the foreclosure of the mortgage.[40] But where an infant allows a mortgage to be foreclosed against him after attaining his majority, without pleading his infancy at the time of the execution of the mortgage, he will thereby waive his right to that defense, and will not be permitted to interpose it against a supplemental bill to enforce the decree.[41] The option which an infant has of disaffirming his contracts should be promptly exercised upon his attaining his majority;[42] but the burden of

Y.) 460; *Flynn* v. *Powers,* 36 How. (N. Y.) Pr. 289; *Green* v. *Wilding,* 59 Iowa, 679, 44 Am. Rep. 696; *Roberts* v. *Wiggin,* 1 N. H. 73, 8 Am. Dec. 38; *Harner* v. *Dipple,* 31 Ohio St. 72, 27 Am. Rep. 496; *Callis* v. *Day,* 38 Wis. 643. As to the ratification of contracts by infants, see *Tobey* v. *Wood,* 123 Mass. 88, 25 Am. Rep. 27, and notes 30 to 32.

[37] *Walsh* v. *Powers,* 43 N. Y. 23, 26, 3 Am. Rep. 654; *Henry* v. *Root,* 33 N. Y. 526. See *Loomer* v. *Wheelwright,* 3 Sandf. Ch. (N. Y.) 135; *Flynn* v. *Powers,* 35 How. (N. Y.) Pr. 279, aff'd 36 How. (N. Y.) Pr. 289; *Lawder* v. *Larkin,* 94 S. W. 171 (Tex. Civ. App.) See *Watson* v. *Rudernian,* 79 Conn. 687, 66 Atl. 515.

[38] A conveyance by the guardian of an infant during her minority does not amount to a disaffirmance of prior mortgages, as such disaffirmance must take place after majority is attained. *Shreeves* v. *Caldwell,* 135 Mich. 323, 106 Am. St. Rep. 394, 97 N. W. 764, 3 Am. Cas. 592.

[39] *State* v. *Plaisted,* 43 N. H. 413; *Campbell* v. *Cooper,* 34 N. H. 49, 67. See *Carr* v. *Clough,* 26 N. H. (6 Fost.) 280, 293, 59 Am. Dec. 345; *Lufkin* v. *Mayall,* 25 N. H. (5 Fost.) 82; *State* v. *Howard,* 88 N. C. 650.

[40] *Willis* v. *Twamby,* 13 Mass. 204. See *Lynde* v. *Budd,* 2 Paige Ch. (N. Y.) 191, 21 Am. Dec. 84; *Flynn* v. *Powers,* 35 How. (N. Y.) Pr. 279, aff'd 36 How. (N. Y.) Pr. 289; *Roberts* v. *Wiggin,* 1 N. H. 74, 8 Am. Dec. 38.

The infant is not estopped from insisting upon his defense, even thought he himself falsely stated that he was over twenty-one years of age. *New York Building, Loan & Banking Co.* v. *Fisher,* 23 App. Div. 363, 48 N. Y. Supp. 152.

[41] *Terry* v. *McClintock,* 41 Mich. 492.

[42] *Flynn* v. *Powers,* 36 How. (N. Y.) Pr. 289, aff'g 35 How. (N. Y.) Pr. 279. See *Walsh* v. *Powers,* 43 N. Y. 23, 26, 3 Am. Rep. 654; *Loomer* v. *Wheelwright,* Sandf. Ch. (N. Y.) 135; *Kline* v. *Beebe,* 6 Conn. 494; *Baker* v. *Kennett,* 54 Mo. 91; *Rich-*

proving that a contract entered into by an infant, has been ratified by him since attaining his majority, rests upon the party seeking to enforce it.[43]

What acts amount to the confirmation of a contract is always a question of law for the court.[44] It has been said, where an infant purchases land and subsequently, but before his majority, sells it, that his retention of the proceeds of such sale after he becomes of age is not such an affirmance of the contract as will bind him personally upon an obligation given as a consideration for the land.[45] And where an infant bought land subject to a mortgage thereon, cove-

ardson v. *Boright,* 9 Vt. 371; *Cecil* v. *Salisbury,* 2 Vern. 224.

[43] *Kane* v. *Kane,* 13 App. Div. 544, 43 N. Y. Supp. 662.

[44] See *Beardsley* v. *Hotchkiss,* 96 N. Y. 211; *Green* v. *Green,* 69 N. Y. 553; *Walsh* v. *Powers,* 43 N. Y. 23, 26, 3 Am. Rep. 654; *Henry* v. *Root,* 33 N. Y. 526; *Roof* v. *Stafford,* 7 Cow. (N. Y.) 179, 183; *Lynde* v. *Budd,* 2 Paige Ch. (N. Y.) 191, 21 Am. Dec. 84; *Bool* v. *Mix,* 17 Wend. (N. Y.) 120; *Hastings* v. *Dollarhide,* 24 Cal. 195; *Benham* v. *Bishop,* 9 Conn. 330, 23 Am. Dec. 358; *Rogers* v. *Hurd,* 4 Day (Conn.) 57, 4 Am. Dec. 182; *Harris* v. *Cannon,* 6 Ga. 382; *Illinois L. & L. Co.* v. *Bonner,* 75 Ill. 315; *Scranton* v *Stewart,* 52 Ind. 69; *Philips* v. *Green,* 3 A. K. Marsh. (Ky.) 7, 13 Am. Dec. 124; *Lawson* v. *Lovejoy,* 8 Me. (8 Greenl.) 405, 23 Am. Dec. 526; *Dana* v. *Coombs,* 6 Me. (6 Greenl.) 89, 19 Am. Dec. 194; *Hubbard* v. *Cummings,* 1 Me. (1 Greenl.) 11; *Thompson* v. *Lay,* 21 Mass. (4 Pick.) 48, 16 Am. Dec. 325; *Whitney* v. *Dutch,* 14 Mass. 457, 7 Am. Dec. 229; *Martin* v. *Mayo,* 10 Mass. 137, 6 Am. Dec. 103; *Smith* v. *Mayo,* 9 Mass. 62, 6 Am. Dec. 28; *Dixon* v. *Merritt,* 21 Minn. 196; *Allen* v. *Poole,* 54 Miss. 323; *Norcum* v. *Sheahan,* 21 Mo. 25; *Roberts* v. *Wiggin,* 1 N. H. 73, 8 Am. Dec. 38; *Cresinger* v. *Welch,* 15 Ohio, 156; *Drake* v. *Ramsay,* 5 Ohio, 251; *Cheshire* v. *Barrett,* 4 McC. (S. C.) 241, 17 Am. Dec. 735; *Scott* v. *Buchanan,* 11 Humph. (Tenn.) 469; *Bigelow* v. *Kinney,* 3 Vt. 353, 21 Am. Dec. 589; *Mustard* v. *Wohlford,* 15 Gratt. (Va.) 329; *Irvine* v. *Irvine,* 76 U. S. (9 Wall.) 617, 19 L. ed. 800; *Tucker* v. *Moreland,* 35 U. S. (10 Pet.) 58, 9 L. ed. 346. To constitute a ratification, there must be something more than a mere acknowledgment; *Benham* v. *Bishop,* 9 Conn. 330; *Thompson* v. *Lay,* 21 Mass. (4 Pick.) 48, 16 Am. Dec. 325. Anything from which assent may fairly be deduced may be regarded as an affirmance; *Cheshire* v. *Barrett,* 4 McC. (S. C.) L. 241, 17 Am. Dec. 735; *Wheaton* v. *East,* 5 Yerg. (Tenn.) 41, 26 Am. Dec. 251. As to what amounts to disaffirmance see *Kane* v. *Kane,* 13 App. Div. 544, 43 N. Y. Supp. 662.

[45] *Walsh* v. *Powers,* 43 N. Y. 23, 3 Am. Rep. 654.

nanting in the deed to pay such mortgage as a part of the consideration of the conveyance, and subsequently, but before coming of age, conveyed the land for a larger price and retained and enjoyed the proceeds of such sale for several years after attaining his majority, the court held that there was no personal liability on the covenant of assumption,[46] and that an appearance by an attorney for the infant in an action to foreclose such mortgage and to obtain a personal judgment against him, would not be a bar to the plea of infancy as a defense in an action against such infant by his grantor to recover the amount of the judgment for deficiency, which he had been obliged to pay.[47] And where the infant has spent the money received as consideration for his mortgage, he may on reaching majority disaffirm without tendering back the consideration.[48]

Where an infant has purchased real property and continued in possession thereof and exercised acts of ownership, after becoming of full age, the retention of the property and the failure to disaffirm the contract, within a reasonable time after attaining his majority, will operate as a ratification of the contract and bar the defense of infancy.[49] It is a well established principle, that an infant will not be permitted to retain property purchased by him, and at the same time to repudiate the contract of purchase;[50] he must either confirm or abandon the contract as a whole.[51]

[46] *Walsh* v. *Powers,* 43 N. Y. 23, 3 Am. Rep. 654.

[47] *Walsh* v. *Powers,* 43 N. Y. 23, 3 Am. Rep. 654, reversing *Flynn* v. *Powers,* 35 How. (N. Y.) Pr. 279, on this point, 36 How. (N. Y.) Pr. 289.

[48] *Kane* v. *Kane,* 13 App. Div. 544, 43 N. Y. Supp. 662.

[49] *Beardsley* v. *Hotchkiss,* 96 N. Y. 211. See *Walsh* v. *Powers,* 43 N. Y. 23, 26, 3 Am. Rep. 654; *Henry* v. *Root,* 33 N Y. 526; *Lynde* v. *Budd,* 2 Paige Ch. (N. Y.) 191, 21 Am. Dec. 84; *Kline* v. *Beebe,* 6 Conn. 494; *Hubbard* v. *Cummings,* 1 Me. (1 Greenl.) 11; *Cecil* v. *Salisbury,* 2 Vern. 225; *Ketley's Case,* 1 Brownl. 120.

[50] *Henry* v. *Root,* 33 N. Y. 526; *Flynn* v. *Powers,* 54 Barb. (N. Y.) 554, 35 How. (N. Y.) Pr. 279; *Gray* v. *Lessington,* 2 Bosw. (N. Y.) 263; *Kitchen* v. *Lee,* 11 Paige Ch. (N. Y.) 107; *Lynde* v. *Budd,* 2 Paige Ch. (N. Y.) 191; *Deason*

A continuance in the possession of the property purchased by an infant, after he attains his majority, is in all instances regarded as an affirmance of the transaction by which title to the property was acquired, and entitles the vendor to a recovery in an action therefor.[52]

§ 396. Foreclosure of infant's purchase money mortgage.—Where an infant executes a mortgage to secure the purchase money, or a portion thereof, for premises purchased by him, and ratifies the same on attaining his majority, the mortgage will become valid and binding.[53] A retention of possession and the continued use of the property, or a sale of the whole or of a part of the premises after attaining his majority, is to be regarded as an affirmance of the contract of purchase, and will bind the infant for the payment of the agreed consideration.[54] Where infancy is set up as a defense

v. *Boyd,* 1 Dana (Ky.) 45; *Cheshire* v. *Barrett,* 4 McC. (S. C.) 241, 17 Am. Dec. 735.

[51] *Overbach* v. *Heermance,* Hopk. Ch. (N. Y.) 337, 14 Am. Dec. 546. See *Walsh* v. *Powers,* 43 N. Y. 23, 26, 3 Am. Rep. 654; *Henry* v. *Root,* 33 N. Y. 526, 553; *Flynn* v. *Powers,* 54 Barb. (N. Y.) 554, 35 How. (N. Y.) Pr. 279; *Bartholomew* v. *Finnemore,* 17 Barb. (N. Y.) 428; *Coutant* v. *Servoss,* 3 Barb. (N. Y.) 128; *Gray* v. *Lessington,* 2 Bosw. (N. Y.) 263; *Kitchen* v. *Lee,* 11 Paige Ch. (N. Y.), 107, 43 Am. Dec. 101; *Lynde* v. *Budd,* 2 Paige Ch. (N. Y.) 191, 21 Am. Dec. 84; *Kline* v. *Beebe,* 6 Conn. 494; *Carpenter* v. *Carpenter,* 45 Ind. 146; *Deason* v. *Boyd,* 1 Dana (Ky.) 45; *Hubbard* v. *Cummings,* 1 Me. (1 Greenl.) 11, 13; *Badger* v. *Phinney,* 15 Mass. 359, 8 Am. Dec. 105; *Young* v. *McKee,* 13 Mich. 552; *Ladd* v. *Wiggin,* 35 N. H. 428; *Cheshire* v. *Barrett,* 4 McC. (S. C.) L. 241, 17 Am. Dec. 735; *Morrill* v. *Aden,* 19 Vt. 505; *Farr* v. *Sumner,* 12 Vt. 28, 36 Am. Dec. 327; *Irish* v. *Clayes,* 10 Vt. 85; *Bigelow* v. *Kinney,* 3 Vet. 353, 21 Am. Dec. 589.

[52] *Henry* v. *Root,* 33 N. Y. 526. See *Walsh* v. *Powers,* 43 N. Y. 23; *Coutant* v. *Servoss,* 3 Barb. (N. Y.) 128; *Kitchen* v. *Lee,* 11 Paige Ch. (N. Y.) 107, 43 Am. Dec. 101; *Lynde* v. *Budd,* 2 Paige Ch. (N. Y.) 191, 21 Am. Dec. 84; *Boyden* v. *Boyden,* 50 Mass. (9 Metc.) 519; *Badger* v. *Phinney,* 15 Mass. 359, 26 Am. Dec. 611; *Boody* v. *McKenny,* 23 Me. 517; *Hubbard v. Cummings,* 1 Me. (1 Greenl.) 11; *Roberts* v. *Wiggin,* 1 N. H. 73, 8 Am. Dec. 38.

[53] *Eagle Fire Ins. Co.* v. *Lent,* 1 Edw. Ch. (N. Y.) 304; *Lynde* v. *Budd,* 2 Paige Ch. (N. Y.) 191, 21 Am. Dec. 84.

[54] See *Lynde* v. *Budd,* 2 Paige Ch. (N. Y.) 191, 21 Am. Dec. 84;

on coming of age, the infant can relinquish the land to his grantor and demand the return of the purchase money which was paid at the time the contract was entered into,[55] but he cannot affirm the contract in part and avoid it in part. The mortgage cannot be avoided without making the deed void also.[56] He cannot retain possession of the property, thereby affirming the purchase, and plead his infancy at the time of making the contract, to avoid the payment of the purchase money.[57]

If an infant wishes to avoid the payment of his purchase money mortgage, he must surrender and reconvey the property; for, as we have seen, an infant cannot retain the property and at the same time avoid his obligation on the mortgage.[58] The deed and the purchase money mortgage, being presumptively executed at the same time and forming parts of the same contract, are to be considered together and regarded as forming but one instrument.[59] They must stand or fall together, and for that reason the defense of infancy can-

Flynn v. *Powers,* 54 Barb. (N. Y.) 554, 35 How. (N. Y.) Pr. 282; *Boody* v. *McKenney,* 23 Me. 517; *Dana* v. *Coombs,* 6 Me. (6 Greenl.) 89; *Hubbard* v. *Cummings,* 1 Me. (1 Greenl.) 11; *Boyden* v. *Boyden,* 50 Mass. (9 Metc.) 519; *Robbins* v. *Eaton,* 10 N. H. 563; *Callis* v. *Day,* 38 Wis. 643.

[55] See *Lynde* v. *Budd,* 2 Paige Ch. (N. Y.) 191, 21 Am. Dec. 84; *Willis* v. *Twambly,* 13 Mass. 204.

[56] *Wood* v. *Gosling,* 1 N. Y. Leg. Obs. 74; *Coutant* v. *Servoss,* 3 Barb. (N. Y.) 128; *Roberts* v. *Wiggin,* 1 N. H. 73, 8 Am. Dec. 38.

[57] See *Henry* v. *Root,* 33 N. Y. 526; *Kitchen* v. *Lee,* 11 Paige Ch. (N. Y.) 109, 42 Am. Dec. 102; *Kline* v. *Beebe,* 6 Conn. 494; *Deason* v. *Boyd,* 1 Dana (Ky.) 46; *Cheshire* v. *Barrett,* 4 McC. (S. C.) 241, 17 Am. Dec. 735; *Bigelow* v. *Kinney,* 3 Vt. 353.

[58] *Henry* v. *Root,* 33 N. Y. 526, 553. See *Chapin* v. *Shafer,* 49 N. Y. 407; *Kitchen* v. *Lee,* 11 Paige Ch. (N. Y.) 107, 42 Am. Dec. 101; *Lynde* v. *Budd,* 2 Paige Ch. (N. Y.) 191, 21 Am. Dec. 84; *Kline* v. *Beebe,* 6 Conn. 494; *Deason* v. *Boyd,* 1 Dana (Ky.) 45; *Dana* v. *Coombs,* 6 Me. (6 Greenl.) 89, 19 Am. Dec. 194; *Badger* v. *Phinney,* 15 Mass. 359, 8 Am. Dec. 105; *Heath* v. *West,* 28 N. H. (8 Fost.) 101.

[59] *Rawson* v. *Lampman,* 5 N. Y. 461; *Lynde* v. *Budd,* 2 Paige Ch. (N. Y.) 191, 21 Am. Dec. 84; *Ready* v. *Pinkham,* 181 Mass. 351, 63 N. E. 887.

not be pleaded to the foreclosure of such a mortgage, where the infant still retains possession of the property.[60]

§ 397. Allegation of insanity of mortgagor.—The insanity of the mortgagor, at the time of the execution of a bond and mortgage, may be set up as a defense in an action for the foreclosure of the mortgage, the same as in an action on any other kind of a contract. But where a mortgage is executed under the direction and by the authority of a court, the sanity or insanity of the mortgagor is not material;[61] and in an equitable proceeding it will be immaterial whether a mortgagee was sane or not at the date of the execution of a mortgage to him, where it was executed in strict pursuance of a written agreement entered into by such mortgagee when sane.[62] It would seem, where a mortgage is given to secure the repayment of money previously loaned, that the insanity of the mortgagor at the time of the execution of the mortgage will not be material.[63] It is an unsettled question what degree of unsoundness of mind must be shown to enable a defendant to avoid his contracts; but the rules which apply to contracts generally will govern mortgages also.[64]

[60] *Coutant* v. *Servoss,* 3 Barb. (N. Y.) 128; *Lynde* v. *Budd,* 2 Paige Ch. (N. Y.) 191, 21 Am. Dec. 84; *Stow* v. *Tifft,* 15 Johns. (N. Y.) 458, 8 Am. Dec. 266; *VanHorne* v. *Crain,* 1 Paige Ch. (N. Y.) 455; *Hubbard* v. *Cummings,* 1 Me. (1 Greenl.) 11; *Roberts* v. *Wiggin,* 1 N. H. 73, 8 Am. Dec. 38.

[61] *Grier's Appeal,* 101 Pa. St. 412.

[62] *Bevin* v. *Powell,* 83 Mo. 365. See *Parker* v. *Marco,* 76 Fed. 510.

[63] See *Copenrath* v. *Kienby,* 83 Ind. 18. In this case the answer set up the mortgagor's unsoundness of mind and incapacity to contract at the time he executed the mortgage, in bar of the action to foreclose. The mortgagee replied to such answer by showing that the mortgage was given to secure the repayment of money borrowed by the mortgagor to enable him to pay his *bona fide* debt to a third person, and that, when the mortgage was executed, the mortgagee had no knowledge whatever of any disability of the mortgagor to contract, but believed him to be sober, in his right mind, and capable of entering into a contract, and also that the transaction between them was *bona fide.* On demurrer to such reply, for want of facts, the court held it to be good.

[64] See *Merritt* v. *Merritt,* 32 Misc. 21, 66 N. Y. Supp. 123; *Jacks* v. *Decring,* 150 Cal. 272, 88 Pac. 909.

Where the insanity is such as to apprise all persons dealing with the party of his mental condition, there is no question regarding the non-liability of the mortgagor upon any contract entered into by him;[65] but where his mental disorder is of such a character as not to apprise a man of ordinary discernment of his mental condition, there is more difficulty and uncertainty. A contract, though fair, entered into by a man under such circumstances, will sometimes be held void. Thus, where a man, who had been insane for some time, but who had only periodical recurrences of insanity, was insane at the time of the execution of a mortgage, the mortgage was set aside as being made while the mortgagor was *non compos mentis,* although he managed his own affairs with average correctness and was treated by his neighbors as competent to do business, even while they considered him of unsound mind, and although he was not so manifestly insane as to make the conduct of the mortgagee fraudulent in accepting the mortgage security.[66]

Where the sanity of the mortgagor is in question, the burden of proof is upon the party who seeks to avoid the mortgage;[67] and he must show not merely an incapacity to make a valid contract at the time of the execution of the mortgage, but also that the mortgagee knew, and took advantage of, the

[65] There are exceptions to the general rule of the nonliability of a person unmistakably insane upon his contracts, such as contracts which are fair and beneficial to him or his estate. But it is not the province of this work to consider these distinctions, which are fully treated in all standard works on contracts. See *Holmes* v. *Martin,* 123 Mich. 155, 81 N. W. 1072.

[66] *Curtis* v. *Brownell,* 42 Mich. 165.

But the supreme court of Missouri, in the case of *Blount* v. *Spratt* (113 Mo. 48, 20 S. W. 967), hold that the grantee in a deed of trust executed by the grantor to secure money loaned her husband, cannot be enjoined from selling the land embraced therein, on the ground of the grantor's insanity, where he took the deed in good faith and without knowledge thereof, and the parties cannot be put in *statu quo.*

[67] *Fay* v. *Burditt,* 81 Ind. 433, 43 Am. Rep. 142; *Day* v. *Seely,* 17 Vt. 542; *Jacobs* v. *Richards,* 18 Beav. 300.

mortgagor's state of mind.[68] Where the consideration has been paid and the conveyance was perfectly fair, no undue advantage having been taken, the security will be held good for its amount, although the insanity may be admitted or proved, if it has not been judicially established.[69] If the insanity of the mortgagor has once been established, however, it will devolve upon the party claiming under the mortgage to establish by clear and satisfactory evidence that it was executed during a lucid interval,[70] because a person, once proved to have been insane, will be presumed to remain so until the contrary is shown.[71]

§ 398. Defect in execution and record of mortgage.— If a mortgage was defectively executed, and not properly recorded, these facts may be shown in defence by any party not absolutely estopped by concurrence in the transaction, such as a subsequent incumbrancer who was not chargeable with notice of the lien.[72] Where the record of a mortgage is made out of the order required by law, it will not be sufficient to give notice to any one dealing with the title to the land, and will be invalid as to *bona fide* purchasers and incumbrancers, without actual notice;[73] and the same is true where the record is made in the wrong register, or in the wrong book

[68] *VanHorn* v. *Keenan*, 28 Ill. 445; *Copenrath* v. *Kienley*, 83 Ind. 18; *Fay* v. *Burditt*, 81 Ind. 443, 43 Am. Rep. 142; *Marmon* v. *Marmon*, 47 Iowa, 121.

[69] *Schuff* v. *Ransom*, 79 Ind. 458; *Hardenbrook* v. *Sherwood*, 72 Ind. 403; *Lancaster Co. National Bank* v. *Moore*, 78 Pa. St. 407, 21 Am. Rep. 24, and notes 29 to 35.

[70] *Ripley* v. *Babcock*, 13 Wis. 425. See *Schuff* v. *Ranson*, 79 Ind. 458; *Bevin* v. *Powell*, 11 Mo. App. 216.

[71] *Saxon* v. *Whittaker*, 30 Ala. 237. See *Sprague* v. *Duel*, Clarke Ch. (N. Y.) 90; *Breed* v. *Pratt*, 35 Mass. (18 Pick.) 115; *Ballew* v. *Clark*, 2 Ired. (N. C.) L. 23; *Titlow* v. *Titlow*, 54 Pa. St. 216, 93 Am. Dec. 691; *Ripley* v. *Babcock*, 13 Wis. 245.

[72] *New York Life Ins. and Trust Co.* v. *Staats*, 21 Barb. (N. Y.) 570, aff'd *sub. nom. New York Life Ins. Co.* v. *White*, 17 N. Y. 469.

[73] *New York Life Ins. Co.* v. *White*, 17 N. Y. 469; *Sawyer* v. *Adams*, 8 Vt. 172, 30 Am. Dec. 459.

of the right register. Thus, where a mortgage deed was recorded by the officer entrusted with the duty of recording deeds, on the last page of a former volume of records in which no mortgages had been recorded for upwards of twelve years, and the names of the parties were not entered in the index of mortgages, it was held that the mortgage was not duly recorded and that a subsequent lienor had a priority over the mortgagee.[74] In an action to foreclose a mortgage, the fact that such mortgage was not recorded within the time prescribed by statute, is not a defense that can be pleaded by the administrator or heirs of the deceased mortgagor.[75]

It has been held in New York,[76] that the index of a mortgage is no part of the record thereof, that the neglect of the county clerk to index it in the proper book will not deprive the mortgagee of his right of priority, and that the mortgage is notice to all subsequent purchasers from the time it is left for record.[77] A mortgage is considered as recorded from the time of its delivery to the county clerk. After such delivery nothing more is required to be done to perfect the record, except at the proper time to copy the mortgage in its proper order in the proper book; and yet, if the mortgage should be mislaid, or lost or purloined before it is copied, the record thereof would still remain complete.[78]

Where an essential part of the mortgage is omitted from the record, it will be constructive notice to subsequent mortgagees and purchasers in good faith only of what appears on the record.[79] Thus, where a mortgage was given to secure three thousand dollars, but by mistake of the clerk was registered for only three hundred dollars, it was held to be notice to

[74] *Sawyer* v. *Adams*, 8 Vt. 172, 30 Am. Dec. 459. See *Gillig* v. *Maas*, 28 N. Y. 191, 214.

[75] *Evans* v. *Pence*, 78 Ind. 439.

[76] *The Mut. Life Ins. Co.* v. *Dake*, 87 N. Y. 257, aff'g 1 Abb. (N. Y.) N. C. 381.

[77] *Wadsworth* v. *Wendell*, 5 Johns. Ch. (N. Y.) 224, 230.

[78] *Mut. Life Ins. Co.* v. *Dake*, 87 N. Y. 257, 264.

[79] *Frost* v. *Beekman*, 1 Johns. Ch. (N. Y.) 288. See *Mut. Life Ins. Co.* v. *Dake*, 87 N. Y. 257, 263.

subsequent *bona fide* purchasers, only to the extent of the sum described in the registry.[80]

§ 399. Allegation of alteration of instrument.—The material alteration of a mortgage by the mortgagee, or by any other person at his instance or with his knowledge and consent, after it has been executed and delivered to him, and while it is in his possession or custody, by changing the description of the premises,[81] by increasing the stated consideration of the mortgage, or by inserting therein an additional obligation,[82] without the knowledge or consent of the mortgagor, will have the effect of destroying and annulling the instrument as between the parties, and the mortgage will not be enforceable as a security for the payment of any portion of the indebtedness therein described.[83] The rule is different, however, where the instrument is altered by a mere stranger, without the privity or consent of the mortgagee or of other parties interested, if the contents of the instrument, as it originally existed, can be ascertained.[84]

Thus, it has been held that the validity of a mortgage will not be impaired by the accidental detachment of the seal after the mortgage has been left at the proper office for record; and where the preponderance of evidence shows that the mortgage was signed and sealed at the time of its acknowl-

[80] *Frost* v. *Beekman,* 1 Johns. Ch. (N. Y.) 288.

[81] *Pereau* v. *Frederick,* 17 Neb. 117.

[82] *Johnson* v. *Moore,* 33 Kan. 90.

[83] *Johnson* v. *Moore,* 33 Kan. 90. See *Smith* v. *Fellows,* 41 N. Y. Supr. Ct. (9 J. & S.) 36, 51; *Waring* v. *Smyth,* 2 Barb. Ch. (N. Y.) 119; *Lewis* v. *Payn,* 8 Cow. (N. Y.) 71, 18 Am. Dec. 427; *Jackson* v. *Malin,* 15 Johns. (N. Y.) 293, 297; *Marcy* v. *Dunlap,* 5 Lans. (N. Y.) 365. See *Pigot's Case,* 11 Coke, 26; Shep. Touch. 69.

Though a mortgage has become void by reason of material alteration, the note which it secured is not affected. *Kime* v. *Jesse,* 52 Neb. 606, 72 N. W. 1050.

[84] *Waring* v. *Smyth,* 2 Barb. Ch. (N. Y.) 119; *Lewis* v. *Payn,* 8 Cow. (N. Y.) 71, 18 Am. Dec. 427; *Rees* v. *Overbaugh,* 6 Cow. (N. Y.) 746; *Jackson* v. *Malin,* 15 Johns. (N. Y.) 293, 297; *Marcy* v. *Dunlap,* 5 Lans. (N. Y.) 365; *United States* v. *Linn,* 42 U. S. (1 How.) 104, 11 L. ed. 64.

edgment, the absence of the seal afterwards will not render the mortgage void.[85]

As early as Pigot's Case,[86] it was decided that "when a deed is altered in a point material, by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, raising, or by drawing of a pen through a line, or through the midst of any material word, the deed thereby becomes void." "So, if the obligee himself alters the deed by any of the said ways, although it is in words not material, yet the deed is void; if a stranger without his privity alters the deed by any of the said ways, in any point not material, it shall not avoid the deed."[87] But in an early New York case,[88] a doubt was expressed whether the act of a stranger should be allowed to prejudice a party, although the alteration might be in a material part of the instrument; and in a later case[89] it was held that it should not.[90]

It is now the well settled doctrine in this country, that an immaterial alteration of a mortgage, made by a person who stands in the position of a stranger to the party claiming under it, will not render the instrument invalid, and that it may be enforced according to its original terms.[91] The doctrine

[85] *VanRiswick* v. *Goodhue,* 50 Md. 57.

[86] 11 Coke, 26. The doctrine of Pigot's Case is doubted in *Bigelow* v. *Stilphens,* 35 Vt. 521, 525; *Miller* v. *Stewart,* 22 U. S. (9 Wheat.) 681, 718, 6 L. ed. 190, 199.

[87] See *Lewis* v. *Payn,* 8 Cow. (N. Y.) 71, 73, 18 Am. Dec. 427; *Jackson* v. *Malin,* 15 Johns. (N. Y.) 293, 297.

In Sheppard's Touchstone, p. 69, it is said: "If the alteration be made by the party himself that owneth the deed albeit it be in a place not material and it tend to the advantage of the other party and his own disadvantage, yet the deed is hereby become void."

[88] *Jackson* v. *Malin,* 15 Johns. (N. Y.) 293, 297.

[89] *Rees* v. *Overbaugh,* 6 Cow. (N. Y.) 746.

[90] See *Lewis* v. *Payn,* 8 Cow. (N. Y.) 71, 73, 18 Am. Dec. 427.

[91] *Casoni* v. *Jerome,* 58 N. Y. 315, 321; *Waring* v. *Smyth,* 2 Barb. Ch. (N. Y.) 119; *Rees* v. *Overbaugh,* 6 Cow. (N. Y.) 746; *Malin* v. *Malin,* 1 Wend. (N. Y.) 625; *United States* v. *Hatch,* 1 Paine C. C. 336. See also *Rodriguez* v. *Haynes,* 76 Tex. 225, 13 S. W. 296.

announced in Pigot's Case was considered and doubted by the English Court of Queen's Bench in the case of Aldous v. Cornwall,[92] where it was held that the addition to a note of words which could not prejudice any person, would not destroy its validity.

§ 400. Allegation of illiteracy and negligence.—Illiteracy or ignorance cannot be set up as a defense to a suit on a contract, where there was no fraud on the part of the plaintiff, nor any for which he was responsible. Consequently, where a person, who is illiterate, executes a mortgage without knowing its contents, he cannot plead his ignorance as a valid defense, if no fraud is shown;[93] neither can his grantee, who purchased with knowledge of the mortgage, avail himself of such defense,[94] unless such mortgagor was prevented from knowing the contents of the mortgage by artifice or trickery for which the mortgagee was responsible.[95] But where fraud, artifice or deceit is used, the rule is different. Thus, it has been held that the employment of a trusted kinsman and friend, as an agent of the mortgagee, to misrepresent the contents of the mortgage, whereby its execution is obtained without its being read, is a fraud from which relief will be granted,[96] because, where a known trust and confidence is reposed in the person making the representations and there

[92] L. R. 3 Q. B. 573, 37 L. J. Q. B. 201. Lush, J., speaking for the court, says: "We are not bound by the doctrine of Pigot's Case, or the authority cited for it; and, not being bound, we are certainly not disposed to lay down as a rule of law, that the addition of words which cannot possibly prejudice any one, destroys the validity of the note. It seems to us repugnant to justice and common sense to hold that the maker of a promissory note is discharged from his obligation to pay it, because the holder has put in writing on the note what the law would have supplied if the words had not been written."

[93] *Leslie* v. *Merrick,* 99 Ind. 180; *Robinson* v. *Glass,* 94 Ind. 211. See *Cunningham* v. *McCready,* 219 Pa. 594, 69 Atl. 82; *Derrick* v. *Sams, as adm'r, etc.* 98 Ga. 397, 58 Am. St. Rep. 309, 25 S. E. 509.

[94] *Leslie* v. *Merrick,* 99 Ind. 180.

[95] See *Leslie* v. *Merrick,* 99 Ind. 180; *Robinson* v. *Glass,* 94 Ind. 211.

[96] *Robinson* v. *Glass,* 94 Ind. 211. See *post,* § 421.

is a relationship justifying such trust and confidence, the person to whom the representations are made may rely upon them without being guilty of negligence.[97]

In an action by a mortgagor for equitable relief from a bond and mortgage, which he had been fraudulently induced to execute, which bond and mortgage had been assigned to a *bona fide* purchaser, it is not enough for him to show that the execution of such instruments was induced by the false and fraudulent representations of the mortgagee; the mortgagor must also show that the execution of the papers was without negligence on his part, and this although he was old, infirm and illiterate.[98]

Negligence in the execution of an instrument furnishes no defense to a suit founded thereon. Thus, where one who can read, depending upon the representations of another as to the contents of a mortgage, neglects to read it before he executes it, he will be bound thereby, although he may sign what he would not have executed had he known its contents.[99] A person who executes a mortgage without a knowledge of its contents, will not be relieved therefrom, because of the fact that its contents were not as the mortgagee represented them, in the absence of any relation of trust or confidence between the parties, and of any artifice or trick for which the mortgagee was responsible, by which the signature to the mortgage was procured.[1]

[97] *Albany Savings Inst.* v. *Burdick,* 87 N. Y. 40; *Robinson* v. *Glass,* 94 Ind. 211; *Worley* v. *Moore,* 77 Ind. 567; *Matlock* v. *Todd,* 19 Ind. 130; *Peter* v. *Wright,* 6 Ind. 183; *Bischof* v. *Coffelt,* 6 Ind. 23; *Shaeffer* v. *Sleade,* 7 Blackf. (Ind.) 178.

[98] *Montgomery* v. *Scott,* 9 S. C. 20, 30 Am. Rep. 1.

[99] See *Chapman* v. *Rose,* 56 N. Y. 137, 15 Am. Rep. 401; *American Ins. Co.* v. *McWhorter,* 78 Ind. 136; *Nebeker* v. *Cutsinger,* 48 Ind. 436; *Douglass* v. *Matting,* 29 Iowa, 498, 4 Am. Rep. 238; *Putnam* v. *Sullivan,* 4 Mass. 45, 3 Am. Dec. 206; *Mackey* v. *Peterson,* 29 Minn. 298, 305; *Shirts* v. *Overjohn,* 60 Mo. 305; *Foster* v. *Mackinnon,* L. R. 4 C. P. 704. See *Nourse* v. *Jennings,* 180 Mass. 592, 62 N. E. 974.

[1] *Robinson* v. *Glass,* 94 Ind. 211.

CHAPTER XVI.

ANSWERS AND DEFENSES—CONSIDERATION—USURY—DEFENSES AGAINST ASSIGNEE OF MORTGAGE, AND AGAINST PURCHASER OF NEGOTIABLE PAPER SECURED BY MORTGAGE.

§ 401. Want of consideration.
§ 402. Partial failure of consideration.
§ 403. What is not a sufficient consideration.
§ 404. Mortgage securing future advances—Actual consideration.
§ 405. Mortgage as security for goods to be furnished—Actual consideration.
§ 406. Defense of illegal or void consideration.
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§ 408. Illegal or void consideration—When no defense to action on note secured by mortgage.
§ 409. Usury as a defense.
§ 410. How to allege usury—What law governs.
§ 411. Who may avail themselves of the defense of usury.
§ 412. Defenses against assignee of mortgage.
§ 413. Defense against voluntary assignee in bankruptcy.
§ 414. Defense against a fraudulent assignment.
§ 415. Defense against transferred mortgage payable to mortgagee alone.
§ 416. Defenses against foreclosure by *bona fide* purchaser of negotiable paper secured by mortgage.
§ 417. Purchaser of negotiable paper secured by mortgage takes subject to equities against it.
§ 418. Defenses against assignee of mortgage securing a non-negotiable instrument.
§ 419. Other defenses against such an assignee.

§ 401. Want of consideration.—It is common information that want of consideration may be shown in answer to an action on a contract, and that when established, it furnishes a complete defense. It follows, necessarily, that want of consideration for a mortgage may be set up as a defense in an

action to foreclose such mortgage.[2] Where the answer, in an action to foreclose a mortgage, admits the execution of the mortgage as a security for the debt, it substantially admits the cause of action; the mere denial of the remaining allegations of the complaint, being aimed at a legal conclusion, raises no issue, and is, therefore, insufficient.[3]

Want of consideration will constitute a good defense to a suit for foreclosure brought by a mortgagee's administrator, even though the mortgage may have been given to defraud creditors;[4] because, as regards such fraudulent purpose, the mortgagee is in no better condition than the mortgagor, as he must have participated in it.[5] It is said that the meaning

[2] See *Bridges* v. *Blake,* 106 Ind. 332; *Dugan* v. *Trisler,* 69 Ind. 553; *Gilchrist* v. *Manning,* 54 Mich. 210; *Hughes* v. *Thweatt,* 57 Miss. 376; *Blanchard* v. *Morey,* 56 Vt. 170.

As to when the defence of a want of consideration will not be sufficient, see *Long* v. *Kinkel,* 36 N. J. Eq. (9 Stew.) 359; *Best* v. *Thiel,* 79 N. Y. 15; *Schlitz, as adm'r. etc.* v. *Koch,* 138 App. Div. 535, 123 N. Y. Supp. 302; *Alton-Dawson Mercantile Co.* v. *Staten,* 19 Okl. 252, 91 Pac. 892.

The court in *Koster* v. *Welch,* 57 S. C. 95, 35 S. E. 435, hold that, although a mortgagor cannot show that the mortgage was without consideration, he has the right to show failure of consideration.

Embezzlement of proceeds by agent procuring loan cannot be set up as a defense, where such agent is the agent of the mortgagor. *American Mortgage Co.* v. *King,* 105 Ala. 358, 16 So. 889; *English American Land Mortgage Co. Limited* v. *Peoples,* 102 Ala. 241, 14 So. 656.

[3] *Kay* v. *Churchill,* 10 Abb. (N. Y.) N. C. 83. See *Fosdick* v. *Groff,* 22 How. (N. Y.) Pr. 158; *Edson* v. *Dillaye,* 8 How. (N. Y.) Pr. 273; *McMurray* v. *Gifford,* 5 How. (N. Y.) Pr. 14; *Cooley* v. *Hobart,* 8 Iowa, 358.

[4] *Hannan* v. *Hannan,* 123 Mass. 441, 25 Am. Rep. 121; *Wearse* v. *Pierce,* 41 Mass. (24 Pick.) 141; *Goudy* v. *Gebhart,* 1 Ohio St. 262. See *Hughes* v. *Thweatt,* 57 Miss. 376.

[5] *Wearse* v. *Pierce,* 41 Mass. (24 Pick.) 141; *Clark* v. *Clark,* 62 N. H. 267. Where the mortgagee attempts, against the will of the mortgagor, to foreclose a mortgage given without consideration and to defraud creditors, and to apply the property in satisfaction thereof, the mortgagor may show in opposition the real nature of the transaction and the want of consideration. *Bickford* v. *Johnson,* 36 Minn. 123, 30 N. W. 439; *Hill* v. *Hoole,* 116 N. Y. 299, 22 N. E. 547, 26 N. Y. S. R. 657, 5 L.R.A. 620.

For, as has been recently said, a mortgagor is not denied the right of defense for lack of con-

of the familiar maxim, *in pari delicto potior est conditio defendentis,* is simply that the law leaves the parties exactly where they stood,—not that it prefers the defendant to the plaintiff, but it will not recognize a right of action founded on an illegal contract in favor of either party as against the other.[6]

A want of consideration for a note secured by a mortgage is a good defense to a suit for foreclosure of the mortgage,[7] parol evidence being admissible to show that no debt ever existed between the parties to the mortgage.[8] And upon a motion for judgment in the foreclosure of such a mortgage, evidence will be admissible of the amount of liabilities, actual and contingent, which the mortgage was given to secure.[9] While a purchaser of the equity of redemption cannot set up the defense of failure, or want of consideration as between the original parties,[10] a junior mortgagee has a right to defeat the lien of a senior mortgage, by showing that it was executed without consideration.[11]

Want of consideration is also a defense as against an as-

sideration,—at least as against any other than a *bona fide* assignee of the mortgage,—because the mortgage was made with a fraudulent design to prevent a creditor from collecting an expected deficiency judgment on foreclosure of a mortgage on other property. *Hill* v. *Hoole,* 116 N. Y. 299, 22 N. E. 547, 5 L.R.A. 620, 26 N. Y. S. R. 657.

But one who takes a mortgage from a grantee who purchased the land subject to a prior recorded mortgage cannot object that a transfer of the prior mortgage was fraudulent as against the creditors of the grantor. *Newton* v. *Manwarring,* 10 N. Y. Supp. 347, 32 N. Y. S. R. 389.

[6] *Atwood* v. *Fisk,* 101 Mass. 363.

[7] *Conwell* v. *Clifford,* 45 Ind. 392; *Hannan* v. *Hannan,* 123 Mass. 341, 25 Am. Rep. 121; *Freeland* v. *Freeland,* 102 Mass. 475; *Wearse* v. *Peirce,* 41 Mass. (24 Pick.) 141; *Matteson* v. *Morris,* 40 Mich. 52. See *Bolling* v. *Munchus,* 65 Ala. 558; *Mell* v. *Mooney,* 30 Ga. 413; *Coleman* v. *Witherspoon,* 76 Ind. 285; *Price* v. *Pollock,* 47 Ind. 362; *Saunders* v. *Dunn, as adm'r etc.* 175 Mass. 164, 55 N. E. 893.

[8] *Hannan* v. *Hannan,* 123 Mass. 441, 25 Am. Rep. 121; *Wearse* v. *Peirce,* 41 Mass. (24 Pick.) 141.

[9] *Freeland* v. *Freeland,* 102 Mass. 475.

[10] *Patten* v. *Pepper Hotel Co.* 153 Cal. 460, 96 Pac. 296.

[11] *Coleman* v. *Witherspoon,* 76 Ind. 285.

signee, and even if he is a *bona fide* purchaser he is not exempt from such a defense.[12] But defenses of want of consideration, extinguishment by remission, prematurity resulting from expiration of extension of time granted are inconsistent and inadmissible.[13]

It has been held that an affidavit of defense in an action for the foreclosure of a mortgage is sufficient where, by proper averments, it alleges that the mortgage was executed in contemplation of a conveyance of the property, which was never made, and that it was delivered in escrow to await the consummation of such conveyance, and was never delivered to the mortgagee, but turned over to his representatives after his death.[14]

It is thought that in all those cases where land is mortgaged without consideration, to enable the mortgagee as agent of mortgagor to negotiate the mortgage, the want of consideration is no defense to an action by an assignee for a valuable consideration.[15] And the supreme court of Pennsylvania say that, in *scire facias,* to foreclose a mortgage it is no defense that the legal plaintiff gave no consideration; the mortgagor must prove that the equitable plaintiff gave no consideration.[16] It is thought the fact that a mortgagor was influenced by friendly advice to make a settlement, in which he executed a mortgage for a balance found due from him, is not, in the absence of fraud upon the part of the person giving the advice, a defense to the foreclosure of the mortgage in favor of such person.[17]

[12] *Briggs* v. *Langford,* 107 N. Y. 680, 14 N. E. 502; See *Bush* v. *Lathrop,* 22 N. Y. 535.

[13] *Citizens' Bank* v. *Benachi,* 38 La. Ann. 376.

[14] *Morgan* v. *Morgan,* 166 Pa. St. 450, 31 Atl. 130.

[15] *Thompson* v. *Humboldt Safe Deposit & Trust Co.* 6 Sadler (Pa.) 450, 9 Atl. 511.

[16] *Thompson* v. *Humboldt Safe Deposit & Trust Co.* 6 Sadler (Pa.) 450, 9 Atl. 511.

[17] *McLane* v. *Piaggio,* 24 Fla. 71, 3 So. 823.

§ 402. **Partial failure of consideration.**—Where the actual consideration for a mortgage was less than the amount for which it was executed as a security, the decree on a foreclosure should be entered only for the actual amount due on the mortgage;[18] the amount of the consideration may be proved by the admissions of the mortgagee.[19] A partial failure of consideration is always a defense *pro tanto*. But such failure of consideration must be distinctly pleaded,[20] for, where the real debt owing to the mortgagees is in fact less than the sum named in the mortgage, neither they nor their assignees can enforce it for more than the actual amount due.[21] The burden of proof is always on the defendant to show that the actual consideration was less than the amount secured by the mortgage, if the plaintiff claims the full amount,[22] for it is a presumption of fact that the sum mentioned in a mortgage as the consideration therefor, is the actual amount secured; and very convincing proof is required to rebut this presumption.[23]

In all those cases where an action is brought to foreclose a mortgage given on other land by a vendee to secure a land contract, the failure of title in the vendor, and an adverse possession under purchase from the owner for more than twenty years, furnish a valid defense.[24] But it is not a valid defense to an action of foreclosure under a statute,[25] authorizing affirmative relief, that certain of the defendants have failed to perform an agreement entered into by them with the mortgagor on her conveying the property to them,

[18] *Dunham* v. *Cudlipp*, 94 N. Y. 129; *Laylin* v. *Knox*, 41 Mich. 40.

[19] *Mackay* v. *Brownfield*, 13 Serg. & R. (Pa.) 239. See *Abbe* v. *Newton*, 19 Conn. 20; *Rood* v. *Winslow*, Walk. Ch. (Mich.) 340, 2 Doug. (Mich.) 68.

[20] *Dunham* v. *Cudlipp*, 94 N. Y. 129; *Mayo* v. *Hughes*, 51 Fla. 495, 40 So. 499.

[21] *Rood* v. *Winslow*, Walk. Ch. (Mich.) 340, 2 Doug. (Mich.) 68. See *Philbrook* v. *McEwen*, 29 Ind. 347.

[22] *Wiswall* v. *Ayres*, 51 Mich. 324.

[23] *Wilwall* v. *Ayres*, 51 Mich. 324.

[24] *Cook* v. *Rounds*, 60 Mich. 310, 27 N. W. 517.

[25] As N. Y. Code Civ. Proc. § 521.

to advance moneys to pay debts and interest on the mortgage in suit, and to reconvey on repayment of advances.[26]

It is thought that a mortgagor cannot defeat the foreclosure of a mortgage by the defense that the deed executed to him, which was the consideration of the mortgage, did not contain all the land to which he was entitled, where he has elected to pursue another remedy by bringing an action to reform the deed, in which a reformation of the deed so as to include all the land he purchased has been decreed.[27]

§ 403. What is not a sufficient consideration.—Where a claim is without foundation, a release therefrom will not constitute a valid consideration for a mortgage;[28] but an extension of time for the payment of an existing obligation will be a sufficient consideration to support a mortgage;[29] so also will an existing promissory note,[30] or an existing indebtedness of any kind, be a sufficient consideration.[31] But a mortgage given to secure the pre-existing debt of another, there being no extension of time for payment nor any new consideration, will not be founded upon a sufficient consideration to support a foreclosure;[32] neither will a promise to pay the debt of another, for which the mortgagor is already liable as

[26] *Mutual Life Insurance Co.* v. *Cranwell,* 32 N. Y. S. R. 376, 10 N. N. Y. Supp. 404.

[27] *Crescent Mining Co.* v. *Wasatch Mining Co.* 151 U. S. 317, 38 L. ed. 177, 14 Sup. Ct. Rep. 348.

[28] *Harris* v. *Cassady,* 107 Ind. 158.

[29] *Farmers' Bank of Mooresville* v. *Butterfield,* 100 Ind. 229; *Port* v. *Embree,* 54 Iowa, 14; *Dempsey* v. *McKenna,* 18 App. Div. 200, 45 N. Y. Supp. 973; *Otto* v. *Long, as adm'r etc.* 127 Cal. 471, 59 Pac. 895; *Muir* v. *Greene,* 115 App. Div. 173, 100 N. Y. Supp. 722.

[30] *Ayers* v. *Adams,* 82 Ind. 109; *Rowell* v. *Williams,* 54 Wis. 636; *Otto* v. *Long, as adm'r etc.* 127 Cal. 471, 59 Pac. 895. See *Sargent, as rec'r etc.* v. *Cooley,* 12 N. D. 1, 94 N. W. 576.

[31] *Buck* v. *Axt,* 85 Ind. 512; *Evans* v. *Pence,* 78 Ind. 439; *Rea* v. *Wilson,* 112 Iowa, 517, 84 N. W. 539; *First National Bank of Crown Point* v. *Davis,* 146 Ill. App. 462. See *Lehrenkrauss* v. *Bonnell,* 199 N. Y. 240, 92 N. E. 637.

[32] *Kansas Manuf. Co.* v. *Gandy,* 11 Neb. 451, 38 Am. Rep. 370. But see *Perkins* v. *Trinity Realty Co.* 69 N. J. Eq. 723.

surety, be a sufficient consideration to sustain a mortgage.[33] It has been held in Indiana that a mortgage executed by a husband and wife, upon the separate property of the latter to secure an overdue note, on which the husband was liable as surety, and without any other or further consideration, is invalid, although under the statute a married woman is empowered to incumber her separate property for the debt of a third person.[34]

Where a mortgage, which was given to secure the payment of judgments confessed by the mortgagor, is sought to be foreclosed, the fact that the judgments were void for want of compliance with the statute, may be set up as a defense to show a want of consideration.[35] But it has been held that where there was any consideration whatever for the mortgage, inquiry could not be made upon the trial whether the consideration was full and adequate.[36] Where a mortgage is executed and entrusted to an agent for the purpose of procuring a loan, and the agent, instead of procuring the loan, uses it for another purpose and misappropriates the proceeds, the mortgage will be void, there being no consideration therefor,[37] except in a case where the assignee thereof might be entitled to the protection accorded to a *bona fide* holder of negotiable paper.

§ 404. Mortgage securing future advances—Actual consideration.—A mortgage to secure indefinite future advances is valid not only between the parties, but also as to third persons;[38] so also is a mortgage given to secure a pre-existing debt and future advances.[39] As between the parties,

[33] *Harris* v. *Cassady*, 107 Ind. 158.

[34] *Bridges* v. *Blake*, 106 Ind. 332.

[35] *Austin* v. *Grant*, 1 Mich. 490.

[36] *Norton* v. *Pattee*, 68 N. Y. 144.

[37] *Davis* v. *Bechstein*, 69 N. Y. 440, 25 Am. Rep. 218; *Craver* v. *Wilson*, 14 Abb. (N. Y.) Pr. N. S. 374.

[38] *Jarratt* v. *McDaniel*, 32 Ark. 598.

[39] *Saunders* v. *Farrell*, 83 Ind. 28. See *Stavers* v. *Philbrick*, 68 N. H. 379, 36 Atl. 16. See also *Blackmar* v. *Sharp*, 23 R. I. 412, 50 Atl. 852.

whatever may be its effect as to third persons, it is not essential to the validity of a mortgage lien to secure future advances and also a pre-existing debt, that the instrument should recite fully the character of the indebtedness which it was given to secure.[40]

Where it appears that a mortgage was given to secure future advances which were never made, a complaint to foreclose will of course be dismised;[41] because, if no advances were made upon the mortgage and no credit was given, it is absolutely without consideration. A mortgage executed for the purpose of securing future advances cannot be enforced for a different liability or purpose.[42] When the mortgage in terms secures future advances, the sum named as the consideration is of no importance,[43] because it will be security for the money actually advanced upon it, and for nothing more.[44] And in an action for the foreclosure of a mortgage given to secure future advances, a failure to advance the entire amount desired to be secured by such executory mortgage, cannot be set up as a defense against advances actually made.[45]

In an action for the foreclosure of mortgages given by the mortgagor to secure certain advances, or, in case they should be held to be invalid, then for the foreclosure of mortgages previously given by the mortgagor in escrow for the mortgagee, to secure the sum advanced, it is error to include in the decree other advances than those secured by the mortgages sought to be foreclosed, which were to be made or procured in case the original amount secured by the mortgages was

[40] *Forsyth* v. *Preer, Illges & Co.* 62 Ala. 443.

[41] *McDowell* v. *Fisher,* 25 N. J. Eq. (10 C. E. Gr.) 93.

[42] *Mizner* v. *Kussell,* 29 Mich. 229.

[43] *Miller* v. *Lockwood,* 32 N. Y. 293, 299.

[44] The mortgage may also stand as security for the accomplishment in the future of definite plans or purposes. See *Bell* v. *Radcliff,* 32 Ark. 645.

[45] *Dart* v. *McAdam,* 27 Barb. (N. Y.) 187.

not sufficient for the purposes for which the original loan was made.[46]

§ 405. Mortgage as security for goods to be furnished —Actual consideration.—A mortgage taken in good faith, the consideration for which is a present debt and the promise of the mortgagee to furnish in the future a stated amount of goods, is valid as between the parties, is not a fraud upon creditors of the mortgagor, and will be upheld by the courts.[47] Thus, where a deed of trust recited that it was executed to secure a given sum for supplies already furnished, and supplies to be furnished and cash to be advanced during the year to enable the grantors to accomplish a specified purpose, the court held that, while the amount was limited in terms, the controlling purpose of the deed was to secure a sufficient amount of supplies to enable the grantors to accomplish a specified purpose, and that a court of equity, if necessary, in order to carry out the purpose of the trust, will uphold and protect additional advances over and above the limitations stated in the deed.[48]

A mortgage given to secure the value of goods to be purchased, is valid to the extent of the goods sold, although the mortgagor may in fact be insolvent at the time, and becomes a bankrupt shortly afterwards.[49] A mortgage given to secure a note for a fixed sum, payable absolutely, but with no actual consideration other than an undertaking to furnish goods, which the mortgagees fail to carry out, cannot be enforced, except where the action is brought by a *bona fide* assignee thereof.[50]

§ 406. Defense of illegal or void consideration.—A mortgage executed upon an illegal consideration is void *ab*

[46] *McComb* v. *Barcelona Apartment Assoc.* 31 N. Y. S. R. 325, 10 N. Y. Supp. 546; *McComb* v. *Cordova Apartment Asso.* 31 N. Y. S. R. 334.

[47] *Sanders* v. *Farrell,* 83 Ind. 28.

[48] *Bell* v. *Radcliff,* 32 Ark. 645.

[49] *Marvin* v. *Chambers,* 12 Blatchf. C. C. 495.

[50] *Fisher* v. *Meister,* 24 Mich. 447.

initio, because the nullity of the principal debt destroys all securities accompanying it;[51] and the actual facts of the transaction may be shown in defence, though they contradict the terms of the instrument.[52] In an action to foreclose a mortgage, where the defence set up was that the mortgage was given to secure twice the amount of money loaned thereon by the mortgagee, with the intention of defrauding the creditors of the mortgagor, the court held that the consideration of the mortgage being entire and illegal, a court of equity could not aid in its foreclosure; and that the defense of illegality of consideration in such a case may be made by the mortgagor or by any person succeeding to his rights and interests.[53]

Every contract or agreement, the consideration for which is immoral, criminal or unlawful, is absolutely void, and no action can be sustained for its enforcement.[54] Thus, a promissory note, the consideration for which is an agreement not to prosecute the maker for a felony, is a contract against public policy,[55] and therefore void; and a mortgage given to secure such a note cannot be enforced.[56] In an action to

[51] *Chatcnond* v. *Herbert,* 30 La. An. 404. The personal defence of illegal consideration is not available however by purchasers of the equity of redemption. *West* v. *Miller,* 125 Ind. 70, 25 N. E. 143.

[52] *Norris* v. *Norris,* 9 Dana (Ky.) 317, 35 Am. Dec. 138; *McQuade* v. *Rosecrans,* 36 Ohio St. 442; *Goudy* v. *Gebhart,* 1 Ohio St. 262; *Raguet* v. *Roll,* 7 Ohio, 77.

[53] *McQuade* v. *Rosecrans,* 36 Ohio St. 442.

[54] See *McDonald* v. *Born,* 135 Mich. 177, 97 N. W. 693.

A mortgage given in part payment for the services of a marriage broker will be annulled. *Place* v. *Conklin,* 34 App. Div. 191, 54 N. Y. Supp. 532.

[55] See *Vanover* v. *Thompson,* 4 Jones (N. C.) L. 485; *Thompson* v. *Whitman,* 4 Jones (N. C.) L. 47; *Bostick* v. *McLaren,* 2 Brev. (S. C.) 275; *Badger* v *Williams,* 1 D. Chip. (Vt.) 137; *Rourke* v. *Mealy,* Ir. L. R. 4 Ch. Div. 166, 175. See also *Hoyt* v. *Macon,* 2 Colo. 502; *Bierbauer* v. *Worth,* 10 Biss. C. C. 60, 5 Fed. 336.

[56] *Cameron* v. *McFarland,* 2 Car. L. R. (N. C.) 415, 6 Am. Dec. 566; *Roll* v. *Raguet,* 4 Ohio, 400, 22 Am. Dec. 759. See *Spalding* v. *Bank of Muskingum,* 12 Ohio, 544, 548; *Moore* v. *Adams,* 8 Ohio, 372, 375; *Goudy* v. *Gebhart,* 1 Ohio St. 265; *Jones* v. *Dannenberg Co.* 112 Ga. 426, 52 L.R.A. 271, 37 S. E. 729; *Owens* v. *Green,* 103 Ky. 342, 20 Ky. L. Rep. 44, 45 S. W. 84.

foreclose a mortgage executed upon the consideration, that the son [57] of the mortgagor who was then under arrest for embezzlement should not be prosecuted, it was held that the mortgage was based upon an illegal consideration and was therefore void.[58] A mortgage, the consideration of which is in whole or in part the withdrawing of a prosecution for conspiracy to defraud and for embezzlement as a bank officer, is likewise void.[59] But a mortgage cannot be avoided because it was given to a third party for the purpose of avoiding the revenue laws.[60]

In an action to foreclose a mortgage, a subsequent incumbrancer by attachment and judgment against the mortgagor, claimed that the mortgage, upon which the suit was founded, was void, because it was intended to hinder, delay and defraud the creditors of the mortgagor, and because it was against public policy as being an attempt to escape taxation. The court held that neither of these defences could be set up by such subsequent incumbrancer, after the mortgagor had waived them by making a default, and that it was questionable whether even the mortgagor could have availed himself of them.[61]

[57] Or husband of mortgagor. See *Moyer* v. *Dodson,* 212 Pa. 344, 61 Atl. 937. Or grantor in trust deed. *Johnson* v. *Graham Bros. Co.* 98 Ark. 274, 135 S. W. 853.

[58] *Peed* v. *McKee,* 42 Iowa, 689, 20 Am. Rep. 631; *Raguet* v. *Roll,* 7 Ohio, 77; *Roll* v. *Raguet,* 4 Ohio, 400, 22 Am. Dec. 759; *Medearis* v. *Granberry,* 38 Tex. Civ. App. 187, 84 S. W. 1070. See *Gray* v. *Freeman,* 37 Tex. Civ. App. 556, 84 S. W. 1105; *Corbett* v. *Clute,* 137 N. C. 546, 50 S. E. 216. But see *Loud* v. *Hamilton,* 51 S. W. 140, 45 L.R.A. 400 (Tenn.)

The same holds good, although it later appear that there was no felony to compound. *Koons* v. *Vauconsaut,* 129 Mich. 260, 95 Am. St. Rep. 438, 88 N. W. 630.

[59] *Pearce* v. *Wilson,* 111 Pa. St. 14, 56 Am. Rep. 243; *Ormerod* v. *Dearman,* 100 Pa. St. 561, 45 Am. Rep. 391; *Riddle* v. *Hall,* 99 Pa. St. 116; *Bredin's Appeal,* 92 Pa. St. 241, 37 Am. Rep. 677.

[60] *Waterbury* v. *McKinnon,* 146 Fed. 737, 77 C. C. A. 294.

[61] *Nichols* v. *Weed Sewing Machine Co.* 7 Hun (N. Y.) 200.

§ 407. Same—Partial invalidity.—Where only part of the consideration is illegal it has been held that the entire agreement is void and the mortgage or trust deed, given to secure it cannot be enforced.[62] Thus where a mortgage is given to secure two notes, one of which is invalid, the mortgage will not be enforced as to the valid note.[63] However where the various transactions are severable, the mortgage will be enforced as to the legal transactions.[64] Thus where a mortgage was made by a wife to pay her husband's debts and to compromise a criminal prosecution against him, in which compromise the mortgagee joined, it was held that the mortgage was invalid only as to the compromise.[65]

§ 408. Illegal or void consideration—When no defence to action on note secured by mortgage.—Where a negotiable instrument secured by a mortgage has been transferred to a *bona fide* purchaser, it has been said that even duress in its execution will not be available as a defense against such assignee in an action on the note.[66] And the fact that the consideration of a promissory note secured by a mortgage was illegal or void, cannot be set up as a defense in an action by an assignee who purchased the note and mortgage in good faith for a valuable consideration and without notice.[67]

It has been said by the supreme court of Iowa that while it is true, that a *bona fide* purchaser of a note before maturity takes the mortgage securing it, as he takes the note, free from the defences to which it is subject in the hands of the

[62] *Evans* v. *American Strawboard Co.* 114 Ill. App. 450. See also *State* v. *Wilson,* 73 Kan. 334, 84 Pac. 737, 117 Am. St. Rep. 479.

[63] *Garvin* v. *Garvin,* 55 S. C. 360, 33 S. E. 458.

[64] *Conradt* v. *Lepper,* 13 Wyo. 473, 81 Pac. 307; *Lepper* v. *Conradt,* 15 Wyo. 394, 89 Pac. 575.

[65] *Pierson* v. *Green,* 69 S. C. 559, 48 S. E. 624.

[66] *Beals* v. *Neddo,* 1 Mc Cr. C. C. 206; *Mack, as guardian etc.* v. *Prang,* 104 Wis. 1, 79 N. W. 770, 45 L.R.A. 407, 76 Am. St. Rep. 848.

[67] *Smart* v. *Bement,* 4 Abb. App. Dec. (N. Y.) 253; *Taylor* v. *Page,* 88 Mass. (6 Allen) 86.

mortgagee, yet that this doctrine will not be extended to a case where the mortgage is upon the homestead of a woman who did not sign the note and whose signature to the mortgage was obtained by duress.[68]

An exception to the general rule laid down above, exists where the assignment of the note and mortgage is made subject by its terms to the rights of the mortgagor; for in such a case, the assignee acquires no greater rights than the mortgagee himself possessed.[69]

§ 409. Usury as a defense.—It is well settled that usury may be set up as a defense to a bill to foreclose a mortgage, and that the mortgage will be declared void, if such defense is established.[70] This is especially true when the evidence

[68] *First National Bank of Nevada* v. *Bryan,* 62 Iowa, 42.

[69] *Fisher* v. *Otis,* 3 Chand. (Wis.) 83.

[70] See *Freeman* v. *Auld,* 44 N. Y. 50; *Mumford* v. *American Life Ins. and Trust Co.* 4 N. Y. 463; *Brooks* v. *Avery,* 4 N. Y. 225; *McCraney* v. *Alden,* 46 Barb. (N. Y.) 272; *Soule* v. *The Union Bank,* 45 Barb. (N. Y.) 111; *Vickery* v. *Dickson,* 35 Barb. (N. Y.) 96; *Lane* v. *Losee,* 2 Barb. (N. Y.) 56; *Warner* v. *Gouverneur,* 1 Barb. (N. Y.) 36; *Bush* v. *Livingston,* 2 Cai. Cas. (N. Y.) 66, 2 Am. Dec. 316; *Jackson* v. *Colden,* 4 Cow. (N. Y.) 266; *Miller* v. *Hull,* 4 Den. (N. Y.) 104; *Pearsall* v. *Kingsland,* 3 Edw. Ch. (N. Y.) 195; *Wheaton* v. *Voorhis,* 53 How. (N. Y.) Pr. 319; *Stoney* v. *American L. Ins. Co.* 11 Paige Ch. (N. Y.) 635; *Righter* v. *Stall,* 3 Sandf. Ch. (N. Y.) 608; *Neefus* v. *Vanderveer,* 3 Sandf. Ch. (N. Y.) 268; *New York Dry Dock Co.* v. *American L. Ins. & T. Co.* 3 Sandf. Ch. (N. Y.) 215; *Fox* v. *Lipe,* 24 Wend. (N. Y.) 164; *Jackson* v. *Packard,* 6 Wend. (N. Y.) 415; *Munter* v. *Linn,* 61 Ala. 492; *Mitchell* v. *Preston,* 5 Day (Conn.) 100; *Nichols* v. *Cosset,* 1 Root (Conn.) 294; *Sherman* v. *Gassett,* 9 Ill. (4 Gilm.) 521; *Gambril* v. *Doe,* 8 Blackf. (Ind.) 14, 44 Am. Dec. 760; *Tyson* v. *Rickard,* 3 Har. & J. (Md.) 109, 5 Am. Dec. 424; *Drury* v. *Morse,* 85 Mass. (3 Allen) 445; *Hart* v. *Goldsmith,* 83 Mass. (1 Allen) 145; *Baxter* v. *McIntire,* 79 Mass. (13 Gray) 168; *Thomes* v. *Cleaves,* 7 Mass. 361; *Donnington* v. *Meeker,* 11 N. J. Eq. (3 Stockt.) 362; *Cotheal* v. *Blydenburgh,* 5 N. J. Eq. (1 (Halst.) 17; *Cunningham* v. *Davis,* 7 Ired. (N. C.) Eq. 5; *Ballinger* v. *Edwards,* 4 Ired. (N. C.) Eq. 449; *Union Bank* v. *Bell,* 14 Ohio St. 200; *Lockwood* v. *Mitchell,* 7 Ohio St. 387, 70 Am. Dec. 78; *Morris* v. *Way,* 16 Ohio, 469; *Heath* v. *Page,* 48 Pa. St. 130; *Greene* v. *Tyler,* 39 Pa. St. 361; *Dyer* v. *Lincoln,* 11 Vt.

shows that the mortgage was executed in pursuance of an usurious agreement.[71] But where a valid and subsisting debt is included in a security, or made the subject of a contract, which is void for usury or for any other reason, it will not be destroyed. Although a valid mortgage may be satisfied and canceled of record upon being made a part of a new usurious mortgage, it can nevertheless be revived and enforced in case the new security is declared to be void.[72] Thus, where a plaintiff advanced money to pay a mortgage, taking another mortgage to secure such advance, and the second mortgage was declared void for usury, it was held that the usury of the second mortgage did not affect the validity of the first mortgage and that, the latter mortgage being void, the prior mortgage survived and could be enforced by the plaintiff,[73] because

300; *Robertson* v. *Campbell,* 2 Call (Va.) 354, 421; *Fay* v. *Lovejoy,* 20 Wis. 407; *Richards* v. *Worthley,* 5 Wis. 73; *DeButts* v. *Bacon,* 10 U. S. (6 Cr.) 252, 3 L. ed. 215; *Morgan* v. *Tipton,* 3 McL. C. C. 339; *Hodgkison* v. *Wyatt,* 4 Ad. & E. N. S. 749; *Blackburn* v. *Warwick,* 2 Y. & C. 92.

In an action to foreclose a mortgage, the mortgagor may show that the consideration of the bond secured by the mortgage is tainted with usury. *Arrington* v. *Jenkins,* 95 N. C. 462. But in those jurisdictions where a usurious contract is not void, the creditor merely forfeiting his interest on the principal, usury in a debt secured by mortgage does not avoid a sale made under the decree foreclosing such mortgage leaving a large deficiency unpaid. *Ferguson* v. *Soden,* 111 Mo. 208, 33 Am. St. Rep. 512, 19 S. W. 727. In those cases where the defense of usury is sustained the decree in a foreclosure case which holds that a sum which was usury was retained from the loan must recite sufficient facts to enable the appellate court to draw the conclusion that the sum so retained was usurious. *Drennan* v. *Huskey,* 31 Ill. App. 208.

[71] See *Walch* v. *Cook,* 63 Barb. (N. Y.) 30; *Vickery* v. *Dickson,* 35 Barb. (N. Y.) 96; *Andrews* v. *Poe,* 30 Md. 485; *Aldrich* v. *Wood,* 26 Wis. 168. But see *Patterson* v. *Birdsall,* 64 N. Y. 294, 21 Am. Rep. 609; *Spencer* v. *Ayhault,* 10 N. Y. 202; *Abrahams* v. *Claussen,* 52 How. (N. Y.) Pr. 241; *White* v. *Lucas,* 46 Iowa, 319.

[72] *Patterson* v. *Birdsall,* 64 N. Y. 294, 21 Am. Rep. 609. See *Gerwig* v. *Sitterly,* 56 N. Y. 214. aff'g 64 Barb. (N. Y.) 620; *Winsted Bank* v. *Webb,* 39 N. Y. 325, 100 Am. Dec. 435; *Farmers & Mechanics' Bank of Genesee* v. *Joslyn,* 37 N. Y. 353; *Cook* v. *Barnes,* 36 N. Y. 520; *Rice* v. *Welling,* 5 Wend. (N. Y.) 595.

[73] *Patterson* v. *Birdsall,* 64 N. Y. 294, 21 Am. Rep. 609.

by paying the first mortgage the plaintiff became equitably subrogated to all the rights of the mortgagee whom he paid, and the mortgage must be regarded as still subsisting and unextinguished, as against the mortgagors.[74]

§ 410. How to allege usury—What law governs.—While full effect will be given to the statute against usury, yet nice distinctions will not be favored for the purpose of extending its penalties to cases not within the spirit of the statute.[75] Where usury is set up as a defence to a bill to foreclose a mortgage, the defendant will be held strictly to proof of the usurious contract as alleged in his answer;[76] and a variance betwen the usurious contract set up in the answer and that established by the evidence at the hearing, will be fatal to the defence.[77] If the defendant pleads generally that the mortgage contract is usurious without a specific allegation as to where the contract was made, the defence will be limited to the statute regarding usury in the state in which the suit is pending, and its usurious character under any other statute cannot be shown.[78]

The law governing a contract is that of the state where it was made, if it was entered into in a state other than that in which the mortgaged property is situated.[79] Where both

[74] *Patterson* v. *Birdsall*, 64 N. Y. 294, 21 Am. Rep. 609. See *Elsworth* v. *Lockwood*, 42 N. Y. 89; *Averill* v. *Taylor*, 8 N. Y. 44; *Pardee* v. *VanAnken*, 3 Barb. (N. Y.) 534; *Jenkins* v. *Continental Ins. Co.* 12 How. (N. Y.) Pr. 67.

[75] See *Patterson* v. *Birdsall*, 64 N. Y. 294, 298, 21 Am. Rep. 609.

[76] *Richards* v. *Worthley*, 5 Wis. 73. See *Atwater* v. *Walker*, 16 N. J. Eq. (1 C. E. Gr.) 42.

[77] *Wheaton* v. *Voorhis*, 53 How. (N. Y.) Pr. 319. See *Cloyes* v. *Thayer*, 3 Hill (N. Y.) 564; *Vroom* v. *Ditmas*, 4 Paige Ch. (N. Y.) 526; *Munter* v. *Linn*, 61 Ala. 492, 2 South. L. J. 205; *Baldwin* v. *Norton*, 2 Conn. 161; *Maher* v. *Lanfrom*, 86 Ill. 513; *Richards* v. *Worthley*, 5 Wis. 73.

[78] *Atwater* v. *Walker*, 16 N. J. Eq. (1 C. E. Gr.) 42. See also *Mosier* v. *Norton*, 83 Ill. 519; *Bennington Iron Co.* v. *Rutherford*, 9 N. J. L. (3 Harr.) 467; *Dolman* v. *Cook*, 14 N. J. Eq. (1 McCart.) 56.

[79] *Cope* v. *Wheeler*, 41 N. Y. 303, 309, aff'g 53 Barb. (N. Y.) 350; *McCraney* v. *Alden*, 46 Barb. (N. Y.) 272; *Dolman* v. *Cook*, 14 N. J. Eq. (1 McCart.) 56; *Kennedy*

parties reside in the same state which is also the place of contract, but the land is situated in another state, if nothing is said about the place of payment, the debt is presumably payable in the state where the parties reside and where the contract was made; and the validity of the contract will be determined by the laws of such state;[80] but if the note and mortgage are made payable in the state where the land is situated, the laws of that state will govern the construction and the legal effect of the contract.[81]

In cases where the defence relied on is that the contract is usurious by the laws of the state where it was made, the defendant must plead this fact, and show in what state the contract was made, and allege that it is in violation of the usury laws of such state.[82] It is not within the scope of this work to deal with the vexed question of what is and what is not usury; the reader is referred to the standard text-books dealing with that subject.

§ 411. Who may avail themselves of the defence of usury.—The defence of usury may be set up not only by the mortgagor himself, but by any person claiming under or in privity with him;[83] but it cannot be set up by a stranger to the original transaction.[84] Some of the cases hold that any person who has become interested in the property subject

v. *Knight*, 21 Wis. 340, 94 Am. Dec. 543; *Newman* v. *Kershaw*, 10 Wis. 333.

[80] See *Cope* v. *Wheeler*, 41 N. Y. 303, 309, aff'g 53 Barb. (N. Y.) 350; *Williams* v. *Fitzhugh*, 37 N. Y. 444; *Williams* v. *Ayrault*, 31 Barb. (N. Y.) 364; *Dobbin* v. *Hewett*, 19 La. An. 513; *Blydenburgh* v. *Cotheal*, 5 N. J. Eq. (1 Halst.) 631.

[81] *Nichols* v. *Cosset*, 1 Root (Conn.) 294; *Duncan* v. *Helm*, 22 La. An. 418.

[82] *Curtis* v. *Mastin*, 11 Paige Ch. (N. Y.) 15; *Dolman* v. *Cook*, 14 N. J. Eq. (1 McCart.) 56; *Cotheal* v. *Blydenburgh*, 5 N. J. Eq. (1 Halst.) 17.

[83] *Brooks* v. *Avery*, 4 N. Y. 225; *Carow* v. *Kelly*, 59 Barb. (N. Y.) 239; *Maher* v. *Lanfrom*, 86 Ill. 513; *Westerfield* v. *Bried*, 26 N. J. Eq. (11 C. E. Gr.) 357; *Brolasky* v. *Miller*, 9 N. J. Eq. (1 Stockt.) 807; 8 N. J. Eq. (4 Halst.) 789; *Greene* v. *Tyler*, 39 Pa. St. 361.

[84] *Ohio & M. R. R. Co.* v. *Kasson*, 37 N. Y. 218; *Williams* v. *Birch*, 2 Trans. App. (N. Y.) 133, *sub nom. Williams* v. *Tilt*, 36 N. Y. 319; *Stoney* v. *American Life Ins. Co.* 11 Paige Ch. (N. Y.) 635.

to the mortgage, may set up the defense of usury, unless he purchased the property expressly subject to such mortgage, or assumed the payment of it.[85]

Thus, it has been held that the defence of usury is available to a wife for the protection of her homestead or her dower interest, although her husband may be estopped by his acts from pleading it as a defence.[86] It may also be set up by the heirs or devisees of the mortgagor; by a judgment creditor;[87] by a person holding a subsequent mechanic's lien upon the premises;[88] by an assignee of the mortgagor's property for the benefit of his creditors;[89] by creditors for whose benefit the land has been conveyed in trust, where the trustee has neglected to set up such defence;[90] by subsequent incumbrancers,[91] or by a purchaser from the mortgagor.[92]

rev'g 4 Edw. Ch. (N. Y.) 332; *Brolasky* v. *Miller,* 9 N. J. Eq. (1 Stockt.) 814.

[85] See *Brooks* v. *Avery,* 4 N. Y. 225; *Post* v. *Dart,* 8 Paige Ch. (N. Y.) 640; *Banks* v. *McClellan,* 24 Md. 62, 87 Am. Dec. 594; *McAlister* v. *Jerman,* 32 Miss. 142; *Gunnison* v. *Gregg,* 20 N. H. 100; *Cummins* v. *Wire,* 6 N. J. Eq. (2 Halst.) 73; *Union Bank* v. *Bell,* 14 Ohio St. 200; *McKnight* v. *Phelps,* 37 Neb. 858, 56 N. W. 722.

[86] *Campbell* v. *Babcock,* 27 Wis. 512.

A married woman, joined with her husband in executing a mortgage on her real estate and afterwards conveyed to another who conveyed to her husband. On a *scire facias* to foreclose the mortgage, the wife was joined as co-defendant with her husband. The court held that, as to her, the action was *in rem,* and that she was not interested in the result of the suit so as to set up the defense of the payment of usurious interest by the husband. *Broomell* v. *Anderson* (Pa.) 8 Atl. 764.

[87] *Merchants' Ex. Bank* v. *Commercial Warehouse Co.* 49 N. Y. 636, 643, note; *Mason* v. *Lord,* 40 N. Y. 476; *Thompson* v. *Van Vechten,* 27 N. Y. 568, 585; *Carow* v. *Kelly,* 59 Barb. (N. Y.) 239; *Jackson* v. *Tuttle,* 9 Cow. (N. Y.) 233; *Schroeppel* v. *Corning,* 5 Den. (N. Y.) 236; *Dix* v. *VanWyck,* 2 Hill (N. Y.) 522; *Knickerbocker Life Ins. Co.* v. *Hill,* 6 T. & C. (N. Y.) 285, 3 Hun (N. Y.) 577; *Post* v. *Dart,* 8 Paige Ch. (N. Y.) 639.

[88] *Knickerbocker Life Ins. Co.* v. *Hill,* 6 T. & C. (N. Y.) 285, 3 Hun (N. Y.) 577.

[89] *Pearsall* v. *Kingsland,* 3 Edw. Ch. (N. Y.) 195.

[90] *Union Bank of Masillon* v. *Bell,* 14 Ohio St. 200. *Contra, Sands* v. *Church,* 6 N. Y. 347.

[91] *Mutual Life Ins. Co.* v. *Bowen,* 47 Barb. (N. Y.) 618; *Brooke* v. *Morris,* 2 Cin. (O.) Supr. Ct. Rep. 528.

[92] *Brooks* v. *Avery,* 4 N. Y. 225.

But where a purchaser of the equity of redemption, covered by an usurious mortgage, takes the land subject to the lien of the mortgage, he cannot plead usury as a defence to the foreclosure of such mortgage.[93] And this is particularly true where he assumes and agrees to pay the mortgage debt.[94] There is also a line of cases holding that the defence of usury is a personal privilege of the debtor, and that where he himself is willing to abide by the terms of his contract, no one can interfere and plead it as a defence.[95]

§ 412. Defences against assignee of mortgage.—In those states where the transfer of a note carries with it the security collateral thereto, in an action by an assignee to foreclose the mortgage securing a note transferred to him, the defendant cannot set up as a defence the want of a formal

See *Bullard* v. *Raynor,* 30 N. Y. 197; *Matthews* v. *Coe,* 56 Barb. (N. Y.) 430; *Shufelt* v. *Shufelt,* 9 Paige Ch. (N. Y.) 137, 37 Am. Dec. 381; *Post* v. *Dart,* 8 Paige Ch. (N. Y.) 639.

[93] *Hartley* v. *Harrison,* 24 N. Y. 170; *Sands* v. *Church,* 6 N. Y. 347; *Morris* v. *Floyd,* 5 Barb. (N. Y.) 130; *Vroom* v. *Ditmas,* 4 Paige Ch. (N. Y.) 527; *Dolman* v. *Cook,* 14 N. J. Eq. (1 McCart.) 56, 61; *Brolasky* v. *Miller,* 9 N. J. Eq. (1 Stockt.) 814; *Hill* v. *Alliance Building Co.* 6 S. D. 160, 55 Am. St. Rep. 819, 60 N. W. 752; *Black* v. *Reno,* 59 Fed. 917.

[94] *Parkinson* v. *Sherman,* 74 N. Y. 88, 30 Am. Rep. 268; *Sands* v. *Church,* 6 N. Y. 347; *Burlington Mut. Assoc.* v. *Heider,* 55 Iowa, 424; *Hough* v. *Horsey,* 36 Md. 181, 11 Am. Rep. 484; *Conover* v. *Hobart,* 24 N. J. Eq. (9 C. E. Gr.) 120; *Cramer* v. *Lepper,* 26 Ohio St. 59, 20 Am. Rep. 756.

[95] See *McGuire* v. *VanPelt,* 55 Ala. 344; *Fielder* v. *Varner,* 45 Ala. 429; *Cain* v. *Gimon,* 36 Ala. 168; *Fenno* v. *Sayre,* 3 Ala. 458; *Loomis* v. *Eaton,* 32 Conn. 550; *Adams* v. *Robertson,* 37 Ill. 45; *Studabaker* v. *Marquardt,* 55 Ind. 341; *Carmichael* v. *Bodfish,* 32 Iowa, 418; *Huston* v. *Stringham,* 21 Iowa, 36; *Powell* v. *Hunt,* 11 Iowa, 430; *Pritchett* v. *Mitchell,* 17 Kan. 355, 22 Am. Rep. 287; *Campbell* v. *Johnson,* 4 Dana (Ky.) 178; *Green* v. *Kemp,* 13 Mass. 515, 7 Am. Dec. 169; *Farmers' & Mechanics' Bank* v. *Kimmel,* 1 Mich. 84; *Ransom* v. *Hays,* 39 Mo. 445; *Miners' Trust Bank* v. *Roseberry,* 81 Pa. St. 309; *Lamoille County Bank* v. *Bingham,* 50 Vt. 105, 28 Am. Rep. 490; *Austin* v. *Chittenden,* 33 Vt. 553; *Ready* v. *Huebner,* 46 Wis. 692, 32 Am. Rep. 749; *DeWolf* v. *Johnson,* 23 U. S. (10 Wheat.) 367, 6 L. ed. 343.

assignment of the mortgage,[96] nor a denial of knowledge of the assignment,[97] nor the fact that the note secured was purchased at a discount,[98] nor that the plaintiff purchased the note from motives of malice, nor that the assignor and his assignee acted in concert with a view unnecessarily to harrass and oppress the mortgagor, or with the intention of preventing his paying the note, so that the equity of redemption might be foreclosed and that they might become the purchasers of the mortgaged premises for a sum less than their value;[99] nor that he has been evicted from the premises, where the mortgage sought to be foreclosed was given for a part of the purchase price;[1] nor defects in the title to the land conveyed and damages awarded against him therefor;[2] nor merger,[3] it being sufficient to sustain the action, that the mortgage debt is due and that it has been transferred to, and is owned by, the plaintiff.[4] But, in an action by the assignee of a note and mortgage for foreclosure, the defendant may show a mistake in drawing the instrument and have it reformed;[5] or that the mortgagee could not make a valid assignment;[6] or that he was induced to sign the mortgage by false representations of the mortgagee.[7]

[96] *Jackson* v. *Blodget,* 5 Cow. N. Y.) 202, 205; *Jackson* v. *Willard,* 4 Johns. (N. Y.) 41, 43; *Rice* v. *Cribb,* 12 Wis. 179.

[97] *Brown* v. *Woodbury,* 5 Ind. 254. The oath of affirmation or denial of an assignment under the Indiana Rev. Stat. of 1843 was required to be to the effect that the party had reason to believe and did believe that no assignment had been made. *Brown* v. *Woodbury, supra.*

[98] *Grissler* v. *Powers,* 53 How. (N. Y.) Pr. 194; *Knox* v. *Galligan,* 21 Wis. 470; *Croft* v. *Bunster,* 9 Wis. 503.

[99] *Morris* v. *Tuthill,* 72 N. Y. 575.

[1] *National Fire Ins. Co.* v. *McKay,* 21 N. Y. 191. See *Hill* v. *Butler,* 6 Ohio St. 207.

[2] *Hill* v. *Butler,* 6 Ohio St. 207.

[3] See *Reed* v. *Latson,* 15 Barb. (N. Y.) 9.

[4] *Morris* v. *Tuthill,* 72 N. Y. 575.

[5] *Andrews* v. *Gillespie,* 47 N. Y. 487.

[6] *Renaud* v. *Conselyea,* 7 Abb. (N. Y.) Pr. 105, reconsidering and reversing 5 Abb. (N. Y.) Pr. 346, 4 Abb. (N. Y.) Pr. 280.

[7] *Paulsen* v. *Koon,* 85 Minn. 240, 88 N. W. 760.

In an action for the foreclosure of a mortgage by the assignee thereof, the defendant may allege in his answer that the mortgage was assigned without authority of law,[8] or that it was assigned to procure the performance of an agreement void for illegality.[9] And where a mortgagor has made *bona fide* payments to an indorsee upon a note secured by a mortgage, without notice that the indorsee's title is invalid, such payments will be valid as against the rightful owner of the mortgage debt.[10]

The fact that a complainant, after having commenced an action to foreclose a mortgage, borrowed money of a third person on such mortgage, with the understanding that the plaintiff was to continue the prosecution of the suit, and, in the event of success, to repay the money so borrowed with interest, cannot be set up as a defence to the foreclosure.[11]

But an answer is insufficient which alleges that the assignee took his assignment of the mortgage from motives of malice, and solely for the purpose of bringing a foreclosure, and that the assignor transferred the mortgage with a like motive and without consideration.[12]

It has been said that any defendant to a mortgage foreclosure suit, who is personally liable for the debt, or whose land is affected by the lien of the mortgage, may introduce a set-off to reduce or extinguish the plaintiff's claim, and may show that the plaintiff has taken only a colorable or a fraud-

[8] *Leavitt* v. *Palmer,* 3 N. Y. 19, 51 Am. Dec. 333; *Johnson* v. *Bush,* 3 Barb. Ch. (N. Y.) 207; *N. Y. Trust & Loan Co.* v. *Helmer,* 12 Hun (N. Y.) 35, 44; *Green* v. *Seymour,* 3 Sandf. Ch. (N. Y.) 285.

[9] *Dewitt* v. *Brisbane,* 16 N. Y. 508; *Talmage* v. *Pell,* 7 N. Y. 328; *Leavitt* v. *Palmer,* 3 N. Y. 19, 51 Am. Dec. 333; *Green* v. *Seymour,* 3 Sandf. Ch. (N. Y.) 285; *Adams* v. *Rowan,* 16 Miss. (8 Smed. & M. 624. See *Wyeth* v. *Braniff,* 84 N. Y. 627, 633; *Fish* v. *DeWolf,* 4 Bosw. (N. Y.) 573.

[10] *Vanarsdall* v. *State,* 65 Ind. 176.

[11] *Chase* v. *Brown,* 32 Mich. 225.

[12] *Morris* v. *Tuthill,* 72 N. Y. 575; *Davis* v. *Flagg,* 35 N. J. Eq. (8 Stew.) 491. Defense of failure of consideration for assignment without showing defendant's interest in such question is demurrable. *Biedler* v. *Malcolm,* 121 App. Div. 145, 105 N. Y. Supp. 642.

ulent assignment of the mortgage and holds it for the benefit of one against whom such a right of set-off exists.[13]

In an action to foreclose a mortgage, brought by an assignee thereof, any defense that would have been admissible against the mortgagee is admissible in a foreclosure suit under a mortgage assigned to plaintiff by the mortgagee's personal representatives after the mortgage became due,[14] and it has even been held that in proceedings to foreclose a mortgage brought by an assignee before maturity of the notes secured thereby, the mortgagor may interpose any defense of which he might have availed himself as against the payee of the notes.[15]

A mortgagor cannot, in an action to foreclose a mortgage, controvert the title of the plaintiff on the ground of assignment from himself as administrator to himself as an individual, as the assignment is merely voidable at the election of the next of kin.[16] Neither is it a defense to the foreclosure of a mortgage by an assignee, that the assignment was made in payment of a gaming debt, since the gaming contract is fully executed, and any remedy which the assignor may have does not concern the mortgagor, who is fully protected by the assignment.[17] And mortgagors who have not paid a mortgage which has been assigned by a life insurance company to secure policy holders, in an action by the assignee thereof to foreclose the same, cannot question whether a statute authorizes the security of policy-holders in a manner provided in the instrument of assignment, where there is no other party who can require a payment.[18]

It has been said that a plea in a mortgage foreclosure suit

[13] *Lathrop* v. *Godfrey,* 3 Hun (N. Y.) 739.

[14] *Robeson* v. *Robeson* (N. J. Ch.) 23 Atl. 612. See *Barry* v. *Guild,* 126 Ill. 439, 18 N. E. 759, 2 L.R.A. 334, aff'g 28 Ill. App. 39.

[15] *Barry* v. *Guild,* 126 Ill. 439, 18 N. E. 759, 2 L.R.A. 334, affirming 28 Ill. App. 39.

[16] *Read* v. *Knell,* 143 N. Y. 484, 39 N. E. 4, 62 N. Y. S. R. 847.

[17] *Reed* v. *Bond,* 96 Mich. 134, 55 N. W. 619.

[18] *Gray* v. *Waldron,* 101 Mich. 612, 60 N. W. 288.

averring that an assignee or the complainant sued to foreclose the mortgage, averring in his bill an assignment from complainant to him, and that such suit was decided in favor of defendant, does not show that complainant had any connection with such suit, or that there was any privity between him and the alleged assignee, and therefore fails to state a good defense.[19] The question whether the plaintiff in an action to foreclose a mortgage is a *bona fide* purchaser of the mortgage is immaterial, where there is no claim which could have been set off against the mortgage in the hands of the original mortgagee.[20]

§ 413. Defence against voluntary assignee in bankruptcy.—The assignee of an insolvent mortgagee for the benefit of creditors, is not entitled to the same favor in equity that is accorded to the purchaser of a mortgage for a valuable consideration. He is not a *bona fide* holder nor a purchaser for value, but takes the property simply as a trustee, subject to all equities which may exist between the debtor and his creditors. He is in no sense a purchaser, because the assignment is simply an appropriation by the debtor of his property, in trust for the payment of his debts in the order and manner specified; an act by which he divests himself of such property for the time being, without altering or parting with his interest in it, for should any property or its proceeds remain after the trust has been executed, it must be returned to the assignor. For these reasons a voluntary assignee in bankruptcy is in no better position, and acquires no better title, than his assignor held.[21]

Where a debtor executed a mortgage and before its ma-

[19] *Cheney* v. *Patton*, 134 Ill. 422, 23 Am. St. Rep. 683, 25 N. E. 792.

[20] *Detroit Savings Bank* v. *Galvin*, 99 Mich. 55, 57 N. W. 1083.

[21] *Schieffelin* v. *Hawkins*, 1 Daly (N. Y.) 289, 14 Abb. (N. Y.) Pr. 112. See *Van Heuson* v. *Radcliffe*, 17 N. Y. 580, 72 Am. Dec. 480; *Warren* v. *Fenn*, 28 Barb. (N. Y.) 333 *Leger* v. *Bonnaffe*, 2 Barb. (N. Y.) 475; *In re Howe*, 1 Paige Ch. (N. Y.) 125, 19 Am. Dec. 395; *Mead* v. *Phillips*, 1 Sandf. Ch. (N. Y.) 83.

turity made a valid assignment of all his property for the benefit of his creditors, in an action to foreclose such mortgage, the assignee alone can attack its validity, if none of the creditors has a specific lien upon the property by judgment prior to the execution of the assignment. The creditors of the mortgagor are not necessary parties to the action, and the fact that they are made parties will not entitle them to interpose a defense.[22]

§ 414. Defence against a fraudulent assignment.—Fraud voids all contracts and transfers into which it enters, at the election of the party defrauded; *ex dolo malo non oritur actio* is a maxim of very wide, if not universal, application. It applies even to the holder of commercial paper, and more strongly to assignees of choses in action.[23] Thus, where a party obtains an assignment of a bond and mortgage by means of fraud and with the ostensible purpose of selling the same for the owner, the equitable ownership thereof still remains in the assignor, and in an action brought by the assignee for foreclosure, the defendant may show payment to the mortgagee.[24] And where a mortgage is assigned immediately before the right of redemption would expire, for the purpose of preventing the redemption, it will have the effect of keeping the equity open until a tender can be made.[25]

§ 415. Defence against transferred mortgage payable to mortgagee alone.—A mortgage, like a note which is payable to the payee alone, is not negotiable, and is always subject to all equities existing between the original parties.[26] And where a mortgage, which was the only evidence of the

[22] *Spring* v. *Short*, 90 N. Y. 538. See *Geery* v. *Geery*, 63 N. Y. 252.

[23] *Hall* v. *Erwin*, 60 Barb. (N. Y.) 349, 57 N. Y. 643.

[24] *Hall* v. *Erwin*, 66 N. Y. 649.

[25] *Deming* v. *Comings*, 11 N. H. 474.

[26] *Ingraham* v. *Disborough*, 47 N. Y. 421, 423. See *Bush* v. *Lathrop*, 22 N. Y. 535; *Richards* v. *Waring*, 1 Keyes (N. Y.) 576; *James* v. *Morey*, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475; *Clute* v. *Robinson*, 2 Johns. (N .Y.) 595; *Livingstone* v.

indebtedness secured, was by its terms, "to be paid by the mortgagor to the mortgagee when called on by said mortgagee, and the mortgagor does not agree to pay the above sum to any one else except the said mortgagee," on suit brought by the administrator of the deceased mortgagee, it not appearing that the mortgagee had in his life-time, either personally or by agent, made a demand upon the mortgagor for payment of the sum secured, the court held, that an action to foreclose the mortgage could not be maintained by such administrator; that on the death of such mortgagee, without having demanded payment of such debt of the mortgagor, the consideration for the debt became a gift to the mortgagor; and that a demand by the administrator would not be sufficient.[27]

§ 416. Defences against foreclosure by bona fide purchaser of negotiable paper secured by mortgage.—The assignee, before maturity, of a negotiable promissory note secured by mortgage, takes it free from all equities which existed between the original parties thereto;[28] but he takes it

Dean, 2 Johns. Ch. (N. Y.) 479; *Murray* v. *Lylburn,* 2 Johns. Ch. (N. Y.) 441.

[27] *Sebrell* v. *Couch,* 55 Ind. 122, 124. The court said: "The demand was not only to be made, but it was to be made by the mortgagee himself; implying, when taken in connection with what follows in the mortgage, that, if he did not choose to make it, the debt was not to be paid at all."

[28] *Gould* v. *Marsh,* 4 T. & C. (N. Y.) 128, 1 Hun (N. Y.) 566; *Updegraft* v. *Edwards,* 45 Iowa, 513; *Farmers' National Bank of Salem* v. *Fletcher,* 44 Iowa, 252; *Preston* v. *Morris,* 42 Iowa, 549; *Duncan* v. *Louisville,* 13 Bush (Ky.) 378, 26 Am. Rep. 201; *Billgerry* v. *Ferguson,* 30 La. Ann. 84; *Pierce* v. *Faunce,* 47 Me. 507; *Sprague* v. *Graham,* 29 Me. 160; *Taylor* v. *Page,* 88 Mass. (6 Allen) 86; *Helmer* v. *Krolick,* 36 Mich. 371; *Jones* v. *Smith,* 22 Mich. 360; *Bloomer* v. *Henderson,* 8 Mich. 395, 77 Am. Dec. 453; *Cicotte* v. *Gagnier,* 2 Mich. 381; *Reeves* v. *Scully,* Walk. Ch. (Mich.) 248; *Logan* v. *Smith,* 62 Mo. 455, overruling *Linville* v. *Savage,* 58 Mo. 248; *Sawyer* v. *Prickett,* 86 U. S. (19 Wall.) 146, 166, 22 L. ed. 80; *Kenicott* v. *Supervisors of Wayne County,* 83 U. S. (16 Wall.) 452, 21 L. ed. 319; *Carpenter* v. *Longan,* 83 U. S. (16 Wall.) 271, 21 L. ed. 313; *Beals* v. *Neddo,* 1 McCr. C. C. 206. See *Trustees of Union College* v. *Wheeler,* 61 N. Y. 88, 107.

subject to such equities as appear from stipulations or recitals contained in any recorded instrument which forms a link in his chain of title.[29] In a case, however, where a mortgage, purporting to secure a promissory note of the mortgagor, was executed to a party who knew that it was without consideration, and that no note was ever delivered, it was held that an assignee of the mortgage took it subject to all equities existing between the original parties and that it could not be enforced.[30]

The assignee of a mortgage, securing a negotiable promissory note, who takes it in good faith before maturity for value, takes it as he does the note free from equities between the original parties;[31] but it will be otherwise, where the mortgage is taken after maturity and without inquiry, although in good faith and for full value.[32] It seems that a purchaser in good faith and for value from the one of a number of con-

[29] *Orrick* v. *Durham,* 79 Mo. 175.

[30] *Burbank* v. *Warwick,* 52 Iowa, 493. See *Gantt* v. *Gantt,* 76 S. C. 163, 56 S. E. 676. See also *Volk* v. *Shoemaker,* 229 Pa. 407, 78 Atl. 933.

[31] *Mundy* v. *Whittemore,* 15 Neb. 647. See *Burhans* v. *Hutcheson,* 25 Kan. 625, 37 Am. Rep. 274; *Cowing* v. *Cloud,* 16 Colo. App. 326; *Borgess Investment Co.* v. *Vette,* 142 Mo. 560, 44 S. W. 754, 64 Am. St. Rep. 567.

[32] *Osborn* v. *McClelland,* 43 Ohio St. 284. In this case O., for value received, made and delivered to F. her negotiable note, secured by mortgage, payable to the order of F. in five years. Two years before the same became due F., without consideration, and solely for the accommodation of B. & S., bankers, loaned the same temporarily to them, to enable them to use the same as collateral for a loan to meet a present emergency, B. & S. promising to keep and return them safely. B. & S. did not use them, but they were suffered to remain in their custody until after the note became due, when S., survivor of B. & S., without the knowledge of F., or without authority from her, hypothecated them to M. by delivery, merely saying the note would be paid. M. took the same in good faith, and for full value, without inquiry, guaranty, or indorsement by S., relying solely on his possession and the blank indorsement of F., that S. was the owner. It was held that M., having received the note after maturity and without inquiry, acquired no better title than S. had, and, as S. had neither title nor interest, which was good against F., he could not transfer a title to M. which would give him the right to foreclose the mortgage as against the real owner.

temporaneous mortgagees, who first recorded his mortgage, will take the same free from a parol agreement between the mortgagees of which he was ignorant, that the mortgages should be equal liens.[33] But the rule that the assignee of a mortgage before maturity, takes it free from the equities existing between the original parties to the instrument, applies only to such mortgages as are collateral to and secure negotiable instruments.[34]

It is well settled that a payment made by the mortgagor to the original mortgagee, without notice of the assignment of the mortgage, is valid as against the assignee.[35] In fact it is held in New York that under the statute [36] the recording of

[33] *Decker* v. *Boice,* 19 Hun (N. Y.) 152.

[34] *Crane* v. *Turner,* 67 N. Y. 437; *Trustees of Union College* v. *Wheeler,* 61 N. Y. 88, 107; *Ingraham* v. *Disborough,* 47 N. Y. 421; *Rice* v. *Dewey,* 54 Barb. (N. Y.) 455; *Hartley* v. *Tatham,* 10 Bosw. (N. Y.) 273, 24 How. (N. Y.) Pr. 505; *Niagara Bank* v. *Roosevelt,* 9 Cow. (N. Y.) 409, Hopk. Ch. (N. Y.) 579; *James* v. *Morey,* 2 Cow. (N. Y.) 246, 16 Am. Dec. 465; *Clute* v. *Robinson,* 2 Johns. (N. Y.) 595; *Ellis* v. *Messervie,* 11 Paige Ch. (N. Y.) 467, 5 Den. (N. Y.) 640; *Pendleton* v. *Fay,* 2 Paige Ch. (N. Y.) 202; *Nichols* v. *Lee,* 10 Mich. 526; *Reeves* v. *Scully,* Walk. Ch. (Mich.) 248; *Russell* v. *Waite,* Walk. Ch. (Mich.) 31; *Kamena* v. *Huelbig,* 23 N. J. Eq. (8 C. E. Gr.) 75; *Andrews* v. *Torrey,* 14 N .J. Eq. (1 McCart.) 355; *Losey* v. *Simpson,* 11 N. J. Eq. (3 Stockt.) 246; *Dunn* v. *Seymour,* 11 N. J. Eq. (3 Stockt.) 278; *Cornish* v. *Bryan,* 10 N. J. Eq (2 Stockt.) 146; *Twitchell* v. *McMurtrie,* 77 Pa. St. 383; *Horstman* v. *Gerker,* 49 Pa. St. 282, 289; *Pryor* v. *Wood,* 31 Pa. St. 142; *Mott* v. *Clark,* 9 Pa. St. 399, 49 Am. Dec. 566; *Goulding* v. *Bunster,* 9 Wis. 513; *Croft* v. *Bunster,* 9 Wis. 503. See *First National Bank* v. *Flath,* 10 N. D. 281, 86 N. W. 867. See also *Thompson* v. *Maddux,* 117 Ala. 468, 23 So. 157.

[35] *Sheldon* v. *McNall,* 89 Ill. App. 138; *McAuliffe, as adm'r etc.* v. *Reuter,* 166 Ill. 491, 46 N. E. 1087; *Carey* v. *Kutten,* 98 Ill. App. 197; *Bull* v. *Sink,* 8 Kan. App. 860, 57 Pac. 853; *Mutual Life Ins. Co.* v. *Hall,* 20 Ky. Law Rep. 1880, 50 S. W. 254; *Fidelity Trust & Safety Vault Co.* v. *Carr,* 24 Ky. Law Rep. 156, 66 S. W. 990; *Bartholf* v. *Bensley,* 234 Ill. 336, 84 N. E. 928. See also *Randall Co.* v. *Glendenning,* 19 Okl. 475, 92 Pac. 158. But see *Marling* v. *Jones,* 138 Wis. 82, 131 Am. St. Rep. 996, 119 N. W. 931.

[36] Real Prop. Law § 324. (Chap. 50 Consolidated Laws.)

an assignment is not such notice as will invalidate a payment to the mortgagee.[37] But it has been held that where payment is made before maturity by the mortgagor to the original mortgagee without a surrender of the note, the mortgagor assumes the risk of its previous assignment, though such assignment was not recorded.[38] In Bautz v. Adams,[39] it was held that a mortgagor is not protected in paying the mortgage indebtedness to the record owner and taking a release where he was not the real owner and did not have possession of the security or authority to act for such real owner.

In an action to foreclose a mortgage, brought by an assignee thereof, where a defence which would be valid as against the assignor is made, the plaintiff will be required to show that his purchase was *bona fide* in all respects.[40] The rule in this regard is the same in a majority of the states, whether the note transferred is, or is not, secured by a mortgage.[41]

§ 417. Purchaser of negotiable paper secured by mortgage takes subject to equities against it.—On the other hand, it has been held that while the purchaser of a negotiable instrument before maturity, without notice, will be protected against all defences to such negotiable instrument, yet that when the negotiable instrument is secured by a mortgage or other collateral security, such security will not for that reason be invested with any of the privileges or immunities belong-

[37] *Barnes* v. *Long Island Real Estate Ex. & Invest. Co.* 88 App. Div. 83, 84 N. Y. Supp. 951. See *Barry* v. *Stover,* 20 S. D. 459, 129 Am. St. Rep. 941, 107 N. W. 672. See also *Bettle* v. *Tiedgen,* 77 Neb. 795, 110 N. W. 548.

[38] *Snell, as adm'r etc.* v. *Margritz,* 64 Neb. 6, 91 N. W. 274.

[39] 131 Wis. 152, 120 Am. St. Rep. 1030, 111 N. W. 69.

[40] *Getzlaff* v. *Seliger,* 43 Wis. 297. See *Matterson* v. *Morris,* 40 Mich. 52.

[41] See *Carpenter* v. *Longan,* 83 U. S. (16 Wall.) 271, 21 L. ed. 313; *Bennett* v. *Taylor,* 5 Cal. 502; *Potts* v. *Blackwell,* 4 Jones (N .C.) Eq. 58; *Martinueau* v. *McCollum,* 4 Chand. (Wis.) 153.

ing to negotiable paper; and, not being assignable separately and apart from the debt, either at common-law [42] or by the law merchant [43] or by statute,[44] the mortgagor may successfully interpose any defence in an action brought by the assignee to foreclose the mortgage, that he could have made against the mortgagee,[45] even though the assignee may have purchased the note and mortgage in good faith for a valuable consideration in the regular course of business.[46] This doctrine is held in California,[47] Colorado,[48] Delaware,[49] Illinois,[50]

[42] *Medley* v. *Elliott,* 62 Ill. 532; *Sumner* v. *Waugh,* 56 Ill. 531.

[43] *In re Kansas City Marble and Stone Manufacturing Co.* 9 Bankr. Reg. 76, 82; *Corbett* v. *Woodward,* 5 Sawy. C. C. 403; *Pertuit* v. *Damare,* 50 La. Ann. 893, 24 So. 681.

[44] *Medley* v. *Elliott,* 62 Ill. 532; *Sumner* v. *Waugh,* 56 Ill. 531.

[45] *White* v. *Sutherland,* 64 Ill. 181; *Sumner* v. *Waugh,* 56 Ill. 531; *Walker* v. *Dement,* 42 Ill. 272; *Johnson* v. *Carpenter,* 7 Minn. 176.

[46] *White* v. *Sutherland,* 64 Ill. 181; *Olds* v. *Cummings,* 31 Ill. 188.

[47] *Briggs* v. *Crawford,* 121 Pac. 381 (Cal.)

[48] *Longan* v. *Carpenter,* 1 Colo. 205. This case was reversed on appeal by the supreme court of the United States. See *Carpenter* v. *Longan,* 83 U. S. (16 Wall.) 271; 21 L. ed. 313. The supreme court hold that where a mortgage is given at the time of the execution of a negotiable note, and to secure its payment, and the mortgage is subsequently, but before the maturity of the note, transferred *bona fide* with the note, the holder of the note, when obliged to resort to the mortgage, will be unaffected by any equities arising between the mortgagor and mortgagee, *subsequently to the transfer,* and of which, he, the assignee, had no notice at the time it was made.

[49] *Trustees of Mutual Loan Ass'c* v. *Tyre,* 81 Atl. 48 (Del.)

[50] *Ellis* v. *Sisson,* 96 Ill. 105; *United States Mortgage Co.* v. *Gross,* 93 Ill. 483; *Chicago D. & V. R. Co.* v. *Lœwenthal,* 93 Ill. 433; *Colchour* v. *State Savings Inst.* 90 Ill. 152; *Brant* v. *Vix,* 83 Ill. 11; *White* v. *Sutherland,* 64 Ill. 181; *Medley* v. *Elliott,* 62 Ill. 532; *Sumner* v. *Waugh,* 56 Ill. 531; *Walker* v. *Dement,* 42 Ill. 272; *Olds* v. *Cummings,* 31 Ill. 188, 192; *Faris* v. *Briscoe,* 78 Ill. App. 242; *Denison* v. *Gambill, as adm'r etc.* 81 Ill. App. 170; *Hahn* v. *Geiger,* 96 Ill. App. 104; *Bebber* v. *Moreland,* 100 Ill. App. 198; *Elser* v. *Williams,* 104 Ill. App. 238; *Chicago Title & Trust Co.* v. *Aff,* 183 Ill. 91, 55 N. E. 659; *Bartholf* v. *Bensley,* 234 Ill. 336, 84 N. E. 928; *Buehler* v. *McCormick,* 169 Ill. 269, 48 N. E. 287; *Lauf* v. *Cahill,* 231 Ill. 220, 83 N. E. 155; *Hass* v. *Lobstein, as executor, etc.* 108 Ill. App. 217. See *Bouton* v. *Cameron,* 205 Ill. 50, 68 N. E. 800; *Pierce* v. *Coryn, as adm'r etc.* 126 Ill. App. 244.

Louisiana,[51] Minnesota,[52] New Jersey,[53] New York,[54] Ohio,[55] Oregon,[56] and Pennsylvania,[57] and in the inferior courts of the United States.[58]

But this rule does not extend to the set-off of a debt due from the assignor to the defendant arising out of a collateral transaction or a subsequent matter.[59] The principle upon which this doctrine is founded, is that while the notes are made negotiable by commercial usage or by statutory regulation, there is no such usage or provision as to the mortgages securing them, and that for this reason the assignee of the mortgage takes it, as he would any other chose in action, sub-

[51] *Bouligny* v. *Frotier,* 17 La. An. 121; *Schmidt* v. *Frey,* 8 Rob. (La.) 435; *Equitable Securities Co.* v. *Talbert,* 49 La. Ann. 1393, 22 So. 762; *Pertuit* v. *Damare,* 50 La. Ann. 893, 24 So. 681.

[52] *Hostetter* v. *Alexander,* 22 Minn. 559; *Johnson* v. *Carpenter,* 7 Minn. 176; *Paulsen* v. *Koon,* 85 Minn. 240, 88 N. W. 760; *Hendricks* v. *Hess,* 112 Minn. 252, 127 N. W. 995.

[53] *Woodruff* v. *Morristown Institution for Savings,* 34 N. J. Eq. (7 Stew.) 174; *Vredenburgh* v. *Burnet,* 31 N. J. Eq. (4 Stew.) 229, 231; *Putnam* v. *Clark,* 29 N. J. Eq. (2 Stew.) 412, 415; *Atwater* v. *Underhill,* 22 N. J. Eq. (7 C. E. Gr.) 599, 606; *Conover* v. *VanMater,* 18 N. J. Eq. (3 C. E. Gr.) 481, 484; *Woodruff* v. *Depue,* 14 N. J. Eq. (1 McCart.) 168, 175; *Loscy* v. *Simpson,* 11 N. J. Eq. (3 Stockt.) 246, 254.

[54] *Dodge* v. *Acker,* 19 App. Div. 29, 46 N. Y. Supp. 1049; *Sparling* v. *Wells,* 24 App. Div. 584, 49 N. Y. Supp. 321; *Rochester Savings Bank* v. *Whitmore,* 25 App. Div. 491, 49 N. Y. Supp. 862; *Merkle* v. *Beidleman,* 165 N. Y. 21, 58 N. E. 757; *Wood* v. *Travis,* 24 Misc. 589, 54 N. Y. Supp. 60; *Colton Improvement Co.* v. *Richter,* 26 Misc. 26, 55 N. Y. Supp. 486; *Quackenbush* v. *Wheaton,* 46 Misc. 357, 94 N. Y. Supp. 823; *Newman* v. *Overbaugh,* 116 N. Y. Supp. 369; *Parmerter* v. *Colrick,* 20 Misc. 202, 45 N. Y. Supp. 748; *Hubbell, Hall & Randall Co.* v. *Brickman,* 64 Misc. 370, 118 N. Y. Supp. 340; *Schlitz* v. *Koch,* 138 App. Div. 535, 123 N. Y. Supp. 302.

[55] *Baily* v. *Smith,* 14 Ohio St. 396, 84 Am. Dec. 385.

[56] *Corbett* v. *Woodward,* 5 Sawy. C. C. 403.

[57] *Myerstown Bank* v. *Roessler, as executor, etc.* 186 Pa. St. 431, 40 Atl. 963.

[58] See *In re Kansas City Marble and Stone Manufacturing Co.* 9 Bankr. Reg. 76, 82; *Fales* v. *Mayberry,* 2 Gall. C. C. 560; *United States* v. *Sturges,* 1 Paine C. C. 525, 534; *Corbett* v. *Woodward,* 5 Sawy. C. C. 403.

[59] *Colchour* v. *State Savings Institution,* 90 Ill. 152.

ject to all the rights which existed against the mortgage while in the hands of the mortgagee, except as to the latent equities of third persons, whose rights he could not know.[60]

§ 418. Defences against assignee of mortgage securing a non-negotiable instrument.—At common-law, a mortgage, as far as it is a debt or merely a security for a debt, is simply a chose in action, non-negotiable, and therefore cannot be transferred by delivery or indorsement.[61] A bond, also, is a non-negotiable instrument, and when assigned is subject to the equities existing between the original parties,[62] and subject to the same equities when assigned with the mortgage, which is simply collateral to it.[63] The bond being a mere

[60] *Sumner* v. *Waugh,* 56 Ill. 531. See *Fortier* v. *Darst,* 31 Ill. 212; *Olds* v. *Cummings,* 31 Ill. 188, 192; *Woodruff* v. *Morristown Institution for Savings,* 34 N. J. Eq. (7 Stew.) 174; *Vredenburgh* v. *Burnet,* 31 N. J. Eq. (4 Stew.) 229, 231; *Putnam* v. *Clark,* 29 N. J. Eq. (2 Stew.) 412, 415; *DeWitt* v *VanSickle,* 29 N. J. Eq. (2 Stew.) 212; *Starr* v. *Haskins,* 26 N. J. Eq. (11 C. E. Gr.) 415; *Atwater* v *Underhill,* 22 N. J. Eq. (7 C. E. Gr.) 599, 606; *Conover* v. *VanMater,* 18 N. J. Eq. (3 C. E. Gr.) 482; *Andrews* v. *Torrey,* 14 N. J. Eq. (1 McCart.) 355; *Lee* v. *Kirkpatrick,* 14 N. J. Eq. (1 McCart) 264; *Danbury* v. *Robinson,* 14 N. J. Eq. (1 Mc Cart.) 213; *Woodruff* v. *Depue,* 14 N. J. Eq. (1 McCart.) 168, 175; *Losey* v. *Simpson,* 11 N. J. Eq. (3 Stockt.) 246, 254; *Jacques* v. *Elser,* 4 N. J. Eq. (3 H. W. Gr.) 461; *Shannon* v. *Marselis,* 1 N. J. Eq. (Saxt.) 413; *Van Burkleo* v. *Southern M'fg Co.* 39 S. W. 1085 (Tex. Civ. App.); *Tate* v. *Security Trust Co.* 63 N. J. Eq. 559, 52 Atl. 313; *Moffett* v. *Parker,* 71 Minn. 139, 73 N. W. 850, 70 Am. St. Rep. 319; *Mann* v. *Merchants' Loan & Trust Co.* 100 Ill. App. 224; *Kittler* v. *Studabaker,* 113 Ill. App. 342, 352. *Contra, Dodge* v. *Acker,* 19 App. Div. 29, 46 N. Y. Supp. 1049; *Ely* v. *McNight,* 30 How. Pr. 97; *Kellogg* v. *Ames,* 41 Barb. 218; *Mertens* v. *Wakefield,* 35 Misc. 501, 71 N. Y. Supp. 1062; *Greene* v. *Warnick,* 64 N. Y. 220; *Cutts* v. *Guild;* 57 N. Y. 229. See *Hubbell, Hall & Randall Co.* v. *Brickman,* 64 Misc. 370, 118 N. Y. Supp. 340.

[61] *Bartholf* v. *Bensley,* 234 Ill. 336, 84 N. E. 928; *Denison* v. *Gambill, as adm'r etc.* 81 Ill. App. 170; *Whiting Paper Co.* v. *Busse,* 95 Ill. App. 288; *Bebber* v. *Morcland,* 100 Ill. App. 198; *Equitable Securities Co.* v. *Talbert,* 49 La. Ann. 1393, 22 So. 762.

[62] *Richardson* v. *Woodruff,* 20 Neb. 132.

[63] *Strong* v. *Jackson,* 123 Mass. 60, 63, 25 Am. Rep. 19. See *Crane* v. *March,* 21 Mass. (4 Pick.) 131,

chose in action, and neither it nor the mortgage having any negotiable character, the mortgagor's rights, in respect to the obligation, will not be changed in any way by the transfer of the bond and mortgage.[64] Where a non-negotiable note is secured by mortgage, and is assigned, it will be subject to the equities existing between the original parties at the time of the transfer, the same as a bond or other chose in action.[65] This, rule, however, is generally understood to mean, the equity residing in the original obligor or debtor, and not an equity residing in some third person.[66]

In an action for foreclosure brought by the assignee of a bond and mortgage, the mortgagor may set up any equitable defence he would have had in a suit brought by the mortgagee, on the well established principle that the assignee of a chose in action takes it subject to all the equities against it in the hands of the assignor.[67] A mortgage not being trans-

16 Am. Dec. 329; *Voorhees* v. *Nixon*, 72 N. J. Eq. 791, 66 Atl. 192.

[64] See *Davis* v. *Beckstein*, 69 N. Y. 440, 25 Am. Rep. 218; *Moore* v. *Metropolitan National Bank*, 55 N. Y. 41, 14 Am. Rep. 173; *Ingraham* v. *Disborough*, 47 N. Y. 421; *Mason* v. *Lord*, 40 N. Y. 476; *Reeves* v. *Kimball*, 40 N. Y. 299; *Bush* v. *Lathrop*, 22 N. Y. 535; *Mickles* v. *Townsend*, 18 N. Y. 575; *Westfall* v. *Jones*, 23 Barb. (N. Y.) 9; *Ely* v. *McNight*, 30 How. (N. Y.) Pr. 97; *Hovey* v. *Hill*, 3 Lans. (N. Y.) 167; *Godeffroy* v. *Caldwell*, 2 Cal. 489, 56 Am. Dec. 360; *Cumberland Coal & Iron Co.* v. *Parish*, 42 Md. 598; *Jones* v. *Hardesty*, 10 Gill & J. (Md.) 404, 420, 32 Am. Dec. 180; *Mathews* v. *Heyward*, 2 S. C. 239.

[65] *White* v. *Heylman*, 34 Pa. St. 142; *Matthews* v. *Wallwyn*, 4 Ves. 118, 126; *Henry* v. *State Bank of Laurens*, 131 Iowa, 97, 107 N. W. 1034; *Meyer* v. *Weber*, 133 Cal. 681, 65 Pac. 1110; *San Jose Ranch Co.* v. *San Jose Land & Water Co.* 132 Cal. 582, 64 Pac. 1097.

And this is true though the transferee be a *bona fide* purchaser. *Midwood Park Co.* v. *Baker*, 128 N. Y. Supp. 954.

[66] *Woodruff* v. *Morristown Inst. for Savings*, 34 N. J. Eq. (7 Stew.) 174. See *Warner* v. *Blakeman*, 36 *Barb.* (N. Y.) 501, 517; *Thompson* v. *Van Vechten*, 6 Bosw. (N. Y.) 373, 411; *James* v. *Morey*, 2 Cow. (N. Y.) 246, 249, 16 Am. Dec. 475; *Livingstone* v. *Dean*, 2 Johns. Ch. (N. Y.) 479; *Murray* v. *Lylburn*, 2 Johns. Ch. (N. Y.) 442; *Mott* v. *Clark*, 9 Pa. St. 399, 49 Am. Dec. 566.

[67] *Murray* v. *Lylburn*, 2 Johns. Ch. (N. Y.) 442; *Covell* v. *Tradesman's Bank*, 1 Paige Ch. (N. Y.) 131, 135. See *Riggs* v. *Purssell*, 89 N. Y. 608; *James* v. *Morey*, 2 Cow. (N. Y.) 246, 298, 16 Am. Dec.

ferable at law by delivery or indorsement, the assignee takes it subject to all equities between the parties; the fact that he takes the note secured by the mortgage by assignment before maturity free from all defences at law, does not protect the mortgage against equitable defences,[68] for while a purchaser in good faith of a note before its maturity, which is indorsed in blank, acquires the legal title, and may enforce his rights in a court of law, yet if the note is secured by a mortgage on real estate, and he resorts to a court of equity to foreclose the mortgage, that court will let in any defence which would have been good against the mortgage in the hands of the mortgagee.[69]

§ 419. Other defences against such an assignee.—A mortgage absolute on its face, assigned by the mortgagee to the holder as collateral security, may be shown, on foreclosure, by way of defence, to have been originally given as a collateral mortgage.[70] And while the assignee of a mortgage takes the same subject to all equities between the mortgagor and the mortgagee, yet he does not take it subject to the equities between the mortgagor and a prior assignee of the mortgage.[71] The reason for the rule is said to be found in the fact, that the assignee can always go to the mortgage

475; *Muir* v. *Schenck,* 3 Hill (N. Y.) 230, 38 Am. Dec. 633; *Young* v. *Guy,* 23 Hun (N. Y.) 1; *Hovey* v. *Hill,* 3 Lans. (N. Y.) 167, 172; *Tabor* v. *Foy,* 56 Iowa, 539; *Woodruff* v. *Morristown Inst. for Savings,* 34 N. J. Eq. (7 Stew.) 171; *Earnest* v. *Hoskins,* 100 Pa. St. 551; *McMullen* v. *Wenner,* 16 Serg. & R. (Pa.) 18, 20, 16 Am. Dec. 543; *Bury* v. *Hartman,* 4 Serg. & R. (Pa.) 175; *Foot* v. *Ketchum,* 15 Vt. 258, 268, 40 Am. Dec. 678; *Norton* v. *Rose,* 2 Wash. (Va.) 238; *Pickett* v. *Morris,* 2 Wash. (Va.) 255; *Withers* v. *Greene,* 50 U. S. (9 How.) 213, 224, 13 L. ed. 109, 114; *United States* v. *Sturges,* 1 Paine C. C. 525, 534; *Bradley* v. *Trammel,* Hempst. C. C. 164, 168; *Priddy* v. *Rose,* 3 Meriv. 86; *Coles* v. *Jones,* 2 Vern. 692; *Hill* v. *Caillovel,* 1 Ves. Sr. 122; *Turton* v. *Benson,* 1 P. Wms. 496.

[68] *Towner* v. *McClelland,* 110 Ill. 542.

[69] *Towner* v. *McClelland,* 110 Ill. 542.

[70] *Dickerson* v. *Wenman,* 35 N. J. Eq. (8 Stew.) 368.

[71] *Reineman* v. *Robb,* 98 Pa. St. 474.

debtor and ascertain what off-sets he may have against the mortgage or other chose in action which he is about to purchase from the mortgagee;[72] and where he neglects this precaution, he will be deemed to have taken the securities upon the representations of the assignor alone as to their legal validity.[73]

The right of the obligor to defend against his bond and mortgage, or non-negotiable note and mortgage, in the hands of an assignee, is limited to matters affecting the existence of the debt, to off-sets against it, and to a want of consideration. A secret equity cannot be pleaded by the mortgagor against an assignee of the bond and mortgage; neither can an agreement with the obligee merely collateral to or inconsistent with the import or legal effect of the instrument.[74]

In Pennsylvania, a bond is used almost exclusively in connection with the mortgage; and, although the mortgage may be assigned so as to enable the assignee to sue in his own name, yet it will be subject to the same equities and rules that govern other non-negotiable instruments or claims.[75] The same is true in New York,[76] and by statute in New Jersey.[77]

[72] *Westfall* v. *Jones,* 23 Barb. (N. Y.) 9, 13; *Murray* v. *Lylburn,* 2 Johns. Ch. (N. Y.) 441. See *Corning* v. *Murray,* 3 Barb. (N. Y.) 652, 654; *Hovey* v. *Hill,* 3 Lans. (N. Y.) 167, 172; *L'Amoreux* v. *Vandenburg,* 7 Paige Ch. (N. Y.) 316, 32 Am. Dec. 635. See *Bouton* v. *Cameron,* 205 Ill. 50, 68 N. E. 800.

[73] *Willis* v. *Twambly,* 13 Mass. 204, 206; *Hass* v. *Lobstein, as executor, etc.* 108 Ill. App. 217.

[74] *McMasters* v. *Wilhelm,* 85 Pa. St. 218; *Commonwealth* v. *Pittsburgh,* 34 Pa. St. 496, 520; *Pryor* v. *Wood,* 31 Pa. St. 142; *Davis* v. *Barr,* 9 Serg. & R. (Pa.) 137, 141; *Merchants' Bank of Buffalo* v. *Weill,* 163 N. Y. 486, 79 Am. St. Rep. 605, 57 N. E. 749. See *Raymond* v. *Hogan,* 10 App. Div. 189, 41 N. Y. Supp. 971.

[75] *Twitchell* v. *McMurtrie,* 77 Pa. St. 383; *Horstman* v. *Gerker,* 49 Pa. St. 282, 88 Am. Dec. 501; *Pryor* v. *Wood,* 31 Pa. St. 142.

[76] *Trustees of Union College* v. *Wheeler,* 61 N. Y. 88. See *ante,* § 416, note 54.

[77] *Black* v. *Thurston,* 71 N. J. Eq. 643, 63 Atl. 999 (Gen. Stat. p. 2108, § 31) P. L. 1902, p. 532, § 61.

CHAPTER XVII.

ANSWERS AND DEFENCES.

Fraud, Misrepresentation, Mistake and Duress.

§ 420. Defence of fraud—Generally.
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§ 437. Duress under Ohio doctrine.
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§ 439. Duress of person.

§ 420. Defence of fraud—Generally.—It is a general rule that fraud vitiates everything it touches; but where fraud enters into a mortgage contract, it will not necessarily render the mortgage void, unless the fraud was committed upon the mortgagor by the mortgagee or his agent, or with the knowledge and assent of the mortgagee or his agent.[78] There may be fraud without a deliberate intention to mislead or deceive;

[78] Fraud affecting the considera tion may be shown. *Ladd* v. *Putnam*, 79 Me. 568, 12 Atl. 628

it may consist merely in the denial of what has been previously affirmed.[79] It has been said that in an action to foreclose a mortgage executed by a married woman upon her separate estate, she may set up as a defence, that she was induced to execute the mortgage by reason of fraudulent representations made to her [80] with reference to the nature of the consideration thereof, even though such representations were not made by the mortgagee nor with his knowledge and consent.[81]

Though a mortgage may be made with the intention of defrauding the creditors of the mortgagor, it will not necessarily be void as between the parties; and in an action for foreclosure, where the mortgagee can show a *prima facie* right to recover on the face of the instrument, without revealing the fraud in the transaction, the defendant will not be permitted to plead as a defence, his own and the plaintiff's fraudulent intention, and that the mortgage was without consideration.[82] And where a debtor purchased real estate which he caused to be conveyed to his wife in fraud of his creditors, it was held that a *bona fide* mortgage from the husband and wife would not be affected by the fraud.[83] Possession of the premises by the husband and wife at the time of the execution of the mortgage, will not charge the mortgagee with

[79] *Ward* v. *Berkshire Life Ins. Co.* 108 Ind. 301.

[80] The defense of a married woman in foreclosure, that she was ignorant of the contents of the mortgage, and was induced to sign the same by the fraud and misrepresentation of her husband, is inadequate unless she also proves that the plaintiff mortgagee participated in or had knowledge of the fraud. *Riggan* v. *Sledge,* 116 N. C. 87, 20 S. E. 1016.

And improper means used by a husband to procure from his wife a deed of gift of land to him, or a ratification thereof, will not impair the security of one who, with the wife's knowledge, has loaned money to him upon such land without no tice of the use of such means. *Hadden* v. *Larned,* 87 Ga. 634, 13 S. E. 806.

[81] *Cridge* v. *Hare,* 98 Pa. St. 561.

[82] *Bonesteel* v. *Sullivan,* 104 Pa. St. 9; *Gill* v. *Henry,* 95 Pa. St. 388; *Blystone* v. *Blystone,* 51 Pa. St. 373; *Williams* v. *Williams,* 34 Pa. St. 312; *Hendrickson* v. *Evans,* 25 Pa. St. 441; *Evans* v. *Dravo,* 24 Pa. St. 62, 62 Am. Dec. 359; *Sherk* v. *Endress,* 3 Watts & S. (Pa.) 255.

[83] *Shorten* v. *Drake,* 38 Ohio St. 76.

notice of the fraud; neither will he be affected by notice of levies upon the property as that of the husband, subsequent to the conveyance to the wife.[84] But where a conveyance was made with the intention of defrauding creditors, such fraudulent intention may be shown by the parties whom it was intended to defraud.[85]

It has been held that the misapplication of the earnings of a railroad company so as to bring about a default in interest upon its mortgage bonds is not available as a defense to the foreclosure of the mortgage, to the company or its stockholders, where it has the right to apply all the net earnings to the improvement of the road, and its action is approved by the stockholders at their annual meeting, as the loss falls upon the bondholders, and not upon the company or stockholders thereof.[86]

§ 421. Defence of fraud by mortgagor.—Fraud can be pleaded in answer by the mortgagor only where it was practiced upon him by the mortgagee or his agents, or with the mortgagee's knowledge;[87] and where a mortgagor has been imposed upon by intentional misrepresentation or concealment, he may have redress in equity for damages in addition to and beyond the canceling of his covenants.[88] Where a trusted kinsman and friend, as an agent of the mortgagee, is employed to misrepresent the contents of a mortgage, whereby its exe-

[84] *Shorten* v. *Drake,* 38 Ohio St. 76.

[85] *Gill* v. *Henry,* 95 Pa. St. 388.

[86] *Farmers' Loan & T. Co.* v. *New York & N. R. Co.* 78 Hun (N. Y.) 213, 28 N. Y. Supp. 933, 60 N. Y. S. R. 217.

[87] *Reed* v. *Latson,* 15 Barb. (N. Y.) 9; *Aiken* v. *Morris,* 2 Barb. Ch. (N. Y.) 140; *Abbott* v. *Allen,* 2 Johns. Ch. (N. Y.) 519, 7 Am. Dec. 554; *Champlin* v. *Laytin,* 6 Paige Ch. (N. Y.) 189, aff'd 18 Wend. (N. Y.) 407, 31 Am. Dec. 382; *Allen* v. *Shackleton,* 15 Ohio St. 145. See *Alton-Dawson Mercantile Co.* v. *Staten,* 19 Okla. 252, 91 Pac. 892.

[88] *Belknap* v. *Scaley,* 2 Duer (N. Y.) 570, aff'd in 14 N. Y. 143, 67 Am. Dec. 120; *Abbott* v. *Allen,* 2 Johns. Ch. (N. Y.) 519, 522, 7 Am. Dec. 554; *Cornell* v. *Corbin,* 64 Cal. 197; *Pierce* v. *Tiersch,* 40 Ohio St. 168; *Edwards* v. *McLeay,* 1 Cooper Eq. 308.

cution is secured without its being read to the mortgagor, it is a fraud against which relief will be promptly granted.[89] If fraud is practiced upon a mortgagor in any manner, it will void the mortgage and an action in equity to set it aside may be maintained, although the plaintiff may be in possession and might maintain his possession against the fraudulent mortgagee in an action at law.[90]

To constitute a good defense to an action to foreclose a mortgage, on the ground of fraud in obtaining such mortgage, it must be shown, not only that the defendant was defrauded, but also that he was defrauded by the mortgagee or his agent, or at least, that the mortgagee, at the time of the execution and delivery of the mortgage, was aware that a fraud was being committed upon the mortgagor. All the facts necessary to establish the fraud and to bring the knowledge of it home to the mortgagee, must be distinctly stated in the answer.[91]

§ 422. Remedies on purchase money mortgage in case of fraud.—It is a well established doctrine in American courts that a purchaser of land, who has gone into possession and accepted a deed, cannot have relief in equity against the payment of the purchase money, except in cases of fraud. Unless he has taken the precaution to require covenants as to his title before paying the contract price, his only remedy will be in a court of law.[92] If the purchaser has not protected

[89] *Robinson* v. *Glass*, 94 Ind. 211. See *ante*, § 400.

[90] *Marston* v. *Brackett*, 9 N. H. 336; *Allen* v. *Shackleton*, 15 Ohio St. 145. See *Wilcox* v. *Howell*, 44 Barb. (N. Y.) 396; *Butler* v. *Viele*, 44 Barb. (N. Y.) 166; *Aiken* v. *Morris*, 2 Barb. Ch. (N. Y.) 140; *Hall* v. *Sands*, 52 Me. 355; *Burns* v. *Hobbs*, 29 Me. 273; *Baily* v. *Smith*, 14 Ohio St. 396, 84 Am. Dec. 385.

[91] *Aiken* v. *Morris*, 2 Barb. Ch. (N. Y.) 140; *Towles* v. *Edwards*, 24 Ky. Law Rep. 491, 68 S. W. 1107. See *First National Bank* v. *Grosshans*, 61 Neb. 575, 85 N. W. 542; *Randall* v. *Reynolds*, 61 N. J. Eq. 335, 48 Atl. 768. See also *Mohr* v. *Griffin*, 137 Ala. 456, 34 So. 378.

[92] *Denston* v. *Morris*, 2 Edw. Ch. (N. Y.) 37; *Abbott* v. *Allen*, 2 Johns. Ch. (N. Y.) 519, 7 Am. Dec. 554. See *Corning* v. *Smith*, 6 N.

himself with covenants in his deed of purchase, he will have no remedy upon a failure of title either at law or in equity, in the absence of fraud.[93] In certain cases, however, relief has been granted in equity against the payment of the purchase money, until the purchaser could be secured against existing incumbrances or defects in his title, where the conveyance was made with full covenants and there were doubts of the grantor's solvency.[94]

§ 423. Remedies by mortgagor against fraud.—Where fraud has been practiced upon the mortgagor by the mortgagee or his agent, or with the mortgagee's knowledge, in an action to foreclose a mortgage executed under such circumstances, the remedy of the mortgagor is to allege damages

Y. 82; *Leggett* v. *McCarty*, 3 Edw. Ch. (N. Y.) 124; *Gouverneur* v. *Elmendorf*, 5 Johns. Ch. (N. Y.) 79; *Chesterman* v. *Gardner*, 5 Johns. Ch. (N. Y.) 29; *Bumpus* v. *Platner*, 1 Johns, Ch. (N. Y.) 213; *Bates* v. *Delavan*, 5 Paige Ch. (N. Y.) 300; *Davison* v. *DeFreest*, 3 Sandf. Ch. (N. Y.) 456; *Banks* v. *Walker*, 2 Sandf. Ch. (N. Y.) 348; *Edwards* v. *Bodine*, 26 Wend. (N. Y.) 109; *Tallmadge* v. *Wallis*, 25 Wend. (N. Y.) 107; *Tobin* v. *Bell*, 61 Ala. 125; *Strong* v. *Waddell*, 56 Ala. 473; *Cullum* v. *Branch Bank*, 4 Ala. 21, 37 Am. Dec. 725; *Alden* v. *Pryal*, 60 Cal. 222; *Barkhamsted* v. *Case*, 5 Conn. 528, 13 Am. Dec. 92; *Harding* v. *Commercial Loan Co.* 84 Ill. 261; *Beebe* v. *Swartwout*, 8 Ill. (3 Gilm.) 162; *James* v. *Hays*, 34 Ind. 274; *Laughery* v. *McLean*, 14 Ind. 106; *Natchez* v. *Minor*, 17 Miss. (9 Smed. & M.) 544, 48 Am. Dec. 727; *Anderson* v. *Lincoln*, 6 Miss. (5 How.) 279; *Waddell* v. *Beach*, 9 N. J. Eq. (1 Stockt.) 793; *VanWaggoner* v. *McEwen*, 2 N. J. Eq. (1 H. W. Gr.) 412; *Shannon* v. *Marselis*, 1 N. J. Eq. (1 Saxt.) 426; *Maner* v. *Washington*, 3 Strobh. (S. C.) Eq. 171; *Commonwealth* v. *McClanachan*, 4 Rand. (Va.) 482; *Noonan* v. *Lee*, 67 U. S. (2 Black) 507, 17 L. ed. 280; *Patton* v. *Taylor*, 48 U. S. (7 How.) 159, 12 L. ed. 649; *Greenleaf* v. *Cook*, 15 U. S. (2 Wheat.) 16, 4 L. ed. 173; *McFarlane* v. *Griffith*, 4 Wash. C. C. 585.

[93] *Abbott* v. *Allen*, 2 Johns. Ch. N. Y.) 519, 7 Am. Dec. 554; *Laughery* v *McLean*, 14 Ind. 108; *Hyatt* v. *Twomey*, 1 Dev. & B. (N. C.) Eq. 317; *Maney* v. *Porter*, 3 Humph. (Tenn.) 363.

[94] See *Jones* v. *Stanton*, 11 Mo. 436; *Woodruff* v. *Bunce*, 9 Paige Ch. (N. Y.) 443; *Bowen* v. *Thrall*, 28 Vt. 385. But ordinarily the insolvency or the absence from the state of the vendor will not take the case out of the general principle stated in the text. See *Platt* v. *Gilchrist*, 3 Sandf. (N. Y.) 120; *Hill* v. *Butler*, 6 Ohio St. 218.

for such fraud and to recoup them by way of a counter-claim.[95] In such a case, in addition to the defences which the mortgagor may set up in an action to foreclose the mortgage, he may seek the affirmative aid of the court, as a court of equity, to cancel the instrument sued upon as fraudulent.[96] This remedy would seem to be founded upon the well established rule, that relief in equity can be had against any deed or contract in writing founded on mistake or fraud.[97]

This remedy, however, has been questioned in some states. Thus, in an early Maine case,[98] it was said that the learned chancellor in Gillespie v. Moon,[99] "maintains that relief may be had in chancery against any deed or contract in writing

[95] *Ludington* v. *Slauson,* 38 N. Y. Supr. Ct. (6 J. & S.) 81. See *Greene* v. *Tallman,* 20 N. Y. 191, 75 Am. Dec. 384; *Abbott* v. *Allen,* 2 Johns. Ch. (N. Y.) 519, 7 Am. Dec. 554; *Lathrop* v. *Godfrey,* 6 T. & C. (N. Y.) 96, 3 Hun (N. Y.) 739.

In South Carolina the mortgagor has the right to elect whether he will rescind for fraud or set up damages as defense to mortgagee's action. *Whittle, as assignee, etc.* v. *Jones,* 79 S. C. 205, 60 S. E. 522.

[96] *Gillespie* v. *Moon,* 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559; *Glass* v. *Herbert,* 102 Mass. 41, 3 Am. Rep. 418, 1 Story Eq. Jur. § 161; *Richardson* v. *Lowe,* 149 Fed. 625, 79 C. C. A. 317. See *Redrow* v. *Sparks,* 75 N. J. Eq. 396. 72 Atl. 442.

In Montana it is held that mistake or fraud in the execution of a note and mortgage, whereby the same do not express the true contract, should not be set up by answer but by cross-bill. *Commonwealth Title Ins. & Trust Co.* v. *Cummings,* 83 Fed. 767.

[97] *Gillespie* v. *Moon,* 2 Johns. Ch. (N. Y.) 585. See *Willes* v. *Yates,* 44 N. Y. 529; *Wood* v. *Hubbell,* 10 N. Y. 486; *Faure* v. *Martin,* 7 N. Y. 213, 57 Am. Dec. 515; *Hutcheon* v. *Johnson,* 33 Barb. (N. Y.) 398; *Kent* v. *Manchester,* 29 Barb. (N. Y.) 595; *Fishell* v. *Bell,* Clarke Ch. (N. Y.) 38; *Roosevelt* v. *Fulton,* 2 Cow. (N. Y.) 133; *Funch* v. *Abenheim,* 20 Hun (N. Y.) 1, 6; *Champlin* v. *Laytin,* 18 Wend. (N. Y.) 422, 31 Am. Dec. 393; *Alden* v. *Pryal,* 60 Cal. 222; *Bishop* v. *Clay Ins. Co.* 49 Conn. 176; *Reading* v. *Weston,* 8 Conn. 122, 20 Am. Dec. 99; *Phœnix Ins. Co.* v. *Hoffheimer,* 46 Miss. 658; *Firmstone* v. *DeCamp,* 17 N. J. Eq. (2 C. E. Gr.) 309; *Huss* v. *Morris,* 63 Pa. St. 373; *Walden* v. *Skinner,* 101 U. S. (11 Otto), 585, 25 L. ed. 966; *Snell* v. *Atlantic F. & M. Ins. Co.* 98 U. S. (8 Otto) 89, 25 L. ed. 54.

[98] *Elder* v. *Elder,* 10 Me. (1 Fairf.) 86, 25 Am. Dec. 208.

[99] 2 Johns. Ch. (N. Y.) 585; opinion *per* Chancellor Kent.

founded in mistake or fraud, and that the mistake may be shown by parol proof, and relief granted to the injured party, where he sets up the mistake affirmatively by bill or as a defence. We have looked into the cases cited by him, but are not satisfied that they sustain the doctrine to the extent which his language would seem to imply." This case, however, was an implication for the reformation of a written contract by enlarging its terms by parol, and for a specific execution of it as amended; and the same is true of all the other decisions in which the doctrine laid down by Chancellor Kent in Gillespie v. Moon is questioned. It is worthy of note that in most of the cases the statute of frauds is relied upon as a defence.

§ 424. Defence of fraud against purchase money mortgage.—In an action by the mortgagee against the mortgagor, upon a note secured by a mortgage given for the purchase money of certain premises, the mortgagor may, as a defence, set up a counter-claim for damages by reason of the fraud of the mortgagee in concealing from him material facts as to the situation and extent of the premises;[1] and if such damages exceed, or are equal to, the amount of the mortgage, the claim under the mortgage will be wholly defeated.[2] And it has been held, that in an action against a mortgagor for purchase money, his right to set up a counter-claim for any excess in price, paid through the vendor's misrepresentations of the extent or value of the property, is the same whether such misrepresentations were wilfully or innocently made.[3]

[1] *Baughman* v. *Gould*, 45 Mich. 481; *Burchard* v. *Frazer*, 23 Mich. 224; *Dayton* v. *Melick*, 32 N. J. Eq. (5 Stew.) 570; *Pierce* v. *Tiersch*, 40 Ohio St. 168; *Allen* v. *Shackleton*, 15 Ohio St. 145.

[2] *Greene* v. *Tallman*, 20 N. Y. 191, 75 Am. Dec. 384; *Lathrop* v. *Godfrey*, 6 T. & C. (N. Y.) 96, 3 Hun (N. Y.) 739.

[3] *Baughman* v. *Gould*, 45 Mich. 481. See *Lockridge* v. *Foster*, 5 Ill. (4 Scam.) 569; *Starkweather* v. *Benjamin*, 32 Mich. 305; *Webster* v. *Bailey*, 31 Mich. 36; *Steinbach* v. *Hill*, 25 Mich. 78; *Converse* v. *Blumrich*, 14 Mich. 109, 90 Am. Dec. 230; *Pierce* v. *Tiersch*, 40 Ohio St. 168; *Smith* v. *Richards*, 38 U. S. (13 Pet.) 26, 10 L. ed. 42; *Tuthill*

In some states the defence of fraud in the consideration of a mortgage, where the fraud is not such as to render the instrument void, but merely to reduce the amount to be recovered upon it, cannot be pleaded by an answer alone. Such at defence, it is held, must be set up in a cross-bill.[4]

§ 425. False representations as a defence.—It is well established that a vendee may set up as a defence to the foreclosure of a purchase money mortgage, or in mitigation of damages, false and fraudulent representations by the vendor.[5] But a fraudulent representation as to the value of property, does not of itself invalidate a purchase money mortgage for its whole amount, if the property purchased has any value at all; in any event the property must be restored or a reconveyance thereof tendered, before the mortgage can be canceled,[6] because, where a party derives any benefit from a purchase, he cannot rescind the contract as long as he retains the thing purchased.[7] And where a purchaser receives anything valuable either to himself or to the fraudulent seller, and does not return it, he thereby affirms the contract, inasmuch as it is void or valid, only at his election.[8]

v. *Babcock*, 2 Woodb. & M. C. C. 298; *Smith* v. *Babcock*, 2 Woodb. & M. C. C. 246; *Taylor* v. *Ashton*, 11 Mees. & W. 401; *Ainslie* v. *Medlycott*, 9 Ves. 21. See *Lassall* v. *Pati*, 25 Misc. 561, 55 N. Y. Supp. 1084.

[4] *Parker* v. *Hartt*, 32 N. J. Eq. (5 Stew.) 225; *O'Brien* v. *Hulfish*, 22 N. J. Eq. (7 C. E. Gr.) 472; *Graham* v. *Berryman*, 19 N. J. Eq. (4 C. E. Gr.) 29; *Miller* v. *Gregory*, 16 N. J. Eq. (1 C. E. Gr.) 274.

[5] See *Carey* v. *Guillow*, 105 Mass. 18, 7 Am. Rep. 494; *Tuttle* v. *Brown*, 70 Mass (4 Gray) 457, 64 Am. Dec. 80; *Burnett* v. *Smith*, 70 Mass. (4 Gray) 50; *Dorr* v. *Fisher*, 55 Mass. (1 Cush.) 271; *Mixer* v. *Coburn*, 52 Mass. (11 Metc.) 559, 561, 45 Am. Dec. 230; *Howard* v. *Ames*, 44 Mass. (3 Metc.) 308, 311; *Perley* v. *Balch*, 40 Mass. (23 Pick.) 283, 34 Am. Dec. 56.

[6] *Perley* v. *Balch*, 40 Mass. (23 Pick.) 283, 34 Am. Dec. 56; *Sanborn* v. *Osgood*, 16 N. H. 112; *Shepherd* v. *Temple*, 3 N. H. 455.

[7] *Perley* v. *Balch*, 40 Mass. (23 Pick.) 283, 34 Am. Dec. 56; *Sanborn* v. *Osgood*, 16 N. H. 112.

[8] *Rowley* v. *Bigelow*, 29 Mass. (12 Pick.) 307, 23 Am. Dec. 607; *Ayers* v. *Hewitt*, 19 Me. 281; *Sanborn* v. *Osgood*, 16 N. H. 112; *Ayer* v. *Hawkes*, 11 N. H. 148.

It has been held that representations by a land company's general manager, at the time of selling lots, that certain improvements, such as the grading of a drive to a proper level and the construction of a public park and hotel near the lots, would be made, do not constitute a valid defense to an action to foreclose a mortgage given for the purchase price of the lots, where such improvements were contemplated at the time and the representations were believed by the manager to be true, although the improvements were not in fact ever made.[9]

§ 426. Defence of false representations by a married woman.—To enable the defence of fraud or misrepresentation to be set up in an action to foreclose a mortgage, it seems that the mortgagee must have participated in or have been in some way privy to such fraud or misrepresentation.[10] Thus, where a mortgage covering a homestead and other property was presented to a wife by her husband for execution, and signed by her under the supposition that the homestead was not included therein, it was held that the mortgage was valid, as it did not appear that the mortgagee had any knowledge of the circumstances under which it was signed.[11]

In the case of Alexander v. Bouton,[12] a married woman, to secure the debt of her husband, joined him in the execution of a note and mortgage upon her separate property, having been induced to do so by the representations of her husband that she was to be liable only to the extent of the mortgaged property. The mortgagee also took a collateral agreement from others to secure any deficiency that might remain after the sale of the mortgaged property; but the defendants were not parties to this agreement. In a foreclosure of the mortgage it was held, that the wife was bound as principal, and that her liability was not modified by her agreement with her

[9] *Joseph* v. *Decatur Land, I. & F. Co.* 102 Ala. 346, 14 So. 739.

[10] See *Mohr* v. *Griffin,* 137 Ala. 456, 34 So. 378.

[11] *Edgell* v. *Hagens,* 53 Iowa, 223.

[12] 55 Cal. 15.

husband, nor by the additional security taken by the plaintiff. But, in Indiana, a person taking an incumbrance on the property of a married woman, is bound to inquire whether the consideration is for her benefit or for the benefit of another; and, unless he is misled by her conduct or misrepresentations, he will be held to have acquired a knowledge of the facts which prudent inquiry would have disclosed.[13]

§ 427. Defense of false representations by purchaser who assumed mortgage.—It has been held in an action by a mortgagee to recover the amount of his mortgage against a purchaser of the mortgaged premises, who received a conveyance thereof subject to the mortgage and assumed the payment of the same, that it is a good defence, that the grantor of the defendant had no title to the property; that his representations respecting the same were false and fraudulent, and that the defendant was induced thereby to assume the payment of the mortgage.[14] Where a person has purchased land expressly subject to a mortgage, such purchaser cannot set up as a counter-claim, a fraud practiced upon him after the mortgage was given, if there is nothing to connect the plaintiff with the fraud of the mortgagor.[15]

Where a vendor, under a misapprehension of his legal rights, makes false representations on which his grantee relies, they will constitute such a fraud as will be a ground for relief in an action for the foreclosure of a mortgage given for part of the purchase money.[16]

To be available as a defence the misrepresentations must be as to facts; misrepresentations merely as to the value of the property will not be sufficient.[17] And where a defendant

[13] *Cupp* v. *Campbell,* 103 Ind. 213.

[14] *Benedict* v. *Hunt,* 32 Iowa, 27. See *Green* v. *Turner,* 86 Fed. 837, 30 C. C. A. 427.

[15] *Reed* v. *Latson,* 15 Barb. (N. Y.) 9.

[16] *Champlin* v. *Laytin,* 6 Paige Ch. (N. Y.) 189, aff'd 18 Wend. (N. Y.) 407, 31 Am. Dec. 382

[17] *Sanborn* v. *Osgood,* 16 N. H. 112.

in a foreclosure suit avers that the mortgage was procured by false representations, the burden of proving the same will be on him.[18]

§ 428. **Misrepresentation as to number of acres— Purchase money mortgage.**—In cases where a vendor fraudulently misrepresents the number of acres and thereby induces the vendee to pay more for the premises than he otherwise would have paid, an abatement will be allowed.[19] And where the vendor of land, by misrepresenting its extent, induces a purchaser to incur a liability for land which the vendor is unable to convey, the effect of the transaction, in the eyes of the law, is a fraud upon the purchaser, even though both parties may act in good faith.[20]

But it has been held that the vendee of land cannot claim a deduction from a purchase money mortgage in a foreclosure suit, on the ground that his vendor, who was not the mortgagor, misstated the number of acres of land conveyed, and that the vendor of such vendor, who was the mortgagee and complainant, made a similar misstatement when he sold such land. To authorize a deduction the mortgagee and the owner must be privies in contract. Thus, where A. sold a farm to B., misstating the number of acres, and taking a mortgage for part of the consideration, and B. sold, making the same misstatement, to C., who assumed the payment of B.'s mortgage, in an action by A. to foreclose, it was held that C. could

[18] *Ricord* v. *Jones,* 33 Iowa, 26; *Perrett* v. *Yarsdorfer,* 37 Mich. 596; *Sloan* v. *Holcomb,* 29 Mich. 153; *Baldwin* v. *Bucklin,* 11 Mich. 389. See *Buck* v. *Sherman,* 2 Doug. (Mich.) 176; *Flint* v. *Jones,* 5 Wis. 424; *Coulson* v. *Coulson,* 5 Wis. 79; *Savery* v. *King,* 5 H. L. Cas. 627, 35 Eng. L. & Eq. 100.

[19] *Dayton* v. *Melic,* 34 N. J. Eq. (7 Stew.) 245; *McMichael* v. *Webster,* 57 N. J. Eq. 295, 73 Am. St. Rep. 630, 41 Atl. 714; *Harsey* v. *Busby,* 69 S. C. 261, 48 S. E. 50. See *Redrow* v. *Sparks,* 76 N. J. Eq. 133, 79 Atl. 450.

[20] *Baughman* v. *Gould,* 45 Mich. 481. See *Starkweather* v. *Benjamin,* 32 Mich. 305; *Webster* v. *Baily,* 31 Mich. 36; *Steinbach* v. *Hill,* 25 Mich. 78; *Convers* v. *Blumrich,* 14 Mich. 109, 90 Am. Dec. 230.

not set up these facts in order to offset his damages against the mortgage.[21]

§ 429. False representations as to extent and boundaries of land.—It is no defense to an action for fraud in misrepresenting the quantity of land in a parcel which the defendant was selling the plaintiff by the acre, that the latter saw the land and was as able to judge of its size as the defendant; a positive assurance of the area of the parcel of land made under such circumstances is very material, and is equivalent to an assurance of measurement; and if the statement is false and the vendee is deceived thereby, it constitutes a fraud for which a court of equity will grant relief.[22]

The court held in a Michigan case,[23] that the principle, that there is no fraud where both parties have equal means of judging, is not applicable to such a case, for it will not be presumed that people generally can judge with accuracy, by the eye, of the contents of a parcel of land; but that the principle, that one who dissuades another from inquiry and deceives him to his prejudice is responsible, is in point.

Where a vendor in the sale of land misrepresents the boundaries of such land, the vendee may plead in defence fraudulent representations as to the extent of the property and recoup in damages in an action by such vendor to foreclose a mortgage taken to secure part of the purchase price thereof,[24] whether the vendor's misrepresentations were innocently or wilfully made.[25]

§ 430. Mutual mistake of parties as a defense.—Courts of equity will relieve against a mistake as well as against

[21] *Davis* v. *Clark*, 33 N. J. Eq. (6 Stew.) 579.

[22] *Starkweather* v. *Benjamin*, 32 Mich. 305.

[23] *Starkweather* v. *Benjamin*, 32 Mich. 305.

[24] *Pierce* v. *Tiersch*, 40 Ohio St. 168; *Allen* v. *Shackleton*, 15 Ohio St. 145.

[25] *Baughman* v. *Gould*, 45 Mich. 481; *Pierce* v. *Tiersch*, 40 Ohio St. 168, 172.

fraud in a deed or contract in writing, both where the plaintiff seeks the relief affirmatively and where the defendant pleads it as a defence,[26] and will correct the instrument so as to make it express the intention and agreement of the parties.[27] Where the fact of a mistake appears and the interests of no third party intervene to raise questions of equitable rights, it is the duty of the court to make the correction; and this duty is co-extensive with the mistake, and extends not merely to the reformation of the original instrument, but also to all subsequent proceedings, judgments and decrees, into which the mistake may have been carried.[28]

To entitle a party to relief on the ground of mutual mistake, in a case free from fraud, the mistake must be as to a material fact, constituting the very essence and terms of the contract; and the fact must be of such a nature that the party could not by reasonable diligence obtain knowledge of it when put upon inquiry.[29] But it will be sufficient notice of the mistake, if the facts stated in the record of the mortgage are such as to put a subsequent purchaser from the mortgagor, or a judgment creditor, upon inquiry, which would lead to a knowledge of the mistake.[30]

§ 431. Against whom mutual mistakes may be corrected.—Such a mutual mistake may be corrected not only as against the mortgagor, but also as against his heirs,

[26] *Gillespie* v. *Moon,* 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559; *Bush* v. *Bush,* 33 Kan. 556, 6 Pac. 794; *Davenport* v. *Sovil,* 6 Ohio St. 459. The evidence to show a mistake in a mortgage must be clear and strong, so as to establish the mistake to the entire satisfaction of the court; *Gillespie* v. *Moon, supra.*

[27] See *Dayton* v. *Melick,* 34 N. J. Eq. (7 Stew.) 245; *Citizens' Nat. Bank* v. *Dayton,* 116 Ill. 257, 4 N. E. 492.

[28] *First National Bank of Parsons* v. *Wentworth,* 28 Kan. 183.

[29] *Taylor* v. *Fleet,* 4 Barb. (N. Y.) 95. See *Melick* v. *Dayton,* 34 N. J. Eq. (7 Stew.) 245; *Hammond* v. *Allen,* 2 Sumn. C. C. 387.

[30] *National Bank* v. *Dayton,* 116 Ill. 257.

representatives,[31] assigns,[32] attaching creditors,[33] judgment creditors,[34] and purchasers [35] with notice of the mistake, and as against a junior mortgagee whose lien was given as a security for an antecedent debt,[36] but not as against subsequent *bona fide* purchasers.[37] Where a clause is surreptitiously inserted in a deed conveying property, contrary to the contract of the parties, purporting to bind the purchaser personally with the assumption of the mortgage debt existing against the property, the vendee may have the deed reformed by striking out such clause.[38]

§ 432. Remedies for correcting a mistake.—A mortgagee may come into a court of equity and have his mortgage reformed by the correction of a mistake in the description of the lands conveyed, and have it foreclosed in the same action,[39] even after the law day has passed,[40] because when a

[31] *McKay* v. *Wakefield*, 63 Ind. 27.

[32] *Andrews* v. *Gillespie*, 47 N. Y. 487.

[33] *Bush* v. *Bush*, 33 Kan. 556, 6 Pac. 794.

[34] *Boyd* v. *Anderson*, 102 Ind. 217; *Duncan* v. *Miller*, 64 Iowa, 223. See *Monticello Hydraulic Works* v. *Loughry*, 72 Ind. 562; *Wainwright* v. *Flanders*, 64 Ind. 306; *Busenbarke* v. *Ramey*, 53 Ind. 499; *Flanders* v. *O'Brien*, 46 Ind. 284; *Glideweld* v. *Spaugh*, 26 Ind. 319; *Sample* v. *Rowe*, 24 Ind. 208; *Orth* v. *Jennings*, 8 Blackf. (Ind.) 420; *Sparks* v. *State Bank*, 7 Blackf. (Ind.) 469, 39 Am. Dec. 437; *White* v. *Wilson*, 6 Blackf. (Ind.) 448.

[35] *Gouverneur* v. *Titus*, 6 Paige Ch. (N. Y.) 347; *Whitehead* v. *Brown*, 18 Ala. 682; *Wall* v. *Arrington*, 13 Ga. 88; *White* v. *Wilson*, 6 Blackf. (Ind.) 448, 39 Am. Dec. 437; *Simmons* v. *North*, 11 Miss. (3 Smed. & M.) 67; *Strang* v. *Beach*, 11 Ohio St. 283, 78 Am. Dec. 308.

[36] *Busenbarke* v. *Rainey*, 53 Ind. 499. See *VanHeusen* v. *Radcliff*, 17 N. Y. 580, 72 Am. Dec. 480; *Manhattan Co.* v. *Evertson*, 6 Paige Ch. (N. Y.) 457; *Powell* v. *Jeffries*, 5 Ill. (4 Scam.) 387; *Clay* v. *Hildebrand*, 34 Kan. 694; *Cox* v. *Esteb*, 81 Mo. 393; *Morse* v. *Godfrey*, 3 Story C. C. 364.

[37] *Busenbarke* v. *Ramey*, 53 Ind. 499; *Flanders* v. *O'Brien*, 46 Ind. 284, 2 Hare & W. Lead Cas. (3d Am. ed.) 104.

[38] *Albany City Savings Inst.* v. *Burdick*, 87 N. Y. 40, 48. See *ante*, § 244.

[39] See *Mississippi Valley Trust Co.* v. *McDonald*, 146 Mo. 467, 48 S. W. 483.

[40] *Alexander* v. *Rea*, 50 Ala. 450. See *Savings & Loan Society* v. *Meeks*, 66 Cal. 371, 5 Pac. 624; *Doe* v. *Vallejo*, 29 Cal. 385; *Halsted*

court once acquires jurisdiction for the purpose of foreclosing a mortgage, it may proceed to settle all questions in litigation between the parties growing out of the mortgage.[41]

Where there has been a mutual mistake in the description of the premises mortgaged, which is not discovered until after the sale on foreclosure, the judgment and sale may be set aside and an amended complaint may be filed, so as to obtain a new judgment correcting the description, reforming the mortgage and directing a new sale, providing the property was bought in by the mortgagee at the foreclosure sale,[42] on the principle that where the plaintiff in a foreclosure has become the purchaser and has not parted with his interest, the decree may be opened by the court which granted it, if the error cannot be corrected on a rehearing or upon a bill to review;[43] or a new action may be maintained to correct the misdescription.[44] But it has been held, that a purchaser upon foreclosure cannot come into court and ask that other property, in the place of that sold to and purchased by him, be subjected to his purchase on the ground that by mistake, the mortgage covered different property from that intended.[45] And where there is a misdescription in a mortgage, of certain courses and distances, and on foreclosure this perpetuated in the deed which is given to the mortgagees, who purchased the property, and also in various subsequent conveyances, a court of equity has power to correct the misdescription in

v. *Lake County*, 56 Ind. 363; *Barnaby* v. *Parker*, 53 Ind. 271; *Palmer* v. *Windrom*, 12 Neb. 494; *Davenport* v. *Sovil*, 6 Ohio St. 459. See also *Bentley* v. *Smith*, 2 Keyes (N. Y.) 343.

[41] *Alexander* v. *Rea*, 50 Ala. 450; *Scruggs* v. *Driver*, 31 Ala. 274; *Stow* v. *Bozeman*, 29 Ala. 397.

[42] *Thompson* v. *Maxwell*, 16 Fla. 773; *Schwickerath* v. *Cooksey*, 53 Mo. 75; *Davenport* v. *Sovil*, 6 Ohio St. 459.

[43] *Thompson* v. *Maxwell*, 16 Fla. 773, 778. See *Millspaugh* v. *McBride*, 7 Paige Ch. (N. Y.) 509, 34 Am. Dec. 360.

[44] Burkam v. Burk, 96 Ind. 270; *Armstrong* v. *Short*, 95 Ind. 326; *First National Bank of Parsons* v. *Wentworth*, 28 Kan. 183.

[45] *Schwickerath* v. *Cooksey*, 53 Mo. 75. See *Barnard* v. *Duncan*, 38 Mo. 170, 90 Am. Dec. 416; *Haley* v. *Bagley*, 37 Mo. 363.

the various instruments, to make them conform to the true intent of the parties to the mortgage, or to give equivalent relief by injunction.[46]

§ 433. **Mutual mistake as to title.**—Although, as a general rule, a mistake of law forms no ground for reforming a contract,[47] yet, where parties enter into a contract under a mutual mistake of law, or a mutual misconception of their legal rights amounting to a mistake of law, by reason of which their object is prevented from being accomplished, such contract is as liable to be set aside or reformed as a contract founded upon a mistake in matters of fact.[48]

Thus, where a vendor, under a misapprehension of his legal rights, sold a lot of land, which, by the terms of conveyances of adjoining lands to prior purchasers, had been constructively dedicated for the purposes of a public street, and represented to the purchaser that the lot would not be taken for a street without paying to the vendee the full value thereof, but without communicating the facts upon which the legal question as to the rights of the prior purchasers depended, and the vendee, relying upon this information, purchased and in part paid for at lot, which was in fact of no value either to him or to the vendor, it was held that the vendee was entitled to relief as against a bond and mortgage given by him on such contract, and to a return of the purchase money which had been paid toward the lot under such mutual misapprehension.[49]

[46] *Greeley* v. *De Cottes,* 24 Fla. 475, 5 So. 239.

[47] *Garnar* v. *Bird,* 57 Barb. (N. Y.) 277, 291. But it has been held in South Carolina that the maxim *ignorantia juris non excusat,* applies in civil cases where redress is sought for a wrong done or a right withheld. *Lawrence* v. *Beaubien,* 2 Bail. (S. C.) L. 623, 23 Am. Dec. 155.

[48] *Champlin* v. *Laytin,* 1 Edw. Ch. (N. Y.) 467, aff'd 6 Paige Ch. (N. Y.) 189, 18 Wend. 407, 31 Am. Dec. 382. See *Garnar* v. *Bird,* 57 Barb. (N. Y.) 277, 291; *Mount* v. *Morton,* 20 Barb. (N. Y.) 123.

[49] *Chamberlin* v. *Laytin,* 6 Paige Ch. (N. Y.) 189, aff'd 18 Wend. (N. Y.) 407, 31 Am. Dec. 382.

And a vendor who, to secure the purchase price of land takes a mortgage upon other property under a mistaken legal conclusion of both parties that she held the fee in the property conveyed, when, in reality, her only interest was the possibility of dower, should she survive the life tenant, may recover the value of such expectant dower as of the time the deed was executed, in a suit upon the mortgage.[50]

It is a general rule, however, that ignorance of the law, with a full knowledge of the facts, cannot generally be pleaded as a defence; nor will it protect a party from the operation of a rule of equity law, when the circumstances would otherwise create an equitable bar.[51]

§ 434. Mutual mistake as to quantity of land.—A mere mistake of both parties as to the number of acres of land conveyed, is no ground of defence to a mortgage given for the purchase money, there being no fraud or misrepresentation by the grantor.[52] But the question of abatement from the amount of the mortgage on account of a deficiency in the area of the premises, may be raised by answer by the mortgagor in foreclosure proceedings.[53]

[50] *Wilson* v. *Ott,* 160 Pa. St. 433, 28 Atl. 848, 34 W. N. C. 159.

[51] *Storrs* v. *Barker,* 6 Johns. Ch. (N. Y.) 166. But see *Lawrence* v. *Beaubien,* 2 Bail. (S. C.) L. 623, 23 Am. Dec. 155.

[52] *Nelson* v. *Hall,* 60 N. H. 274; *Melick* v. *Dayton,* 34 N. J. Eq. (7 Stew.) 245. Where there has been no fraud or misrepresentation, the purchaser is neither liable for a surplus nor entitled to a deduction on account of any deficiency in the quantity or measurement of the premises mentioned in the contract or deed. *Morris Canal Co.* v. *Emmett,* 9 Paige Ch. (N. Y.) 168, 37 Am. Dec. 388. See *Northup* v. *Sumney,* 27 Barb. (N. Y.) 196; *Mann* v. *Pearson,* 2 Johns. (N. Y.) 37; *Kirkpatrick* v. *McMillen,* 14 La. 497; *Powell* v. *Clark,* 5 Mass. 355 4 Am. Dec. 67; *Clark* v. *Davis,* 32 N. J. Eq. (5 Stew.) 530; *Beach* v. *Stearnes,* 1 Aik. (Vt.) 325. It seems that while a deficiency in the quantity of the land sold may be set up by the vendee in an action to foreclose a mortgage given as part of the purchase price, it cannot be pleaded by the grantee of the vendee, who has assumed and covenanted to pay the mortgage as part of his purchase money. *Clark* v. *Davis. Supra.*

[53] *Melick* v. *Dayton,* 34 N. J. Eq. (7 Stew.) 245.

It has been held that a reply to a counter-claim, which sets up a prior mortgage on the premises, alleging a material mistake in the description of the lands in the defendant's mortgage, and that it was not intended to cover the same premises as the mortgage sought to be foreclosed, is good on demurrer.[54] And under executory contracts relief will be granted, where it clearly appears that the parties acted under a mutual mistake as to the quantity of land sold, and it is proved that the deficiency was material, if the mistake on the part of the vendee was caused by the misrepresentation of the vendor, although not fraudulently made.[55] Thus, where the owner of a farm, innocently but untruly, states the quantity of land contained therein, and a purchaser, relying upon the statement, buys the land and takes a deed thereof, and subsequently discovers that the actual quantity deeded to him is materially less than that stated, he will be entitled to plead such deficiency as a defence in abatement in an action to foreclose a mortgage given by him as part of the purchase money.[56]

§ 435. Defence of undue influence.—A contract made between persons sustaining relations of trust and confidence, where it appears that the stronger and controlling mind has obtained an advantage, will be set aside as fraudulent unless the beneficiary shows good faith in the transaction.[57] Thus,

[54] *Porter* v. *Reid,* 81 Ind. 569.

[55] *Belknap* v. *Sealey,* 14 N. Y. 143, 67 Am. Dec. 120, aff'g 2 Duer (N. Y.) 570. Where the statement made by the vendor of the quantity of land sold is mere matter of description and not of the essence of the contract, no relief will be granted. *Stebbins* v. *Eddy,* 4 Mason, C. C. 414. See this case, collating the authorities, for a full discussion as to when a court will grant relief for a deficiency in the quantity of land purchased.

[56] *Paine* v. *Upton,* 87 N. Y. 327, 41 Am. Rep. 371. See *Couse* v. *Boyles,* 4 N. J. Eq. (3 H. W. Gr.) 212, 38 Am. Dec. 514; *Darling* v. *Osborne,* 51 Vt. 148; *Quesnel* v. *Woodlief,* 2 Hen. & Munf. (Va.) 173; *Hill* v. *Buckley,* 17 Ves. 395; *Shovel* v. *Bogan,* 2 Eq. Cas. Abr. 688.

[57] *Spargur* v. *Hall,* 62 Iowa, 498; *Leighton* v. *Orr,* 44 Iowa. 679; *Tucke* v. *Buchholz,* 43 Iowa, 415.

where a daughter, through undue influence, and without an adequate consideration, procured from her aged and infirm mother the execution of a note and mortgage, it was held that these obligations should be canceled upon the petition of the heirs of the mother.[58] And relief may be granted as against a mortgage extorted by a son from his parents by oppressive means and for an inadequate consideration, while he was practically in a position of guardianship over them and their property.[59]

Where one standing in *loco parentis* to minor owners of real estate, who are accustomed to obey him, and are ignorant of business affairs, induces them after they have attained their majority, to execute to him a mortgage, it may be impeached for fraud and undue influence.[60] And where a man, who lived for years in unlawful relations with a woman who shared his home and who claimed to be a spiritualistic medium and to have daily communication with his deceased wife, executed a mortgage in favor of such woman, it was held that fraud and undue influence would be presumed in the absence of proof of a valid consideration for the conveyance.[61]

§ 436. Duress as a defense.—A defendant may show as a defence to an action to foreclose a mortgage that the instrument was executed under duress, and that it is for that reason, void.[62] The duress need not be actual physical restraint,

[58] *Spargur* v. *Hall,* 62 Iowa, 498. See also *Sims* v. *Sims,* 101 Mo. App. 407, 74 S. W. 449.

[59] *Bowe* v. *Bowe,* 42 Mich. 195.

[60] *Tucke* v. *Buchholz,* 43 Iowa, 415.

[61] *Leighton* v. *Orr,* 44 Iowa, 679.

[62] *Vinton* v. *King,* 86 Mass. (4 Allen) 562, 564. See *Eadie* v. *Slimmon,* 26 N. Y. 9, 82 Am. Dec. 595; *Sears* v. *Shafer,* 1 Barb. (N. Y.) 408, 6 N. Y. 272; *Whelan* v. *Whelan,* 3 Cow. (N. Y.) 537; *Evans* v. *Ellis,* 5 Den. (N. Y.) 640; *Schoener* v. *Lissauer,* 36 Hun (N. Y.) 100; *Mills* v. *Rodewald,* 17 Hun (N. Y.) 297, 304; *Howell* v. *Ransom,* 11 Paige Ch. (N. Y.) 538; *Ellis* v. *Messervie,* 11 Paige Ch. (N. Y.) 467; *Spargur* v. *Hall,* 62 Iowa, 498; *First Nat. Bank of Nevada* v. *Bryan,* 62 Iowa, 42; *Bosworth* v. *Sandlin,* 46 Fla. 532, 35 So. 66.

In the following cases the facts were held not to show duress *Kittel* v. *Schmieder,* 89 App. Div.

or duress of the person; it may be a species of force, terrorism or coercion which overcomes free agency, and under which fear seeks security in concession to threats and to apprehensions of injury.[63] But the mortgagee must be responsible for, or participate in, the duress or force in order to render the mortgage invalid.[64]

The defendant may show that the note was paid, as well as given, under duress, such as a threat to have the obligor's son arrested and prosecuted for burglary, larceny or other crime;[65] but if the money be voluntarily paid in fulfillment of such an agreement, it cannot be recovered.[66] The defence of duress is available to one who stands in the relation of surety as well as to the principal.[67] Where threats of a criminal prosecution are resorted to, for the purpose of overcoming the will of the party threatened by intimidating or terrifying him, they amount to such duress or pressure as will avoid a contract thereby obtained.[68] And where a person has been induced by threats of a groundless prosecution to execute a note and mortgage, a court of equity will grant relief and restrain their collection.[69]

618, 85 N. Y. Supp. 977; *Dispeau* v. *First National Bank,* 24 R. I. 508, 53 Atl. 868; *Detroit National Bank* v. *Blodgett,* 115 Mich. 160, 73 N. W. 120.

Duress is a personal defense and is not available on foreclosure in favor of purchasers of the equity of redemption. *West* v. *Miller,* 125 Ind. 70, 25 N. E. 143.

[63] *Eade* v. *Slimmon,* 26 N. Y. 9, 82 Am. Dec. 395, and *Lefebvre* v. *Dutruit,* 51 Wis. 326, 37 Am. Rep. 833. *State Bank* v. *Hutchinson,* 62 Kan. 9, 61 Pac. 443.

[64] *J. M. Robinson, Norton & Co.* v. *Randall,* 147 Ky. 45, 143 S. W. 769.

[65] *Schultz* v. *Culbertson,* 49 Wis. 122; *Williamson-Halsell, Frazier Co.* v. *Ackerman,* 77 Kan. 502, 20 L.R.A.(N.S.) 484, 94 Pac. 807; *Gray* v. *Freeman,* 37 Tex. Civ. App. 556, 84 S. W. 1105; *National Bank of Republic* v. *Cox,* 47 App. Div. 53, 62 N. Y. Supp. 314. See *Perkins* v. *W. B. Adams & Co.* 17 Tex. Civ. App. 331, 43 S. W. 529.

[66] *Schultz* v. *Culbertson,* 49 Wis. 122.

[67] *Ingersoll* v. *Roe,* 65 Barb. (N. Y.) 346.

[68] *Eadie* v. *Slimmon,* 26 N. Y. 9, 82 Am. Dec. 395; *Fisher* v. *Bishop,* 36 Hun (N. Y.) 112, 114; *Haynes* v. *Rudd,* 30 Hun (N. Y.) 239, 83 N. Y. 251; *Williams* v. *Bayley,* 35 L. J. Ch. 717.

[69] *James* v. *Roberts,* 18 Ohio, 548.

Where the consideration of a bond is an agreement to interfere with the due administration of a criminal prosecution, or its execution is procured by duress, it will not be binding on the obligor.[70] But, if such a bond is voluntarily executed for the purpose of making reparation to the persons defrauded by the obligor, it will be binding, notwithstanding the fact that such persons were prosecuting the obligor for the fraud, and such prosecution was pending at the time of the execution of the bond.[71]

§ 437. Duress under Ohio doctrine.—In one case[72] the supreme court of Ohio held, that in an action by a mortgagee against the mortgagor under the statute,[73] to recover possession of the lands mortgaged, the fact that such mortgage was given to compound a felony, is not available as a defence. The court say, Okey, C. J., writing the opinion, that, "An examination of these cases will show very clearly, that under the law as it existed before the adoption of the Code of Civil Procedure of 1853, there was no such defence to an action of ejectment based on a mortgage like this; nor could a bill in chancery, founded on such facts, be entertained to restrain such action or quiet the title of the mortgagor. As against such mortgage the only relief in the courts available to the mortgagor or his heirs, on the facts here stated, was a bill to redeem. It is urged, however, that the rule is now very different, and that by reason of the blending of legal and equitable actions and defences, under the Code of Civil Procedure, the defence of illegality is equally available to the defendant whether an action is brought upon the note or upon the mortgage to obtain a sale of the

[70] *Avery* v. *Layton,* (Pa.) 12 Crit. Rep. 159, 19 Pitts. L. J. 84; 21 Chicago Leg. News, 47; *Bentley* v. *Robson,* 117 Mich. 691, 76 N. W. 146.

[71] *Avery* v. *Layton,* (Pa.) 12 Crit. Rep. 159, 19 Pitts. L. J. 84, 21 Chicago Leg. News, 47.

[72] *Williams* v. *Englebrecht,* 37 Ohio St. 383.

[73] Ohio Civil Code, § 558, Rev. Stat. §§ 57, 81.

property, or for the recovery of the possession of the land under the mortgage. True, the rights of parties, with respect to a few matters, are changed by the Code, as, for instance, the acknowledgment of a debt sufficient to take a case out of the statute of limitations, must now be in writing; and the practical effect of permitting, in a proper case, the determination of the rights of the parties, legal and equitable, in the same suit, enables a person sometimes to secure rights, which, under the former practice, would have been lost. But, with the exception of the express changes referred to, the rights of parties are unaffected by the Code.

This view is well expressed in Dixon v. Caldwell,[74] where it was said: 'The distinction between legal and equitable rights exists in the subjects to which they relate, and is not affected by the former mode of procedure that may be prescribed for their enforcement. The Code abolished the distinction between actions at law and suits in equity, and substituted in their place one form of action, yet the rights and liabilities of parties, legal and equitable, as distinguished from the mode of procedure, remain the same since, as before, the adoption of the Code.' As the heirs of the mortgagor could, in a case like this, have maintained a bill under the former practice, to redeem, they may, of course, obtain the same relief in this case by cross-petition.[75] This is not a change of the rights of the parties. But, as we have seen, a bill in chancery could not have been entertained to restrain an action of ejectment on a mortgage like this, and hence the heirs of the mortgagor cannot maintain a cross-petition for such relief in this case. To hold otherwise is to affirm that the Code has effected most material changes in the rights of the parties, without any words to indicate a purpose to make such change."

[74] 15 Ohio St. 412, 415, 86 Am. Dec. 487.

[75] Ohio Rev. St. § 5071.

§ 438. Mortgage executed by married woman under duress.—Where the signature of a woman to a mortgage was obtained by duress, the mortgage purporting in terms to charge her separate estate, and stating that the consideration therefor was for the benefit of such estate, it may be shown in defense that such statement was not true, that the note was not given in the course of any separate business carried on by her, but that it was obtained by duress and fraud. Such a mortgage cannot be enforced against her even in the hands of a *bona fide* holder.[76] Thus, where a woman's husband was illegally restrained in the office of an attorney, who represented to her that unless she executed a mortgage on her homestead, her husband would be arrested on a charge of felony, and she executed the mortgage sued upon, solely to avoid his arrest, the mortgage was held to have been obtained under duress and therefore to be void.[76a]

But it will not be a good plea of duress in an action to foreclose a mortgage executed by a husband and wife, that she was induced to sign the mortgage through representations that the plaintiff would pursue legal remedies against the husband, to collect the debt secured, and would sell them out of house and home, in case she did not execute it.[77] And where a husband threatened to poison himself unless his wife signed a note as security for him, which threat was conveyed to her through the payee, by means where of she was induced to sign such note, the court held that this did not amount to such duress as would avoid her contract.[78]

Where a public defaulter disclosed his situation and his liability to a criminal prosecution to his wife, and urged her to execute a mortgage to secure his sureties, declaring at the

[76] *Loomis* v. *Ruck,* 56 N. Y. 462.

[76a] *First Nat. Bank of Nevada* v. *Bryan,* 62 Iowa, 42; *Green* v. *Scranage,* 19 Iowa, 461, 87 Am. Dec. 447.

[77] *Buck* v. *Axt,* 85 Ind. 512. But see *Nebraska Central Building & Loan Asso.* v. *McCandless,* 83 Neb. 536, 120 N. W. 134.

[78] *Wright* v. *Remington,* 41 N. J. L. (12 Vr.) 48, 32 Am. Rep. 180.

time that he would commit suicide before he would go to jail, and she executed, acknowledged and delivered the mortgage without final objection after several days' hesitation and importunity—the mortgagees having no knowledge of her reluctance, and no prosecution having been commenced or threatened against the husband, and he not having represented to his wife that there had been—the mortgage was held to be valid.[79]

§ 439. Duress of person.—Where a note and mortgage are obtained from a prisoner falsely charged with felony, they are obtained under duress and are void in the hands of one who received them with knowledge of the facts.[80]

It is a general rule that the assignment of property by a wife to free her husband from imprisonment, must be obtained under circumstances which leave no doubt either of the validity of the claim against the husband or of the full consciousness on her part of the effect of her own deed.[81] It matters not whether the threats are made by the husband or by a third party against the husband, provided they be of such a character as to show beyond a question that the wife acted under an apprehension of personal injury or grievous wrong.[82] Thus, it has been held, that terrifying a woman so as nearly to produce hysterics, by threatening to prosecute her husband for alleged embezzlement, will be such coercion

[79] *Lefebvre* v. *Dutruit,* 51 Wis. 326, 37 Am. Rep. 833. See also *Smith* v. *Allis,* 52 Wis. 337 and *Wright* v. *Remington,* 41 N. J. L. (12 Vr.) 48, 32 Am. Rep. 180, aff'd 43 N. J. L. (14 Vr.) 451; *Shell* v. *Holston National Building & Loan Asso.* 52 S. W. 909 (Tenn.); *Butner* v. *Blevins,* 125 N. C. 585, 34 S. E. 629; *Walker* v. *Nicrosi,* 135 Ala. 353, 33 So. 161; *Jouchert* v. *Johnson,* 108 Ind. 436, 9 N. E. 413.

[80] *Osborn* v. *Robbins,* 36 N. Y. 365, 4 Abb. (N. Y.) Pr. N. S. 15, 21. See *Strong* v. *Grannis,* 26 Barb. (N. Y.) 123; *Richards* v. *Vanderpoel,* 1 Daly (N. Y.) 71, 75, 76; *Foshay* v. *Ferguson,* 5 Hill (N. Y.) 154; *Watkins* v. *Baird,* 6 Mass. 510, 4 Am. Dec. 170; *Severance* v. *Kimball,* 8 N. H. 386; *Richardson* v. *Duncan,* 3 N. H. 508; *Cumming* v. *Ince,* 11 Ad. & E. N. S. 112, 119.

[81] *Barry* v. *Equitable Life Assurance Society,* 59 N. Y. 587; *Jones* v. *Diederich,* 3 Daly (N. Y.) 177; *Wallach* v. *Hoexter,* 3 How. (N. Y.) Pr. N. S. 196.

[82] *Rexford* v *Rexford,* 7 Lans. (N. Y.) 6, 8.

as will avoid a mortgage which was thus procured upon her separate property.[83]

It has been said that the constraint and duress which has generally availed to impeach a contract, has proceeded from actual violence or a well-grounded fear of personal injury;[84] and that duress and coercion, to prevail as a defence against a mortgage executed by a wife upon her separate estate, to secure her husband's debt, must go to the extent of depriving her of free volition by reason of fear of personal injury.[85]

Where a husband, through the procurement of one of the payees of a note secured by mortgage, threatens that unless his wife signs such note he will poison himself, such threat, being made to induce her to sign the note, does not amount to personal duress and cannot be pleaded as a defence in an action to foreclose the mortgage.[86] The same has been held to be true where the husband was a defaulter, and induced his wife to sign a mortgage to secure his sureties by threatening to commit suicide rather than go to jail.[87] Where a mortgage was executed by a wife at the request of her husband, and she was impelled to such execution by his declaration that unless she signed the deed "she should not live with him in peace," this was held not sufficient coercion or duress to invalidate the mortgage deed.[88]

[83] *Eadie* v. *Slimmon*, 26 N. Y. 9, 82 Am. Dec. 395; *Wallach* v. *Hoexter*, 3 How. (N. Y.) Pr. N. S. 196, 198; *Schoener* v. *Lissauer*, 36 Hun (N. Y.) 100.

[84] *Wallach* v. *Hoexter*, 3 How. (N. Y.) Pr. N. S. 196. See *Loomis* v. *Ruck*, 56 N. Y. 462; *Rexford* v. *Rexford*, 7 Lans. (N. Y.) 6.

[85] *Wallach* v. *Hoexter*, 3 How. (N. Y.) Pr. N. S. 196; *Lord* v. *Lindsay*, 18 Hun (N. Y.) 484.

[86] *Wright* v. *Remington*, 41 N. J. L. (12 Vr.) 48, 32 Am. Rep. 180; aff'd 43 N. J. L. (14 Vr.) 451.

[87] *Lifebvre v. Dutruit*, 51 Wis. 326, 37 Am. Rep. 833.

[88] *Rexford* v. *Rexford*, 7 Lans. (N. Y.) 6.

CHAPTER XVIII.

ANSWERS AND DEFENCES.

Counter-claims and Estoppels.

§ 440. Allegation of counter-claim or set-off.
§ 441. Counter-claim on contract.
§ 442. Who may plead a counter-claim or set-off.
§ 443. Counter-claim against assignee of mortgage.
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§ 459. Estoppel against purchaser of mortgaged premises subject to the mortgage.
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§ 461. Estoppel against purchaser subject to usurious mortgage.

§ 440. Allegation of counter-claim or set-off.—In an action to foreclose a mortgage, in a court of equity, the mortgagor is entitled to set off a debt due to him from the complainant in any case where a set-off would be allowed in an action at law,[89] and also in peculiar cases of equity not

[89] *Hunt* v. *Chapman*, 51 N. Y. 555; *Real Estate Trust Co.* v. *Keech*, 7 Hun (N. Y.) 253; *Lathrop* v. *Godfrey*, 3 Hun (N. Y.) 739, 6

strictly within the rules of law;[90] as, in a case where an action is brought against the mortgagor and his surety on a note or bond secured by a mortgage, both obligors being made defendants and a judgment being demanded against both for the deficiency, a debt due to the mortgagor from the plaintiff, may be pleaded in answer by way of counter-claim.[91] The fact that a joint judgment may be rendered on a bond for any deficiency, will not exclude the allowance of a counter-claim in favor of one of the defendants.[92]

And where a mortgagor has overpaid the indebtedness secured by the mortgage, he will be entitled to plead the overpayment as a counter-claim and to demand judgment for the difference.[93] The debt which it is sought to set off must be one which is due and payable at the time of the commencement of the suit.[94] And to enable a defendant to avail himself of such set-off, if it is not liquidated by judgment, he must set up such defence by a cross-bill or an answer to the complaint.[95] But it seems that where junior incumbrancers are made parties defendant in a mortgage foreclosure, a cross-bill will be unnecessary, unless some affirmative relief other than a simple foreclosure is sought.[96]

T. & C. (N. Y.) 96; *Holden* v. *Gilbert,* 7 Paige Ch. (N. Y.) 208; *Chapman* v. *Robertson,* 6 Paige Ch. (N. Y.) 627, 31 Am. Dec. 264; *Gafford* v. *Proskauer,* 59 Ala. 264; *Spencer* v. *Almoney,* 56 Md. 551; *Lockwood* v. *Beckwith,* 6 Mich. 168, 72 Am. Dec. 62; *Allen* v. *Shackelton,* 15 Ohio St. 145. It was formerly held in New York that a defendant could not set off a demand, but must resort to a cross-bill to accomplish his object; *Troup* v. *Haight,* Hopk. Ch. (N. Y.) 239.

[90] *Irving* v. *DeKay,* 10 Paige Ch. (N. Y.) 319.

[91] *Bathgate* v. *Haskin,* 59 N. Y. 533.

[92] *Bathgate* v. *Haskin,* 59 N. Y. 533; *Holbrook* v. *Receivers of American Fire Ins. Co.* 6 Paige Ch. (N. Y.) 221; *Ex parte Hanson,* 12 Ves. 346.

[93] *Conaway* v. *Carpenter,* 58 Ind. 477.

[94] *Holden* v. *Gilbert,* 7 Paige Ch. (N. Y.) 208.

[95] *Holden* v. *Gilbert,* 7 Paige Ch. (N. Y.) 208; *Ward* v. *Seymour,* 51 Vt. 320.

[96] *Sales* v. *Sheppard,* 99 Ill. 616.

A different rule prevails in New Jersey,[97] where, in an action of foreclosure, the mortgagor or his grantee is not permitted to set off any demand against the mortgage debt, except partial payments, which operate as a release *pro tanto,* or an agreement that the sum desired to be set off should be received and credited as a payment.[98]

It has been held that the owner of an undivided half-interest in land, who pays a designated sum to the owner of the other half to induce him to execute a quit claim deed of his half to one holding a mortgage on the entire land, is not entitled to have such amount allowed on his note to the mortgagee, where the latter was never consulted as to whether he would allow such payment on the note.[99] But it is said that mortgagors to whom the beneficiary in the mortgage assigns his interest as indemnity for the mortgagors becoming sureties on an attachment bond upon which they are subsequently compelled to pay the judgment, are entitled to set off amount so paid as subsequent assignees of the mortgage.[1]

§ 441. Counter-claim on contract.—An action to foreclose a mortgage is, in law and in fact, an action to enforce the payment of its amount against the mortgagor or other persons liable for the debt, by a sale of the premises mortgaged and an application of the proceeds of such sale to such payment, and further, for a personal judgment against the persons liable for the deficiency, if any. Such an action, being against the mortgagor, or person liable upon the contract to pay the amount specified in the note or bond, is one against which an off-set might have been pleaded before the adoption

[97] *Parker* v. *Hartt,* 32 N. J. Eq. (5 Stew.) 225. See *Williamson* v. *Fox,* 30 N. J. Eq. (3 Stew.) 488.

[98] *Dudley* v. *Bergen,* 23 N. J. Eq. (8 C. E. Gr.) 397; *Williams* v. *Doran,* 23 N. J. Eq. (8 C. E. Gr.) 385; *Bird* v. *Davis,* 14 N. J. Eq. (1 McCart.) 467; *Dolman* v. *Cook,* 14 N. J. Eq. (1 McCart.) 56; *White* v. *Williams,* 3 N. J. Eq. (2 H. W. Gr.) 376. See *Petat* v. *Ellis,* 9 Ves. 562.

[99] *Mann* v. *Mann,* 49 Ill. App. 472.

[1] *Fisher* v. *Bull* (N. J. Err. & App.) 29 Atl. 440.

of the New York Code of Civil Procedure, and is one in which under the Code [2] a separate judgment may be rendered against the person liable for the debt, and for that reason the suit is subject to a counter-claim for any other cause of action arising on a contract, which the person liable for the payment of the debt, or on whose property the mortgage is a lien, has against the plaintiff at the time of the commencement of the action to foreclose.[3]

§ 442. Who may plead a counter-claim or set-off.—In an action to foreclose a mortgage a defendant who is personally liable for the debt, or whose land is bound by the lien of the mortgage, may plead any off-set arising on a contract to reduce or extinguish the claim;[4] but in order to enable the defendant to set up a counter-claim and to demand judgment upon it, he must be personally liable to the plaintiff, or claim some interest in the mortgaged premises. Where such personal liability is not in question, and where the defendant disclaims all interest in the mortgaged premises, he will not be permitted to plead a counter-claim or set-off,[5] because his counter-claim must in some way tend to reduce or to defeat the plaintiff's demand in order to be admissible. And where a defendant is not personally liable for the mortgage debt, his right to plead a counter-claim is said to be limited to matters arising out of the subject of the action.[6] This rule does not apply, however, where a defendant owning the equity desires to set up a claim which he has against the plaintiff, in order

[2] N. Y. Code Civ. Proc. §§ 501, 507.

[3] *Bathgate* v. *Haskin,* 59 N. Y. 533; *Hunt* v. *Chapman,* 51 N. Y. 555; *National Fire Ins. Co.* v. *McKay,* 21 N. Y. 191; *Holden* v. *Gilbert,* 7 Paige Ch. (N. Y.) 208; *Chapman* v. *Robertson,* 6 Paige Ch. (N. Y.) 627, 31 Am. Dec. 264. See *Harrison* v. *Bray,* 92 N. C. 488; *Penn Lumber Co.* v. *McPherson,* 133 N. C. 287, 45 S. E. 577.

[4] *Lathrop* v. *Godfrey,* 3 Hun (N. Y.) 739, 6 T. & C. (N. Y.) 96.

[5] *National Fire Ins. Co.* v. *McKay,* 21 N. Y. 191, 196.

[6] *Agate* v. *King,* 17 Abb. (N. Y.) Pr. 159. See *Bennett* v. *Bates,* 26 Hun (N. Y.) 364.

that his demand may off-set a portion of the mortgage lien upon his estate.

Where the complainant in an action to foreclose a mortgage is insolvent, and the respondent, who owns the equity of redemption, but who is not the original mortgagor, has a claim against him personally, such claim may be set off against the mortgage debt.[7] The insolvency of the complainant presents a case where "natural equity" is very strong. Insolvency will often raise an equity which will justify the interference of a court, even where the party desiring the set-off is himself the petitioner; and such insolvency will have greater force if the party opposing such equity is before a court seeking relief.[8]

In cases where a senior mortgagee is made a defendant in a suit to foreclose a junior mortgage, he may, by counter-claim, foreclose his senior mortgage.[9]

§ 443. Counter-claim against assignee of mortgage.— Where an action to foreclose a mortgage is brought in the name of a person other than the real owner of the mortgage, the mortgagor, or owner of the equity of redemption, may plead in answer any defence or set-off which he has against the real owner of the mortgage;[10] the defendant may also show that the plaintiff has received only a colorable or fraudulent assignment of the mortgage, and that he holds it for the benefit of one against whom the set-off or counter-claim would be a valid defence.[11]

[7] *Goodwin* v. *Keney*, 49 Conn. 563.

[8] *Lindsay* v. *Jackson*, 2 Paige Ch. (N. Y.) 581. See *Rowan* v. *Sharp's Rifle Manufacturing Co.* 29 Conn. 282, 31 Conn. 1; *Bowen* v. *Bowen*, 20 Conn. 127; *Pond* v. *Smith*, 4 Conn. 297; *Chamberlain* v. *Stewart*, 6 Dana. (Ky.) 32; *Blake* v. *Langdon*, 19 Vt. 485, 47 Am. Dec. 701; *Foot* v. *Ketchum*, 15 Vt. 258, 40 Am. Dec. 678. See *Central Appalachian Co.* v. *Buchanan*, 90 Fed. 454, 33 C. C. A. 598.

[9] *Ætna Life Ins. Co.* v. *Finch*, 84 Ind. 301.

[10] *Spear* v. *Hadden*, 31 Mich. 265. See *Chase* v. *Brown*, 32 Mich. 225.

[11] *Lathrop* v. *Godfrey*, 3 Hun (N. Y.) 739, 6 T. & C. (N. Y.) 96.

The assignee of a mortgage takes it subject to all equitable claims existing in favor of the mortgagor, or of his grantees, at the time of the assignment;[12] and where a party holds an executory contract for the conveyance to him of certain premises subject to a mortgage, it will be a good defence to an action of foreclosure brought by an assignee of the mortgage, that the defendant had, before the assignment of the mortgage, rendered services for the mortgagee which he had agreed to apply upon the mortgage in reduction of the amount due thereon.[13] But where services are rendered under a contract that they are to be applied in partial or complete payment and discharge of a mortgage, they will not constitute an absolute payment *pro tanto*, but will only give a claim in set-off, which will be subject to the bar of the statute of limitations, the same as any other counter-claim or set-off.[14]

§ 444. Requisites of counter-claim.—To entitle the defendant to a counter-claim or set-off, under the New York Code of Civil Procedure, the claim must be one existing in favor of the defendant and against the plaintiff, tending in some way to diminish or defeat the plaintiff's recovery;[15] an independent claim of the defendant cannot be pleaded in answer.[16] Thus, where an action is brought to foreclose a mortgage, in which the principal debtor and his sureties are made

[12] *Hartley* v. *Tatham*, 1 Robt. (N. Y.) 246, 24 How. (N. Y.) Pr. 505; *Black* v. *Thurston*, 71 N. J. Eq. 643, 63 Atl. 999; *Bartholf* v. *Bensley*, 234 Ill. 336, 84 N. E. 928; *Elser* v. *Williams*, 104 Ill. App. 238; *Paulsen* v. *Koon*, 85 Minn. 240, 88 N. W. 760; *Rochester Savings Bank* v. *Whitmore*, 25 App. Div. 491, 49 N. Y. Supp. 862; *Merkle* v. *Beidelman*, 165 N. Y. 21, 58 N. E. 757; *Schlitz* v. *Kock*, 138 App. Div. 535, 123 N. Y. Supp. 302; *Taylor* v. *Carmon, as adm'r. etc.* 153 N. C. 101, 68 S. E. 1058. See *Kerby* v. *Wade*, —Ark. —, 142 S. W. 1121; *Briggs* v. *Crawford*, — Cal. —, 121 Pac. 381.

[13] *Hartley* v. *Tatham*, 1 Robt. (N. Y.) 246, 24 How. (N. Y.) Pr. 505.

[14] *Ballow* v. *Taylor*, 14 R. I. 277, 280. See *Doody* v. *Pierce*, 91 Mass. (9 Allen) 141.

[15] N. Y. Code Civ. Proc. § 501.

[16] *National Fire Ins. Co.* v. *McKay*, 21 N. Y. 191. See *White* v. *Williams*, 3 N. J. Eq. (2 H. W. Gr.) 376.

parties defendant, and a personal judgment for deficiency is asked against them, a claim due from the plaintiff to the principal debtor may be allowed to offset the amount due upon the mortgage.[17] It is said that the several judgment required by the Code may be a judgment for only a part of the relief sought, so as to extinguish the right of one of the defendants in the land, and that the fact that a joint judgment may also be given does not exclude the allowance of a counterclaim.[18]

It is held in some states, that to entitle the defendant to set off against the mortgage debt, any payment made by him upon the mortgage, he must plead and show that it was made in direct payment of part of the debt, or that it was agreed that the sum should be received and credited on account of the mortgage;[19] for it is a well settled principle, that where a partial payment is made by a person indebted on more than one account, if there is no actual application of the payment by the debtor at the time to a particular indebtedness, the creditor may apply it as he pleases.[20]

§ 445. Counter-claim must be a debt due and payable.—To entitle a defendant to offset a debt as a counterclaim, it must be due to him from the plaintiff at the time the foreclosure suit is commenced.[21] And where a claim sought to be set off is for damages not yet liquidated,[22] it will

[17] *Bathgate* v. *Haskin,* 59 N. Y. 533. See *Holbrook* v. *Receivers of Am. Fire Ins. Co.* 6 Paige Ch. (N. Y.) 220; *Ex parte Hanson,* 12 V 346.

[18] *Bathgate* v. *Haskin,* 59 N. Y. 533, 540.

[19] *Dudley* v. *Bergen,* 23 N. J. Eq. (8 C. E. Gr.) 397; *Williams* v. *Doran,* 23 N. J. Eq. (8 C. E. Gr.) 385; *Bird* v. *Davis,* 14 N. J. Eq. (1 McCart.) 467; *Dolan* v. *Cook,* 14 N. J. Eq. (1 McCart.) 56; *White* v. *Williams,* 3 N. J. Eq. (2 H. W. Gr.) 376.

[20] *Bird* v. *Davis,* 14 N. J. Eq. (1 McCart.) 467. See 1 Am. Lead. Cas. (5th ed.) 339, side paging 276. See *post,* § 473.

[21] *Knapp* v. *Birnham,* 11 Paige Ch. (N. Y.) 330; *Holden* v. *Gilbert,* 7 Paige Ch. (N. Y.) 208.

[22] See *Bennett* v. *Bates,* 26 Hun (N. Y.) 364; *Provident Life & Trust Co.* v. *Parrott,* 49 Atl. 1131. (N. J.).

generally not be allowed, if the defendant has an adequate remedy at law.[23] Thus, in a suit to foreclose a mortgage securing a note given for a part of the purchase price of real estate, an answer has been held insufficient which merely sets up a breach of a covenant of warranty in the deed by which the land was conveyed to the defendant, by reason of an alleged lien of a gravel road tax on the premises, and asks that the amount of such tax be deducted from the note, but which does not state that the defendant has paid such tax, or that he has been in any way damaged; and which fails, also, to allege facts showing that the tax set out is a valid and binding lien upon the property under the existing statutes providing for such a tax.[24] Under the code practice in some of the states, however, such a claim may be allowed.

Where there are several suits to foreclose different mortgages, the defendant cannot be compelled to elect in which suit he will set up his counter-claim.[25]

§ 446. What are proper counter-claims.—A debt due from a complainant to a defendant at the time of filing a complaint for foreclosure, or when a subsequent installment of the mortgage becomes due and is attempted to be enforced, is a proper counter-claim or set-off.[26] But in a suit on a note and mortgage the maker is precluded from setting up any counter-claim which was known when he gave the note and mortgage.[27] Illegal interest paid upon a mortgage or included in it, is a valid set-off in an action to foreclose the mortgage;[28]

[23] *Hattier* v. *Etinaud,* 2 Desaus (S. C.) Eq. 570. But see *Peterson* v. *Reid,* 76 N. J. Eq. 377, 74 Atl. 662.

[24] *Cook* v. *Fuson,* 66 Ind. 521.

[25] *McLane* v. *Geer,* 3 Edw. Ch. (N. Y.) 245.

[26] *Holden* v. *Gilbert,* 7 Paige Ch. (N. Y.) 208. See *Somerset Colliery Co.* v. *John,* 219 Pa. 380, 68 Atl. 843.

Agreement to that effect is necessary. *Peterson* v. *Johnson,* 20 Wash. 497, 55 Pac. 932.

[27] *McLeish* v. *Hanson,* 157 Ill. App. 605. See *Hill* v. *Parsons,* 110 Ill. 107; *McCartney* v. *Washburn,* 52 Ill. App. 540; *Swartzbaugh* v. *Swartzbaugh,* 81 Ill. App. 196; *Babcock* v. *Farwell,* 146 Ill. App. 307.

[28] *Harbison* v. *Houghton,* 41 Ill. 522; *Pond* v. *Causdell,* 23 N. J. Eq.

and where the mortgagor has paid a bonus in addition to the lawful interest to procure an extension of time within which to pay the debt, the amount so paid in excess of the legal rate of interest, is a proper set-off in an action to foreclose the mortgage.[29]

Mere delay in foreclosing a mortgage, where there has been no request or notice to foreclose, and the interest has been kept up, is not enough to charge upon the mortgagee the loss occasioned by a depreciation in the value of the mortgaged premises; and such loss cannot be set up as a defence by way of counter-claim.[30]

In an action brought to foreclose a mortgage for $25,000, the defendant alleged in his answer that at the time of its execution, he, being desirous of purchasing certain real estate, borrowed $38,000 of the plaintiff, to be secured by mortgage on the premises to be purchased; that subsequently, at the plaintiff's request, he executed the mortgage sought to be foreclosed upon half of the premises, and an absolute deed of the other half, which it was agreed should be in fact a mortgage to secure the remaining $13,000; and that the plaintiff never claimed that the deed was an absolute conveyance. The defendant then prayed to be allowed to pay the $38,000 and all interest due thereon, and to have the deed canceled and the mortgage satisfied of record. The court held that the cause of action alleged in the answer arose out of the contract or transaction set forth in the complaint and constituted a proper counter-claim.[31]

Where by the terms of a policy of insurance, the mortgagee

(8 C. E. Gr.) 181; *Ward* v. *Sharp*, 15 Vt. 115.

[29] *Real Estate Trust Co.* v. *Keech*, 7 Hun (N. Y.) 253; *Dunlap's Adm'r* v. *Mueller*, 1 Cin. Supr. Ct. Rep. (Ohio) 486.

[30] *Merchants' Ins. Co.* v. *Hinman*, 34 Barb. (N. Y.) 410, 13 Abb. (N. Y.) Pr. 110.

[31] *Bernheimer* v. *Willis*, 11 Hun (N. Y.) 16.

A claim arising from a transaction not connected with the notes or trust deed, security sued upon, cannot be made a counterclaim. *Alderton* v. *Conger*, 78 Ill. App. 533.

is required to notify the company of any change of ownership, and he neglects so to do although requested to by the purchaser of the mortgaged property by reason whereof the insurance company is relieved from all liability on the policy, the purchaser may, in an action to foreclose the mortgage, set up a counter-claim for damages arising from loss by fire.[32] A claim for rent cannot be made the basis of a counter-claim in an action to foreclose a purchase money mortgage, where the mortgagee remained in possession after transfer.[33] One, who, with his wife executed a joint and several bond with mortgage security, may, in an action by the assignee to foreclose the mortgage and recover a deficiency of judgment against the husband and wife individually, counter-claim an individual claim against the mortgagee which will inure to the benefit of both the husband and wife.[34]

§ 447. Other matters of proper counter-claim.—In an action on one of a series of notes secured by mortgage, the defendant answered, setting up the invalidity of the foreclosure proceedings upon another note of the same series, and asked that he might be allowed to redeem; the court held that the matter set out in the answer constituted a good counter-claim, and that the defendant was entitled to the relief asked.[35] A mortgagor may also set up a counterclaim for the conversion of a sawmill which was covered by a mortgage on land.[36] Breach of covenant may be made the basis of a counter-claim.[37] Where in an action to foreclose a mortgage, the answer alleged, "as a separate defence and counter-claim,"

[32] *First National Bank, as trustee, etc.* v. *Renn,* 63 Kan. 334, 65 Pac. 698. See also *Detwiler* v. *Hibbard,* 66 Ill. App. 82.

[33] *McMichael* v. *Webster,* 54 N. J. Eq. 478, 35 Atl. 663.

[34] *American Guild of Richmond, Virginia* v. *Damon,* 186 N. Y. 360.

[35] *Fouts* v. *Mann,* 15 Neb. 172.

[36] *Aultman & Taylor Co.* v. *Meade,* 121 Ky. 241, 123 Am. St. Rep. 193, 89 S. W. 137.

[37] *Frenche* v. *McConnell,* 38 Atl. 687 (N. J.); *Kuhnen* v. *Parker,* 56 N. J. Eq. 286, 38 Atl. 641; *Cassada* v. *Stabel,* 98 App. Div. 600, 90 N. Y. Supp. 533.

that the mortgagee had been in possession of the premises under an agreement to apply the profits to the payment of the mortgage debt, and stated the amount of profits received by the plaintiff, the court held that whether such facts constituted a counter-claim or not, evidence thereof was admissible under the answer as showing payment *pro tanto*.[38] The reason for this would seem to be, that a payment of money made on account of a mortgage is not a cause of action which must be pleaded by the defendant as a counter-claim in order to enable him to prove it in a suit to foreclose the mortgage.[39]

It has been said that where the plaintiff in a mortgage foreclosure suit is insolvent, and the defendant who owns the equity of redemption, but is not the original mortgagor, has a claim against him personally, such claim may be set off against the mortgage debt.[40]

When an answer sets up facts tending to show that a mortgage sought to be enforced is invalid, such facts do not constitute a counter-claim which calls for a reply.[41] Thus, where an answer sets up facts tending to show that a bond or note and mortgage sued upon are void for usury and asks that they be delivered up to be canceled, without explicitly stating that such facts are alleged as a counter-claim, such an allegation will not constitute a counter-claim, but merely a defence to the action, and no reply will be required.[42]

To entitle the defendant to set up a counter-claim it must be based upon a legal obligation, and not merely upon an equitable or supposed right.[43] Thus, in an action to foreclose a mortgage executed by a gas light company, another gas

[38] *Ford* v. *Smith*, 60 Wis. 222.

[39] *Hendrix* v. *Gore*, 8 Oreg. 406.

[40] *Goodwin* v. *Keney*, 49 Conn. 563.

[41] *Vasser* v. *Livingstone*, 13 N. Y. 248. See *Bates* v. *Rosekans*, 37 N. Y. 409; *Agate* v. *Keen*, 17 Abb. (N. Y.) Pr. 159; *Caryl* v. *Williams*, 7 Lans. (N. Y.) 416.

[42] *Barthett* v. *Elias*, 2 Abb. N. Y.) Pr. N. C. 364; *Equitable Life Association* v. *Cuyler*, 12 Hun (N. Y.) 247, aff'd 75 N. Y. 511.

[43] *Smith* v. *Billings*, 170 Ill. 543, 49 N. E. 212.

light company, which had succeeded to the rights of the mortgagor, set up a counter-claim in substance, that A., the real principal for whom plaintiff acted, and certain associates of his, who were stockholders of defendant, and also of certain other gas light companies, all of whom were interested in certain patents, requested and instigated defendant to make experiments to test the value of such patents, and that by the aid of such services the other corporations were enabled to sell the rights owned by them for a large price; defendant did not allege an express agreement or promise to pay for such services, but claimed an implied promise from the fact of the request and the benefits derived. The court held the claim untenable, and that the facts did not constitute a counter-claim.[44]

The New York Code of Civil Procedure requires that where a defendant deems himself entitled to an affirmative judgment against the plaintiff, he must demand such judgment in his answer.[45] The same rule, it seems, prevails in New Jersey.[46]

§ 448. Counter-claim for damages.—In an action brought by a vendor to foreclose a mortgage given for the purchase money of real estate conveyed by a deed of general warranty, the vendee and mortgagor may set up as a defence and counter-claim for damages, failure of title to the property;[47] but if the defendant has been in possession of the premises, he will not be entitled to interest in estimating the damages sustained because of such failure of his title, although a judgment in ejectment may have been recovered against him.[48] In such an action, the mortgagor, as a defence, may set up a counter-claim for damages by reason of

[44] *Davidson* v. *W. G. L. Co.* 99 N. Y. 558.

[45] N. Y. Code Civ. Proc. § 509.

[46] See *Emley* v. *Mount,* 32 N. J. Eq. (5 Stew.) 470.

[47] *Chambers* v. *Cox,* 23 Kan. 393; *Wacker* v. *Straub,* 88 Pa. St. 32. See *post,* §§ 499, 500.

[48] *Wacker* v. *Straub,* 88 Pa. St. 32.

the fraud of the mortgagee and vendor in concealing from him material facts as to the situation and extent of the premises.[49] And in an action against a mortgagor upon a purchase money mortgage, he will be entitled to set up as a defence a counter-claim for any excess of the agreed price paid through the vendor's misrepresentations of the extent of the property, whether such misrepresentations were willful or innocent.[50]

Where a grantor of lands by fraud induces a mortgagor to purchase a defective title, and to execute a mortgage securing part of the purchase money, the mortgagor will be entitled, in an action to foreclose such mortgage, to recoupment to the extent of his actual damages; and if such damages are equal to or exceed the amount of the mortgage, they will constitute an entire defence to the foreclosure.[51] Where the defect of title extends only to a part of the lands, it will constitute a breach of the covenant of seizin, if not also of the covenant of warranty, and a counter-claim for damages for such breach will be a proper defence in an action to foreclose a purchase money mortgage thereon.[52]

§ 449. **Counter-claim for damages for fraud.**—Where a mortgage is given for a portion of the purchase money of lands, a subsequent grantee who has assumed the payment of such mortgage may interpose a counter-claim for damages for fraud and misrepresentation in the sale of the property to the mortgagor, made to induce him to purchase.[53] But

[49] *Pierce* v. *Tiersch*, 40 Ohio St. 168; *Allen* v. *Shackelton*, 15 Ohio St. 145. See *post*, § 499.

[50] *Baughman* v. *Gould*, 45 Mich. 481; *Pierce* v. *Tiersch*, 40 Ohio St. 168, 172. See *post*, §§ 499, 500.

[51] *Greene* v. *Tallman*, 20 N. Y. 191, 75 Am. Dec. 384; *Ludington* v. *Slauson*, 38 N. Y. Supr. Ct. (6 J. & S.) 81; *Lathrop* v. *Godfrey*, 3 Hun (N. Y.) 739, 6 T. & C. 96; *Abbott* v. *Allen*, 2 Johns. Ch. (N. Y.) 519, 7 Am. Dec. 554; *Parker* v. *Hartt*, 32 N. J. Eq. (5 Stew.) 225.

[52] *Tallmage* v. *Wallace*, 25 Wend. (N. Y.) 107; *Rice* v. *Goddard*, 31 Mass. (14 Pick.) 293; *Latham* v. *McCann*, 2 Neb. 276.

[53] See *Reed* v. *Latson*, 15 Barb. (N. Y.) 9. See *ante*, chap. XVII.

where there is no allegation of fraud, and no personal claim is made against the grantee of the mortgagor, he cannot set up, by way of answer, that he purchased the premises of the plaintiff's grantee and was the assignee of the plaintiff's covenants of warranty and against incumbrances, and had been evicted by a paramount title acquired under a sale for certain taxes which were incumbrancers at the time of the plaintiff's grant. In such a case the grantee will be confined to his remedy by an action at law.[54] And a purchaser from a mortgagor cannot set up as a counter-claim the fraud practiced upon him by a person other than the plaintiff after the execution of the mortgage, where there is nothing to connect the plaintiff with the fraud of the mortgagor.[55]

A mortgage executed as security for advances is valid only for the amount of the advances actually made, and the mortgage will be a lien to the extent of the amount actually due upon the mortgage; and the mortgagee's failure to complete the contemplated advances, will afford ground for merely nominal damages by way of set-off, although the mortgagor may be seriously injured by the failure of the mortgagee to advance the stipulated amount,[56] except in cases where there is an express agreement by the mortgagee to make an advancement of the full amount stipulated.

But where the mortgage contains a covenant on the part of the mortgagee to release portions of the premises on sales thereof made by the mortgagor, he will be entitled, on breach of such covenant, to damages sustained by reason of such refusal, which damages will constitute an equitable set-off in an action to foreclose the mortgage.[57]

[54] *National Fire Ins. Co.* v. *McKay,* 21 N. Y. 191; *Greene* v. *Tallman,* 20 N. Y. 191, 75 Am. Dec. 384; *Abbott* v. *Allen,* 2 Johns. Ch. (N. Y.) 519.

[55] *Reed* v. *Latson,* 15 Barb. (N. Y.) 9.

[56] *Dart* v. *McAdam,* 27 Barb. (N. Y.) 187. See *ante,* §§ 404, 405.

[57] *Warner* v. *Gouverneur's Ex'rs.* 1 Barb. (N. Y.) 36.

§ 450. **Counter-claim or set-off must be pleaded.**—Where a grantor brings an action to foreclose a mortgage executed to secure purchase money, to enable the defendant to avail himself of a set-off or counter-claim not liquidated by judgment, he must set up such defence by answer to the complaint.[58] Thus, where one of the grantors of land sued on bonds for the purchase money, of which he was the sole owner, an objection to a counter-claim for breach of covenants on the ground that the other grantor was not a party, must be taken by answer or demurrer or it will be waived.[59]

§ 451. **Estoppel in pais against the mortgagor.**—In an action to foreclose a mortgage the defendant is estopped by his deed from denying the validity of his title to the mortgaged property, and an answer setting up the defense that the mortgage is of no effect and constitutes no lien upon the premises described in the complaint, is unavailing because it pleads no facts; it is merely a statement of a conclusion of law.[60] And where a mortgage of land purports to convey the fee, any title afterwards acquired by the mortgagor will strengthen the mortgage and inure to the benefit of the mortgagee. This is true, although the title to the property was in the government of the United States when the mortgage was executed, and was acquired by the mortgagor after a foreclosure of the mortgage.[61] And it has been held that a mortgage upon real property containing the usual covenants of warranty, executed by a person who subsequently becomes entitled to an estate in remainder therein, will attach to and may be enforced against such after-acquired estate; but such mortgage cannot affect the rights of a party holding an estate

[58] *Holden* v. *Gilbert*, 7 Paige Ch. (N. Y.) 208.

[59] *Ackerly* v *Villas*, 21 Wis. 88, 110. See also *Cummings* v. *Morris*, 25 N. Y. 625; *Schubert* v. *Harteau*, 34 Barb. (N. Y.) 449; *Briggs* v. *Briggs*, 20 Barb. (N. Y.) 477.

[60] *Caryl* v. *Williams*, 7 Lans. (N. Y.) 416.

[61] *Orr* v. *Stewart*, 67 Cal. 275.

for life in the property, and who was in the actual possession thereof when the mortgage was executed.[62]

It has been held that a mortgagor is estopped from alleging in his answer by way of defence, that the notes and mortgage, while executed to the plaintiff, were as a matter of fact given for goods purchased of a mercantile firm, of which he was a member, and were the property of such firm, and that the partners of such firm had made no assignment of their interest therein to the plaintiff.[63]

In an action to foreclose a mortgage, the mortgagor cannot be heard to complain of an indefinite description of the mortgaged property, whatever may be the effect of a sale under such a description.[64] A mortgagor is estopped from denying that his mortgage in fact covers all that it was supposed to cover, or all that the parties believed or intended that it should cover.[65] And one who deals with a foreign corporation by borrowing its money and executing a mortgage as security therefor, will be estopped from answering that the plaintiff had no authority to loan money where the mortgaged premises were situated, unless he shows that the corporation violated its charter or that some law prohibited the loan.[66] A mortgagor is also estopped to set up as a defense that the mortgage exceeds in amount the legal limit for a loan by a national bank seeking to foreclose.[67] But the holder of one of two notes secured by a mortgage will not be estopped from contesting the validity of the other note, where the notes were executed to different persons upon different considerations.[68]

[62] *Iowa Loan & Trust Co.* v. *King,* 58 Iowa, 598.

[63] *French* v. *Blanchard,* 16 Ind. 143; *Trumble* v. *The State,* 4 Blackf. (Ind.) 435. See *Breeding* v. *Stamper,* 18 B. Mon. (Ky.) 175.

[64] *Graham* v. *Stewart,* 68 Cal. 374.

[65] *Madaris* v. *Edwards,* 32 Kan. 284.

[66] *Pancoast* v. *Travelers' Ins. Co.* 79 Ind. 172.

[67] *Mills County National Bank* v. *Perry,* 72 Iowa, 15, 2 Am. St. Rep. 228, 33 N. W. 341.

[68] *Coleman* v. *Witherspoon,* 76 Ind. 285.

A mortgagor is estopped from denying the recitals contained in his mortgage; [69] but it was held in a case where the mortgage recited that it was a purchase money mortgage, when in fact it was not for purchase money, that the wife's right of dower was not affected by such a recital.[70]

§ 452. Mortgagor estopped from denying his title.—A party who mortgages his property with covenants of title is estopped from pleading in defense to a foreclosure, that at the time of the execution of the mortgage he had no title to,[71] nor interest in,[72] the mortgaged premises, or any part thereof; neither can he set up as a defense a defect in his title,[73] or the existence of an outstanding paramount title in a third person, because he is estopped therefrom by his deed and will not be permitted to claim adversely to it.[74] Thus, a mortgagor is estopped from pleading in defense that the property mortgaged is trust property and that he had no right to mortgage it.[75] And where upon a conveyance of land to an executor as such, he gives back a purchase money mortgage as executor, the mortgagor, his grantees and all persons claiming under him or them, will be estopped from denying his appointment and authority as such executor.[76]

[69] *Neal* v. *Perkerson*, 61 Ga. 345.

[70] *Taylor* v. *Post*, 30 Hun (N. Y.) 446.

[71] *Strong* v. *Waddell*, 56 Ala. 471; *Boone* v. *Armstrong*, 87 Ind. 168; *Pancoast* v. *Travelers' Insurance Co.* 79 Ind. 172. See *post*, § 501; *Townsend* v. *Boyd*, 217 Pa. 386, 12 L.R.A.(N.S.) 1148, 66 Atl. 1099.

[72] *Sutlive* v. *Jones*, 61 Ga. 679; *Usina* v. *Wilder*, 58 Ga. 178; *Allen* v. *Lathrop*, 46 Ga. 133; *Boisclair* v. *Jones*, 36 Ga. 499.

[73] *Dime Sav. Bank* v. *Crook*, 29 Hun (N. Y.) 671.

[74] *Tefft* v. *Munson*, 57 N. Y. 97; *Bank of Utica* v. *Mersereau*, 3 Barb. Ch. (N. Y.) 528, 567; *Jackson* v. *Bull*, 1 Johns. Cas. (N. Y.) 81, 90; *Strong* v. *Waddell*, 56 Ala. 471; *Usina* v. *Wilder*, 58 Ga. 178; *Pike* v. *Galvin*, 29 Me. 183; *White* v. *Patten*, 41 Mass. (24 Pick.) 324; *Somes* v. *Skinner*, 20 Mass. (3 Pick.) 52; *Wark* v. *Willard*, 13 N. H. 389; *Kimball* v. *Blaisdell*, 5 N. H. 533, 22 Am. Dec. 476; *Macloon* v. *Smith*, 49 Wis. 200.

[75] *Boisclair* v. *Jones*, 36 Ga. 499.

[76] *Skelton* v. *Scott*, 18 Hun (N. Y.) 375.

§ 453. Estoppel against the mortgagor by his acts, declarations and agreements.—A mortgagor may be estopped by his acts, declarations and agreements from setting up defenses which would otherwise be valid;[77] as where he induces the plaintiff to take an assignment of a mortgage against him.[78] And where a mortgagee sells a bond and mortgage, which have been delivered to him to be held for the benefit of the mortgagor, at a usurious discount, and represents to the purchaser that the bond and mortgage are good and valid securities in his hands, in an action brought by the purchaser of the mortgage to foreclose the same, the mortgagor will be estopped from showing that it is void for usury.[79] And where a mortgagor, at the time of executing a mortgage, delivers to the mortgagee a certificate that there is no defence against it, in an action brought by the purchaser of the mortgage for foreclosure, the mortgagor cannot plead the defence, that there was fraud in obtaining the mortgage, or a misappropriation by the mortgagee of the moneys raised by its sale.[80]

And where the owner of a tract of land, covered by a mortgage given prior to his purchase, influenced a third person to purchase the mortgage by stating to him that it was all right and valid, and a lien upon the premises, and that he would pay the same, he will be estopped afterward from pleading a failure of consideration as a defence against a foreclosure brought by such third person.[81] Thus, where the plaintiff, being about to purchase a second mortgage, inquired of the defendant with regard to his personal liability for its payment, and the latter, with full knowledge that the

[77] See *Austen* v. *Richardson*, 67 App. Div. 166, 73 N. Y. Supp. 731.

[78] *Johnson* v. *Parmely*, 14 Hun (N. Y.) 398; *Norris* v. *Wood*, 14 Hun (N. Y.) 196.

[79] *Platt* v. *Newcomb*, 27 Hun (N. Y.) 186.

[80] *Hutchison* v. *Gill*, 91 Pa. St. 253. See *Reilly* v. *Haseltine*, 127 App. Div. 64, 111 N. Y. Supp. 457; *Nixon* v. *Haslett*, 74 N. J. Eq. 789, 70 Atl. 987.

[81] *Smith* v. *Newton*, 38 Ill. 230. See *Bassett* v. *Bradley*, 48 Conn. 224.

inquiry was made with reference to a purchase of the mortgage, replied that "he had assumed and agreed to pay the debt, as his deed would show," it was held that he was equitably estopped from denying his liability on the contract of assumption.[82]

Statements made by representatives of a deceased mortgagor to the effect that nothing had been paid on the mortgage, will not, however, operate as an estoppel where the holder of the mortgage parted with nothing on the faith of them.[83]

§ 454. Estoppel against married women.—A married woman is bound by an estoppel the same as any other person;[84] and this estoppel may extend to the conveyance of land by deed or by mortgage.[85] But there can be no estoppel where there is no fraud; yet there may be fraud without a preconceived design to mislead or deceive. The fraud may consist merely in a denial of what had previously been affirmed.[86] Thus, where a married woman makes a

[82] *Bassett* v. *Bradley,* 48 Conn. 224.

[83] *Myerstown Bank* v. *Roessler, as ex'r. etc.* 186 Pa. St. 431, 40 Atl. 963.

[84] *Orr* v. *White,* 106 Ind. 344; *Cupp* v. *Campbell,* 103 Ind. 213; *Vogel* v. *Leichner,* 102 Ind. 55. Under this rule the coverture of a married woman, who executed a mortgage to secure the bond of a third person, given to secure payment of a debt of her husband, is no defense to a suit to foreclose a mortgage. *Fowler* v. *Wood,* 78 Hun (N. Y.) 304, 60 N. Y. S. R. 176, 28 N. Y. Supp. 976. Neither will coverture be a valid defense in an action to foreclose a mortgage given for the purchase price of the lands mortgaged, where the bill seeks no personal decree against the *feme* defendant, but simply asks a foreclosure of the mortgage and a sale of the premises to pay the debt secured thereby. *Joseph* v. *Decatur Land, I. & F. Co.* 102 Ala. 346, 14 So. 739.

[85] *Ward* v. *Berkshire L. Ins. Co.* 108 Ind. 301. In this case it was held that it is immaterial to whom the check for the money loaned was made payable, for if the loan was made to the wife the mortgage is valid.

[86] *Ward* v. *Berkshire Life Ins. Co.* 108 Ind. 301. See *Blair* v. *Wait,* 69 N. Y. 113; *Continental Nat. Bank* v. *Nat. Bank of Com.* 50 N. Y. 575; *Pitcher* v. *Dove,* 99 Ind. 175; *Anderson* v. *Hubble,* 93 Ind. 570, 47 Am. Rep. 394.

representation by affidavit that a loan is for her benefit, which is relied on in good faith and believed to be true, she will be estopped, in a suit to foreclose a mortgage executed upon her lands to secure the loan, from denying the truth of such representation by asserting that the mortgage was given for a debt contracted by her husband.[87]

§ 455. Estoppel against title subsequently acquired by mortgagor.—Where a mortgage of land purports to convey the fee, any title subsequently acquired by the mortgagor, will strengthen the mortgage and inure to the benefit of the mortgagee in the absence of intervening equities;[88] and the rights of the mortgagee in such land cannot be divested or rendered subservient to the lien of a subsequent judgment or incumbrance.[89] The reason for this rule is that the mortgagor will be estopped, after the execution of a mortgage, from setting up the defense that he has acquired some new and independent title not covered by the mortgage.[90]

In a case where a mortgage containing the usual covenants, was executed upon real property by a person who had no title at the time, but who subsequently became entitled to an estate in remainder therein, it was held that the subsequently acquired title inured to the benefit of the mortgagee and that he could enforce his mortgage against such after-acquired estate.[91] But it has been held, where a grantor receives a mortgage for part of the purchase money of a conveyance, that the covenants in the mortgage will affect only the estate acquired from the mortgage and not an after-acquired title.[92] It is said, however, that, under the law as it now prevails in Missouri, a mortgagor occupies no such sub-

[87] *Ward* v. *Berkshire L. Ins. Co.* 108 Ind. 301.

[88] *Orr* v. *Stewart,* 67 Cal. 275; *Camp* v. *Grider,* 62 Cal. 20; *Sherman* v. *McCarthy,* 57 Cal. 507; *Rice* v. *Kelso,* 57 Iowa, 115.

[89] *Rice* v. *Kelso,* 57 Iowa 115.

[90] *Madaris* v. *Edwards,* 32 Kan. 284.

[91] *Iowa Loan and Trust Co.* v. *King,* 58 Iowa, 598.

[92] *Randal* v. *Lower,* 98 Ind. 255. See *Bradford* v. *Russell,* 79 Ind. 64.

servient relation to the mortgagee as will prevent him from acquiring an out-standing title and holding it against the mortgagee.[93]

§ 456. Other matters as defense in estoppel—Agreement to release lots.—In an action to foreclose a mortgage the defendant may plead in estoppel any fraud which will have the effect of avoiding a title otherwise valid, as an unfair representation or concealment on the part of the mortgagee;[94] but mere knowledge on the part of the mortgagee, that the mortgagor has conveyed an absolute estate in the mortgaged premises to a third party, will not estop him from asserting his legal rights against such third party at any time.[95] But it seems that a foreclosure cannot be defeated by mere presumption in favor of an issue raised by a subsequent incumbrancer as assignee of the mortgage, if such incumbrancer has not relied upon the records nor upon inquiry before taking the incumbrance.[96]

It has been said that an agreement by a mortgagee, that the mortgagor might subdivide the mortgaged premises into

[93] *Bush* v. *White,* 85 Mo. 339.

[94] *Storrs* v. *Barker,* 6 Johns. Ch. (N. Y.) 166; *Wendell* v. *Van Rensselaer,* 1 Johns. Ch. (N. Y.) 344; *Niven* v. *Belknap,* 2 Johns. (N. Y.) 573; *L'Amoureux* v. *Vandenburgh,* 7 Paige Ch. (N. Y.) 316, 32 Am. Dec. 635; *Lasselle* v. *Barnett,* 1 Blackf. (Ind.) 150, 41 Am. Dec. 217; *Dewey* v. *Field,* 45 Mass. (4 Metc.) 381, 38 Am. Dec. 376; *Spear* v. *Hubbard,* 21 Mass. (4 Pick.) 143; *Carter* v. *Longworth,* 4 Ohio 384; *Hoffman* v. *Lee,* 3 Watts (Pa.) 352; *Napier* v. *Elam,* 6 Yerg. (Tenn.) 108; *Peter* v. *Russell,* 2 Vern. 726; *Evans* v. *Bicknell,* 6 Ves. 173, 182. For modifications of the general rule, see *Patterson* v. *Esterling,* 27 Ga. 205; *Rangeley* v. *Spring,* 21 Me. 130; *Carpenter* v. *Cummings,* 40 N. H. 158; *Buswell* v. *Davis,* 10 N. H. 413; *Marston* v. *Brackett,* 9 N. H. 337; *Wade* v. *Green,* 3 Humph. (Tenn.) 547; *Meux* v. *Bell,* 1 Hare, 73; *Jones* v. *Smith,* 1 Hare, 43; *Paulsen* v. *Koon,* 85 Minn. 240, 88 N. W. 760. See also *Marden* v. *Dorthy,* 160 N. Y. 39, 46 L.R.A. 694, 54 N. E. 726.

For waiver of fraud, see *Daly* v. *Reineldt,* 97 App. Div. 147, 89 N. Y. Supp. 647.

[95] *Parker* v. *Banks,* 79 N. C. 480.

[96] *Jakway* v. *Jenison,* 46 Mich. 521.

town lots, and that, on the request of the mortgagor, he would release any one or more of such lots on the payment to him of a stipulated price per foot front thereof, will be treated also as an agreement, to release his mortgage on the parcels of land adjacent to the lots and designated on the plat as streets and alleys.[97] And where a mortgage expressly provides for subdividing the premises into lots, whenever the mortgagor may deem it advisable, the consent of the mortgagee to lay out the usual streets and alleys, will be implied, and when they are so laid out he will be bound by the plat.[98] In such a case, when the mortgagee adopted the plat by acting upon it and by making releases of the lots by their numbers, this, after the sale of lots to others, would estop any objection on his part that the mortgaged premises were not subdivided according to his express written assent, and would amount to a ratification of the subdivision as actually made; and parties purchasing would have the right to rely on admissions thus shown by his conduct and acts.[99] In a case where a person holding a mortgage upon a tract of land agreed with a party purchasing the land that he would release his mortgage lien, if such purchaser would sell certain chattels and deliver the proceeds thereof to a person designated, he will be estopped from foreclosing his mortgage on performance by the purchaser of his part of the contract.[1]

§ 457. Estoppel by assenting to, or encouraging a sale.—It is well established that a mortgagee may, by mere silence or failure to act, as well as by his declarations and conduct, estop himself from claiming rights in opposition to those of a party who acted upon his tacit encouragement;[2] because it is only natural justice that a party who claims an interest in property, and is privy to the fact that another is

[97] *Smith* v. *Heath,* 102 Ill. 130.
[98] *Smith* v. *Heath,* 102 Ill. 130.
[99] *Smith* v. *Heath,* 102 Ill. 130.
[1] *Burke* v. *Grant,* 116 Ill. 124.
[2] See *Trenton Banking Co.* v. *Duncan,* 86 N. Y. 221, 24 Alb. L. J. 390; *Wendell* v. *Van Rensselaer,* 1 Johns. Ch. (N. Y.) 344.

dealing with it as his own, and by his conduct influences a third person to act on the belief that he has no interest therein, or implies that it will not be asserted, will not be permitted to assert his claim against a title or a lien created by such other person to his prejudice, although he may derive no benefit from the transaction.[3] Thus, where a mortgagee stands by and advises or encourages a purchase of premises by a third person, who is ignorant of the claim of such mortgagee, he will be estopped from asserting such mortgage as against such purchaser,[4] for if a man suppresses facts which he is in duty bound to communicate, or by acts or words suggests a falsehood to the prejudice of a person who had a right to a full and correct statement of the facts in the case, his claim or lien will be postponed to that of the person who may be prejudiced by its enforcement.[5]

But it is said that a fraudulent intent is necessary to constitute an estoppel affecting the legal title to land;[6] yet if the declarations or conduct of a party were intended to deceive generally, or occurred under circumstances likely to deceive, they will be sufficient to establish the fraud.[7] And it is deemed an act of fraud for a party, cognizant at the time of his own rights, to suffer another, ignorant of those rights, to proceed under such ignorance in the purchase of the property, or in the improvement of it.[8]

It is well settled that prior to default in the payment of a debt secured by mortgage, the mortgagee has no right to

[3] See *McGovern* v. *Knox*, 21 Ohio St. 547, 8 Am. Rep. 83; *Nicholson* v. *Hooper*, 4 Myl. & Cr. 179.

[4] *Storrs* v. *Barker*, 6 Johns. Ch. (N. Y.) 166. See *Trenton Banking Co.* v. *Duncan*, 86 N. Y. 221, 24 Alb. L. J. 390; *Skirving* v. *Neufville*, 2 Desaus (S. C.) Eq. 194; *Nicholson* v. *Hooper*, 4 Myl. & Cr. 186.

[5] See *Storrs* v. *Barker*, 6 Johns. Ch. (N. Y.) 166; *Danley* v. *Rector*, 10 Ark. (5 Eng.) 211, 50 Am. Dec. 245.

[6] *Wendell* v. *VanRensselaer*, 1 Johns. Ch. (N. Y.) 344.

[7] See *Dezell* v. *Odell*, 3 Hill (N. Y.) 221; *Mitchell* v. *Reed*, 9 Cal. 204, 70 Am. Dec. 647; *Quirk* v. *Thomas*, 6 Mich. 76; *Horn* v. *Cole*, 51 N. H. 297, 12 Am. Rep. 111; *Adams* v. *Brown*, 16 Ohio St. 78.

[8] *Guffey* v. *O'Reiley*, 88 Mo. 418, 57 Am. Rep. 424.

forbid the mortgagor or his licensee from using the mortgaged premises in any manner which will not impair their value as a security. But after default he may, and under some circumstances equity requires that he should, interfere. Thus, where a mortgagee has notice of the fact that a railroad company is building its road across the mortgaged premises under a parol license or an unrecorded deed given by the mortgagor prior to his default, it is the duty of the mortgagee to notify the company of his rights and to forbid the further prosecution of the work. In case he fails to do this, and the company afterwards makes expenditures upon the work and improvements upon the mortgaged property, the licensee of the mortgagor will be held to be the licensee of the mortgagee also, and his interests will be fully protected on a foreclosure of the mortgage.[9]

§ 458. Estoppel by silence at a sale.—Where a person owns or has an interest in property and stands by and permits it to be sold without giving notice of his title or asserting his rights, he will be estopped from setting up his claim or title against the purchaser,[10] because it is his duty at the time of the sale to disclose his claim or title to the property, and if he fails to do so, an innocent purchaser, without knowledge of such title or claim, will not be made to suffer because of the owner's laches.[11]

[9] *Masterson* v. *West End N. G. R. R. Co.* 72 Mo. 342.

[10] See *Wendell* v. *VanRensselaer*, 1 Johns. Ch. (N. Y.) 344; *McPherson* v. *Walters*, 16 Ala. 714, 50 Am. Dec. 200; *Trapnall* v. *Burton*, 24 Ark. 399; *Danley* v. *Rector*, 10 Ark. (5 Eng.) 211, 50 Am. Dec. 245; *Shall* v. *Biscoe*, 18 Ark. 142; *Markham* v. *O'Connor*, 52 Ga. 198, 21 Am. Rep. 249; *Corbett* v. *Norcross*, 35 N. H. 99.

[11] *Thompson* v. *Blanchard*, 4 N. Y. 303. See *Brown* v. *Owen*, 30 N. Y. 541, 86 Am. Dec. 406; *Baldwin* v. *Brown*, 16 N. Y. 359; *Corkhill* v. *Landers*, 44 Barb. (N. Y.) 228; *Guthrie* v. *Quinn*, 43 Ala. 568; *Trapnall* v. *Burton*, 24 Ark. 399; *Shall* v. *Biscoe*, 18 Ark. 142; *Markham* v. *O'Connor*, 52 Ga. 198, 21 Am. Rep. 249; *Anderson* v. *Hubble*, 93 Ind. 570, 47 Am. Rep. 394; *Breeding* v. *Stamper*, 18 B. Mon. (Ky.) 175; *Corbett* v. *Norcross*, 35 N. H. 99; *Buckingham* v. *Smith*,

Thus, where a mortgagee is present at a public sale of the mortgaged property and it is announced that the title is unincumbered, and a purchaser buys under the belief that he is obtaining an unincumbered title, the mortgagee will be estopped from enforcing his mortgage against the purchaser, even though the mortgage was duly recorded at the time of the sale,[12] if he fails to make a correction of the announcement, because it would be a fraud to permit a party to assert a claim which his previous conduct had denied, especially if others had acted upon the fair interpretation of his conduct.[13] But it has been said that where the right, title and interest of a bankrupt in certain real estate is publicly sold by his assignee, and there is a mortgage on record against the premises at the time of the sale, the mortgagee will not be estopped from enforcing his mortgage because he was present at the sale and neglected to state his lien on the lands, especially if no inquiry was made of him.[14]

§ 459. Estoppel against purchaser of mortgaged premises subject to the mortgage.—Where a person buys lands, which the vendor had encumbered by mortgage to secure a debt to a third person, expressly agreeing with the vendor and the mortgagee to pay such debt, which is deducted from the purchase price, his title will be made subordinate to

10 Ohio, 288; *Hill* v. *Epley*, 31 Pa. St. 334; *Boston & P. R. R. Corp.* v. *New York & N. E. R. R. Co.* 13 R. I. 265; *First National Bank* v. *Hammond*, 51 Vt. 215; *Sturm* v. *Parish*, 1 W. Va. 135; *Smith* v. *Ford*, 48 Wis. 115, 145; *Morgan* v. *Chicago & A. R. R. Co.* 96 U. S. (6 Otto) 716, 24 L. ed. 743; *Baldwin* v. *Howell*, 45 N. J. Eq. 519, 15 Atl. 236.

[12] *Markham* v. *O'Connor*, 52 Ga. 183, 21 Am. Rep. 249. See *Storrs* v. *Barker*, 6 Johns. Ch. (N. Y.) 166; *Wendell* v. *VanRensselaer*, 1 Johns. Ch. (N. Y.) 344; *Rice* v. *Bunce*, 49 Mo. 231, 8 Am. Rep. 129; *Blackwood* v. *Jones*, 4 Jones (N. C.) Eq. 54.

[13] *Rice* v. *Bunce*, 49 Mo. 231, 8 Am. Rep. 129. See *Campbell* v. *Johnson*, 44 Mo. 247; *Chouteau* v. *Goddin*, 39 Mo. 229, 90 Am. Dec. 462; *Newman* v. *Hook*, 37 Mo. 207, 90 Am. Dec. 378; *Taylor* v. *Zepp*, 14 Mo. 482, 55 Am. Dec. 113.

[14] *Mason* v. *Philbrook*, 69 Me. 57.

the mortgage, and he will be estopped from denying its validity;[15] a purchaser of the lands at a sale on execution against the vendee, merely succeeds to his rights, and will also be bound by the estoppel, the mortgage having been duly recorded.[16]

It is a general rule that a purchaser, whose conveyance is by its terms made subject to a prior mortgage, the amount of which is deducted as part of the consideration of the purchase, whether he expressly assumes it as a part of the purchase money or not, cannot plead usury as a defence to the foreclosure of such mortgage;[17] neither can he plead a failure

[15] *Kennedy* v. *Brown*, 61 Ala. 296. See *Simpson* v. *Del Hoyo*, 94 N. Y. 189; *Real Estate Trust Co.* v. *Balch*, 45 N. Y. Supr. Ct. (13 J. & S.) 528; *Root* v. *Wright*, 21 Hun (N. Y.) 344; *Mitchell* v. *National Railway Building & Loan Ass'c.* 49 S. W. 624 (Tex. Civ. App.); *Sherman* v. *Goodwin*, 11 Ariz. 141, 89 Pac. 517; *McGregor* v. *Eastern Building & Loan Ass'c.* 5 Neb. (Unof.) 563, 99 N. W. 509; *Camden Safe Deposit & Trust Co.* v. *Citizens' Ice & Cold Storage Co.* 71 N. J. Eq. 221, 65 Atl. 980; *Brown* v. *Elwell*, 17 Wash. 442, 49 Pac. 1068; *Hadley* v. *Clark*, 8 Idaho, 497, 69 Pac. 319; *Selby* v. *Sanford*, 7 Kan. App. 781, 54 Pac. 17; *Cummings* v. *Jackson*, 55 N. J. Eq. 805, 38 Atl. 763; *Newton* v. *Evers*, 143 App. Div. 673, 128 N. Y. Supp. 327. See *Curry* v. *LaFon*, 133 Mo. App. 163, 113 S. W. 246.

[16] *Kennedy* v. *Brown*, 61 Ala. 296.

[17] *Hartley* v. *Harrison*, 24 N. Y. 170; *Sands* v. *Church*, 6 N. Y. 347; *Hardin* v. *Hyde*, 40 Barb. (N. Y.) 435; *Morris* v. *Floyd*, 5 Barb. (N. Y.) 130; *Chamberlain* v. *Dempsey*, 9 Bosw. (N. Y.) 212; *Post* v. *Dart*, 8 Paige Ch. (N. Y.) 639; *Stein* v. *Indianapolis, &c., Assoc.* 18 Ind. 237, 81 Am. Dec. 353; *Butler* v. *Myer*, 17 Ind. 77; *Wright* v. *Bundy*, 11 Ind. 398; *Huston* v. *Stringham*, 21 Iowa, 36; *Greither* v. *Alexander*, 15 Iowa, 470; *Perry* v. *Kearns*, 13 Iowa, 174; *Hough* v. *Horsey*, 36 Md. 181, 11 Am. Rep. 484; *Sellers* v. *Botsford*, 11 Mich. 59; *Conover* v. *Hobart*, 24 N. J. Eq. (9 C. E. Gr.) 120; *Cramer* v. *Lepper*, 26 Ohio St. 59, 20 Am. Rep. 756; *Reed* v. *Eastman*, 50 Vt. 67; *Thomas* v. *Mitchell*, 27 Wis. 414; *DeWolf* v. *Johnson*, 23 U. S. (10 Wheat.) 367, 6 L. ed. 343. See *Merchants' Exchange Nat. Bank* v. *Commercial Warehouse Co.* 49 N. Y. 635, 643; *Freeman* v. *Auld*, 44 N. Y. 50; *Mason* v. *Lord*, 40 N. Y. 476. But where A. B. & C., partners, having executed a promissory note to D., embracing usurious interest, and having also executed to him a mortgage on real estate to secure the note, A. conveyed to B. & C. his interest in the partnership property including the real estate mortgaged, B. & C. agreeing, in consideration thereof, to pay the firm debts, in-

or want of consideration in the mortgage as between the parties to it,[18] nor that it was defectively executed,[19] nor that the mortgage is not a valid lien upon the land,[20] nor that the mortgagee has other collateral security for the same debt,[21] nor that the debt is different in its terms from that set out in the complaint, nor that it is payable in a manner different from that stipulated; [22] neither can he urge any defence whatever against the mortgage.[23] And the same rule applies as against a second mortgagee, where his mortgagee is made expressly subject to a prior incumbrance;[24] it has also been

cluding the debt to D., it was held that B. & C. were not estopped from asserting such usury in an action by D. for the sale of the mortgaged premises, and that the assignee in bankruptcy of B. & C. was not precluded from making such defense, although B. & C. in the bankrupt proceedings, reported D.'s debt at the full amount claimed by him; *Beals* v. *Lewis*, 43 Ohio St. 220.

[18] *Parkinson* v. *Sherman*, 74 N. Y. 88, 30 Am. Rep. 268; *Ritter* v. *Phillips*, 53 N. Y. 586; *Horton* v. *Davis*, 26 N. Y. 495; *Lester* v. *Barron*, 40 Barb. (N. Y.) 297; *Hartley* v. *Tatham*, 26 How. (N. Y.) Pr. 158; *Haile* v. *Nichols*, 16 Hun (N. Y.) 37; *Russell* v. *Kinney*, 1 Sandf. Ch. (N. Y.) 34. See *Jewell* v. *Harrington*, 19 Wend. (N. Y.) 471; *Barker* v. *International Bank of Chicago*, 80 Ill. 96; *Price* v. *Pollock*, 47 Ind. 362; *Crawford* v. *Edwards*, 33 Mich. 354; *Miller* v. *Thompson*, 34 Mich. 10; *Foy* v. *Armstrong*, 113 Iowa, 629, 85 N. W. 753.

[19] *Pidgeon* v. *Trustees of Schools*, 44 Ill. 501; *Greither* v. *Alexander*, 15 Iowa, 470; *Riley* v. *Rice*, 40 Ohio St. 441. However, it was held in *Goodman* v. *Randall*, 44 Conn. 321, that a purchaser who had expressly assumed a mortgage for a certain amount in his deed of conveyance, was not estopped from showing that the incumbrance had no existence in fact, because the mortgage was fatally defective, having been witnessed, delivered and recorded without having been signed by the mortgagor.

[20] *Ritter* v. *Phillips*, 53 N. Y. 586; *Johnson* v. *Parmaly*, 14 Hun (N. Y.) 398; *Kennedy* v. *Brown*, 61 Ala. 296; *Scarry* v. *Eldridge*, 63 Ind. 44, 7 Cent. L. J. 418; *Green* v. *Houston*, 22 Kan. 35.

[21] *Ferris* v. *Crawford*, 2 Den. (N. Y.) 595.

[22] *Klein* v. *Isaacs*, 8 Mo. App. 568.

[23] *Freeman* v. *Auld*, 44 N. Y. 50; *Holden* v. *Rison*, 77 Ala. 515; *McDonald* v. *Mobile Life Ins. Co.* 65 Ala. 358; *Delaware & H. Canal Co.* v. *Bonnell*, 46 Conn. 9; *Losey* v. *Bond*, 94 Ind. 67; *Hill* v. *Minor*, 79 Ind. 48; *Smith* v. *Graham*, 34 Mich. 302.

[24] *Bronson* v. *Lacrosse & M. R. Co.* 69 U. S. (2 Wall.) 283, 17 L. ed. 725; *Central Trust Co.* v. *Co-*

applied to a case where the recital was erroneous in fact, the prior mortgage being on an entirely different parcel of land from that covered by the second mortgage.[25]

A purchaser of property subject to a mortgage securing a promissory note is not entitled to have the lien of the mortgage limited to the amount due at maturity, by reason of the fact that the description of the note in the record of the mortgage, which was his only source of information, did not state the place of payment, and that he was unable to find the holder to pay him at maturity, as in such circumstances he should have made a tender at the place of business or residence of the maker under a statute[26] providing that a negotiable instrument not specifying a place of payment is payable at the place of residence or business of the maker.[27]

§ 460. When purchaser subject to mortgage not estopped.—The fact, that in a conveyance of mortgaged premises with full covenants, the mortgage was excepted from the covenant against incumbrances, does not show that the grantee took the land subject to the mortgage, nor will it prevent him from making any defense against the mortgage which the mortgagor might have made;[28] but a purchaser of land on which there is a mortgage, of which he had notice will be bound by all the information which he could presumably obtain upon inquiry from the mortgagee in regard to his claim to a lien on said land.[29] A purchaser who does not assume the incumbrances on the land but expects to pro-

lumbus, H. V. & T. Ry. Co. 87 Fed. 815. See also *Park* v. *Prendergast,* 4 Tex. Civ. App. 566, 23 S. W. 535. But see *Atchison Savings Bank* v. *Wyman,* 65 Kan. 314, 69 Pac. 326.

[25] *Sweetzer* v. *Jones,* 35 Vt. 317, 82 Am. Dec. 639.

[26] Utah Comp. Laws, 1888, § 2851.

[27] *McCauley* v. *Leavitt,* 10 Utah, 91, 37 Pac. 164.

[28] *Bennett* v. *Keehn,* 67 Wis. 154; *Stough* v. *Badger Lumber Co.* 70 Kan. 713, 79 Pac. 737.

[29] *Martin* v. *Cauble,* 72 Ind. 67. See *Central Trust Company* v. *Sloan,* 65 Iowa, 655.

tect the title by paying the valid liens, is not estopped from questioning the validity of any lien.[30]

Where a purchaser has bought not merely the equity of redemption, but the whole title, paying the full price therefor with no deduction on account of a mortgage, he may set up the defence of usury in the original contract between the parties.[31] A purchaser under the foreclosure of a second mortgage, will not be precluded by a clause in the deed of the sheriff, reciting that the conveyance is subject to the lien of the prior mortgage, from pleading the defence of usury, where the second mortgagee could have set up such defence against the first mortgage.[32]

In order to estop a mortgagee from asserting his mortgage against a subsequent purchaser of the premises, the proof of the facts from which the estoppel *in pais* is claimed must be clear and satisfactory.[33] Where the statement of a mortgagee as to the amount due him is a mere matter of opinion and no effort was used to induce the purchase, and the purchaser relied upon the assurance of the mortgagor from whom he purchased, when he could, by the use of reasonable diligence on his part, have ascertained the amount of the incumbrance, the mortgagee will not be estopped from enforcing his mortgage against such purchaser.[34] It is a general principle that the party setting up an estoppel must be free from the imputation of laches in the premises.[35]

§ 461. Estoppel against purchaser subject to usurious mortgage.—The doctrine is well established that where property covered by a usurious mortgage is conveyed by a deed containing a clause expressly making the conveyance

[30] *Waughtal & Sons* v. *Kane*, 108 Iowa, 268, 79 N. W. 91.

[31] *Lilienthal* v. *Champion*, 58 Ga. 158; *Maher* v. *Lanfrom*, 86 Ill. 513.

[32] *Pinnell* v. *Boyd*, 33 N. J. Eq. (6 Stew.) 600.

[33] *Preble* v. *Conger*, 66 Ill. 370.

[34] *Preble* v. *Conger*, 66 Ill. 370.

[35] *Trenton Banking Co.* v. *Duncan*, 86 N. Y. 221.

subject to the mortgage lien, such clause in the deed will operate as a waiver of the defense of usury, and will be regarded as a provision made by the mortgagor for the payment of the usurious debt which the grantee cannot afterwards question;[36] and the grantee under such a deed cannot compel the application of the usurious bonus paid by his grantor to the reduction of the mortgage debt.[37] But it is held, where the property is reconveyed to the grantor by a deed in which nothing is said regarding the mortgage, that he will be entitled to set up the defence of usury in an action to foreclose the mortgage.[38]

[36] *Hartley* v. *Harrison,* 24 N. Y. 170; *Smith* v. *Cross,* 16 Hun (N. Y.) 487; *Baskins* v. *Calhoun,* 45 Ala. 582; *Loomis* v. *Eaton,* 32 Conn. 550; *Studabaker* v. *Marquardt,* 55 Ind. 341; *Pinnell* v. *Boyd,* 33 N. J. Eq. (6 Stew.) 190; *Jones* v. *Ins. Co.* 40 Ohio St. 583; *Cramer* v. *Lepper,* 26 Ohio St. 59, 20 Am. Rep. 756; *Austin* v. *Chittenden,* 33 Vt. 553.

[37] *Root* v. *Wright,* 21 Hun (N. Y.) 344.

[38] *Knickerbocker Life Ins. Co.* v. *Nelson,* 78 N. Y. 137, 7 Abb. (N. Y.) N. C. 170, aff'g 13 Hun (N. Y.) 321. See *Bennett* v. *Bates,* 94 N. Y. 354, 371.

CHAPTER XIX.

ANSWERS AND DEFENCES.

RIGHT OF ACTION NOT ACCRUED—MORTGAGE DEBT NOT DUE—PAYMENT AND DISCHARGE—DENIAL OF PERSONAL LIABILITY—RELEASE OF PART OF MORTGAGED PREMISES.

§ 462. Denial of right of action accrued—Nothing due.
§ 463. Alleging condition precedent as a defence.
§ 464. Breach of an independent or collateral covenant as a defence.
§ 465. Allegation that mortgage is for indemnity only.
§ 466. Extension of time of payment as a defence.
§ 467. Consideration for extension of time.
§ 468. Payment as a defence.
§ 469. What amounts to a payment.
§ 470. Attorney's fees and taxes to be paid as part of mortgage debt.
§ 471. Payment of condemnation money to mortgagor instead of to mortgagee.
§ 472. Payment by deposit of collateral security or assumption of prior mortgage.
§ 473. Application of payments—How to be made.
§ 474. Payments by mortgagor after conveyance.
§ 475. Payments—How pleaded—Inability to find mortgagee.
§ 476. Payment—How proved in defence.
§ 477. Alleging discharge and satisfaction of mortgage in defence.
§ 478. Allegation of release of part of mortgaged premises.
§ 479. Alleging release of part of mortgaged premises in defence.
§ 480. Application of proceeds on release of part of mortgaged premises.
§ 481. Denial of personal liability on contract of assumption.

§ 462. Denial of right of action accrued—Nothing due.—A defendant in an action to foreclose a mortgage may show in defence, while admitting the validity of the mortgage, that by its terms nothing is due thereon, and that a cause of action has not accrued. Thus, an answer showing an agreement between the parties, contemporaneous with the execution of the mortgage, to the effect that the mortgage should become due and payable only on the occurrence of an

event which never happened, pleads a good defence to an action to foreclose the mortgage.[39] Where such a defence is set up, if the plaintiff fails to establish the fact that a portion of the debt is due, or that a cause of action has accrued, his complaint will be dismissed;[40] but where the condition of the mortgage is other than for the payment of money, and there is a breach of it, the mortgagor cannot set up as a defence to an action for foreclosure the fact that nothing is due.

Where the condition of the defeasance in a mortgage is, that the note secured thereby shall be paid within sixty days after demand, and a demand is made by a person claiming to act as agent for the owner, but whose agency is denied, the mere possession of the note by the person making the demand will not be sufficient proof of his agency.[41]

§ 463. Alleging condition precedent as a defence.— Where the title of the vendor to certain premises is known to be defective at the time of conveyance, and a note and mortgage given to secure the whole or a part of the purchase price of the property, contain a stipulation that nothing shall be deemed to be due upon the note until the vendor shall have perfected the title to the premises, the mortgagor may set up the non-performance of this condition as a defence to an action to foreclose such mortgage.[42] This proposition has been supported where a vendor covenanted to pay all existing incumbrances;[43] also, where a stipulation executed with the mortgage provided that it should not be enforced, until a quit-claim deed of an outstanding title had been obtained by the vendor.[44]

[39] *Lucas* v. *Hendrix*, 92 Ind. 54.

[40] See *Hall* v. *Davis*, 73 Ga. 101; *Lucas* v. *Hendrix*, 92 Ind. 54.

[41] *Union Central Life Insurance Co.* v. *Jones*, 35 Ohio St. 351.

[42] *Weaver* v. *Wilson*, 48 Ill. 125. See *Ryerson* v. *Willis*, 81 N. Y. 277. See *post*, § 464.

[43] *Stewart* v. *Clark*, 8 Kan. 210; *McGrath* v. *Myers*, 126 Mich. 204, 85 N. W. 712.

[44] *Ryerson* v. *Willis*, 81 N. Y. 277.

But where the mortgagor sets up as a defense failure of title to the whole or a part of the premises conveyed, he must also release to the vendor whatever title he may have acquired by his deed to that part of the property, to which the title failed or was defective; and in case of the failure of the title to the whole property he must offer to rescind the contract,[45] because one who seeks equitable relief must first do equity.[46]

§ 464. Breach of an independent or collateral covenant as a defence.—A mortgagor cannot set up the breach of an independent or collateral covenant as a defence in an action to foreclose a mortgage, where the payment of the debt secured is not made to depend upon the performance of such independent covenant.[47] Thus, where a mortgage is given to secure part of the purchase price of land, the title to which is defective, or upon which there is a prior incumbrance, and such title is to be perfected or the incumbrance removed by the mortgagee, an answer in an action to foreclose the mortgage, alleging that the title has not been perfected, nor the incumbrance removed, will be unavailing, unless the payment of the mortgage is made dependent upon the perfection of the title or the removal of the incumbrance.[48]

And where a complaint sets forth the conditions of a bond, and avers the execution of the mortgage as collateral thereto with the same conditions, an answer merely repeating the words of the conditions as stated in the complaint and alleging that such conditions are not contained in the mortgage,

[45] *Ryerson* v. *Willis*, 81 N. Y. 277; *Baker* v. *Robbins*, 2 Den. (N. Y.) 136; *Rosebaum* v. *Gunter*, 3 E. D. *Smith*, (N. Y.) 203; *Fisher* v. *Conant*, 3 E. D. Smith, (N. Y.) 199; *Weaver* v. *Wilson*, 48 Ill. 125.

[46] *Ryerson* v. *Willis*, 81 N. Y. 277.

[47] *Duryea* v. *Linsheimer*, 27 N. J. Eq. (12 C. E. Gr.) 366; *Courson* v. *VanSyckle*, 21 N. J. Eq. (6 C. E. Gr.) 92; *Pfeninghausen* v. *Shearer*, 65 Mo. App. 348.

[48] *Courson* v. *VanSyckle*, 21 N. J. Eq. (6 C. E. Gr.) 92. See *Duryea* v. *Linsheimer*, 27 N. J. Eq. (12 C. E. Gr.) 366. See *ante*, § 463.

is not a denial that they are in substance the conditions of the mortgage; to raise an issue upon that question, the defendant should either deny the debt or plead the conditions *verbatim* from the bond and mortgage.[49] In an action to foreclose a purchase money mortgage, if the answer attempts to show a failure of title, but does not set forth the deed or any covenants therein, nor allege fraud, it will be bad on demurrer.[50]

Where a mortgage is given to secure part of the purchase price of land and the mortgagor is ousted from possession on failure to pay interest due, he may set up, as a defense to a foreclosure action, such act as a breach of the covenant for quiet and peaceable possession contained in his deed.[51]

§ 465. Allegation that mortgage is for indemnity only.—The defendant may set up by way of defense and show by parol evidence, that the mortgage sought to be foreclosed was given simply to indemnify the plaintiff as a surety,[52] that the obligation has been paid and satisfied, and that the plaintiff has not been injured in any way, because where there has not been a breach of the conditions of the mortgage, an action for foreclosure cannot be maintained.[53] The effect of parol evidence in showing that a mortgage given for the payment of money was in reality to indemnify the

[49] *Dimond* v. *Dunn*, 15 N. Y. 498, reversing 8 How. (N. Y.) Pr. 16.

[50] *Cornwall* v. *Clifford*, 45 Ind. 392; *Church* v. *Fisher*, 40 Ind. 145; *McClerkin* v. *Sutton*, 29 Ind. 407. See *Ryerson* v. *Willis*, 81 N. Y. 277; *Platt* v. *Graham*, 3 Sandf. (N. Y.) 118; *Wilbur* v. *Buchanan*, 85 Ind. 42; *Jenkinson* v. *Ewing*, 17 Ind. 505; *Woodforth* v. *Leavenworth*, 14 Ind. 311; *Laughery* v. *McLean*, 14 Ind. 106; *Chambers* v. *Cox*, 23 Kan. 393; *Mendenhall* v. *Steckel*, 47 Md. 453, 28 Am. Rep. 481; *Key* v. *Jennings*, 66 Mo. 356, 368; *Wheeler* v. *Standley*, 50 Mo. 509; *Glen* v. *Whipple*, 12 N. J. Eq. (1 Beas.) 50; *Hill* v. *Butler*, 6 Ohio St. 207; *Darling* v. *Osborne*, 51 Vt. 148; *Booth* v. *Ryan*, 31 Wis. 45; *Hall* v. *Gale*, 14 Wis. 54.

[51] *Classada* v. *Stabel*, 98 App. Div. 600, 90 N. Y. Supp. 533.

[52] On a recognizance of bail, see *Colman* v. *Past*, 10 Mich. 422, 82 Am. Dec. 49, or on a note, *Kimball* v. *Myers*, 21 Mich. 276, 4 Am. Rep. 487; *Ide* v. *Spencer*, 50 Vt. 293.

[53] *Ide* v. *Spencer*, 50 Vt. 293.

plaintiff, is not to counteract or to vary the mortgage, but to identify the demand to which it refers; and such evidence is always competent.[54]

§ 466. Extension of time of payment as a defense.— A mortgage cannot be foreclosed until the debt which it was given to secure has become due and payable, even though the security may be impaired and rendered precarious by delay.[55] And the time within which a mortgage debt is to be paid may be extended upon a valid consideration, and such extension will be a bar to an action to foreclose the mortgage until after the period of extension has expired.[56] An extension of

[54] *Kimball* v. *Myers*, 21 Mich. 276, 285, 4 Am. Rep. 487. Judge Cooley said, in delivering the opinion of the court: "We understand also that evidence of the satisfaction of a demand actually received, though in a manner varying from that agreed, is always competent, notwithstanding it may have been received with some contemporaneous agreement," citing *Crosman* v. *Fuller*, 34 Mass. (17 Pick.) 171, 174; *Hagood* v. *Swords*, 2 Bail (S. C.) L. 305; *Bradley* v. *Bentley*, 8 Vt. 245.

[55] *Campbell* v. *Macomb*, 4 Johns. Ch. (N. Y.) 534. See *Building Association* v. *Platt*, 5 Duer (N. Y.) 675. See *ante*, § 276, *et seq.*

[56] *Seaton* v. *Fiske*, 128 Cal. 549 61 Pac. 666; *Nicholson* v. *Cinque*, 51 App. Div. 604, 64 N. Y. Supp. 191; *Hauser* v. *Capital City Brewery Co.* 57 Atl. 722 (N. J. Eq.) See *Beach* v. *Shanley*, 35 App. Div. 566, 55 N. Y. Supp. 130; *Macauley* v. *Hayden*, 48 Misc. 21, 96 N. Y. Supp. 64; *Bradley* v. *Glenmary Co.* 64 N. J. Eq. 77, 53 Atl. 49; *Swon* v. *Stevens*, 143 Mo. 384, 45 S. W. 270.

As to when extension of time expires, see *Nelms* v. *Rogers*, 155 Ala. 489, 46 So. 453.

An extension of time of payment, where interposed as a defense to a suit to foreclose a mortgage, must be specially pleaded and clearly made out by the evidence. *Eastwood* v. *Worrell* (N. J.) 2 Atl. 772.

An extension of time inures to the benefit of the mortgagor's grantee. *Kelsey* v. *Collins*, 49 Tex. Civ. App. 230, 108 S. W. 793.

Where a mortgage contains a clause accelerating the payment of the entire mortgage debt on failure to pay an installment of interest or taxes the mortgagee may upon such breach of condition elect to treat the entire debt as due and foreclose notwithstanding a previous extension of time for the payment of the principal. *Iowa Loan & Trust Co.* v. *Haller*, 119 Iowa 645, 93 N. W. 636; *Washburn* v. *Williams*, 10 Colo. App. 153, 50 Pac. 223; *Clark* v. *Elmendorf*, 78 S. W. 538 (Tex. Civ. App.); *Germond* v. *Hermosa Ice Co.* 9 S. D. 387, 69

the time for the payment of a mortgage affects the right to foreclose, but does not in any way affect the mortgage lien; for neither an extension of time nor a change in the indebtedness secured by a mortgage will impair or in any way affect the validity of the mortgage.[57]

Where the obligation is under seal and an agreement for its extension is made before maturity, it must be in writing and of equal legal formality as the original instrument;[58] but where there has been a breach of the conditions of a sealed instrument, the time for payment may be extended by parol, if founded upon a sufficient consideration.[59] Thus, where the holder of a mortgage which was past due was about to enforce it by an action, and a third person for a valid consideration agreed by parol with the plaintiff's testator, who had assumed the payment thereof, to purchase said mortgage and to refrain from collecting the principal for five years, the court held in an action to foreclose the mortgage that this agreement, having been executed by the

N. W. 578; *Brockway* v. *McClun,* 148 Ill. App. 465.

One who sets up an agreement to extend the time for the payment of interest, as a defense to an action to foreclose a trust deed, must do equity by offering to pay the interest. *Stone* v. *Billings,* 167 Ill. 170, 47 N. E. 372.

[57] *Shuey* v. *Latta,* 90 Ind. 136; *Russell* v. *Bosworth,* 106 Ill. App. 314; *Davis* v. *Thomas,* 66 Neb. 26, 92 N. W. 187; *Stavers* v. *Philbrick,* 68 N. H. 379, 36 Atl. 16; *Matthews* v. *Towell,* 138 S. W. 169 (Tex. Civ. App.) See *post,* § 469.

[58] *Dodge* v. *Crandall,* 30 N. Y. 306; *Eddy* v. *Graves,* 23 Wend. (N. Y.) 84; *Allen* v. *Jacquish,* 21 Wend. (N. Y.) 628. See *People's State Bank* v. *Francis,* 8 N. D. 369, 79 N. W. 853. See also *Veerhoff* v. *Miller,* 30 App. Div. 355, 51 N. Y. Supp. 1048.

[59] *Dodge* v. *Crandall,* 30 N. Y. 306; *Stone* v. *Sprague,* 20 Barb. (N. Y.) 509; *Clark* v. *Dales,* 20 Barb. (N. Y.) 42; *Esmond* v. *Vanbenschoten,* 12 Barb. (N. Y.) 369; *Dearborn* v. *Cross,* 7 Cow. (N. Y.) 48; *Townsend* v. *Empire Stone Dressing Co.* 6 Duer (N. Y.) 208; *Flynn* v. *McKeon,* 6 Duer (N. Y.) 203; *Fish* v. *Hayward,* 28 Hun (N. Y.) 456; *Burt* v. *Saxton,* 1 Hun (N. Y.) 551, 4 T. & C. 109; *Lattimore* v. *Harsen,* 14 Johns. (N. Y.) 330; *Fleming* v. *Gilbert,* 3 Johns. (N. Y.) 528; *Keating* v. *Price,* 1 Johns. Cas. (N. Y.) 22; *Newton* v. *Wales,* 3 Robt. (N. Y.) 453; *Delacroix* v. *Bulkley,* 13 Wend. (N. Y.) 71.

taking of the assignment of the mortgage, operated as effectually to extend the time of payment as if it had been under seal.[60]

While an executory parol agreement is not technically sufficient to alter the terms of a contract under seal, yet when made before a breach of the conditions of such contract and upon a sufficient consideration, it may operate for a limited time as a waiver of a right to enforce the obligation of such contract;[61] and where such parol agreement for an extension of time has been entered into, and the consideration paid, no court will enforce the contract at the time of its maturity merely on the ground that such agreement was not in writing.[62] To enforce a mortgage in opposition to an agreement founded upon a valuable consideration for an extension of time would be against conscience and good faith, and a fraud upon the rights of the mortgagor.[63] An agreement to extend the time for the payment of a mortgage debt must be made after the execution and delivery of the mortgage; and both the mortgagor and the mortgagee must be parties to the contract in order to be entitled to rights under it.[64]

[60] *Dodge* v. *Crandall,* 30 N. Y. 294; *Burt* v. *Saxton,* 1 Hun (N. Y.) 551, 4 T. & C. (N. Y.) 109.

[61] *Trayser* v. *The Trustees of Indiana Asbury University,* 39 Ind. 556; *Van Houten* v. *McCarty,* 4 N. J. Eq. (3 H. W. Gr. 141; *King* v. *Morford,* 1 N. J. Eq. (Saxt.) 274, 280; *Tompkins* v. *Thompkins,* 21 N. J. Eq. (6 C. E. Gr.) 338; *Cox* v. *Bennet,* 13 N. J. L. (1 J. S. Gr.) 165, 171.

[62] *Scott* v. *Frink,* 53 Barb. (N. Y.) 533; *Burt* v. *Saxton,* 1 Hun (N. Y.) 551, 4 T. & C. (N. Y.) 109. *In re* Betts, 4 Dill C. C. 93, 7 Rep. 225. See *Albert* v. *Grosvenor Investment Co.* L. R. 3 Q B. 123, 127.

[63] *Trayser* v. *Trustees of Indiana Asbury University,* 39 Ind. 556, 567. See *Fowler* v. *Brooks,* 13 N. H. 240; *Bailey* v. *Adams,* 10 N. H. 162; *Wheat* v. *Kendall,* 6 N. H. 504; *McComb* v. *Kittridge,* 14 Ohio, 348; *Austin* v. *Dorwin,* 21 Vt. 38.

[64] *Lee* v. *West Jersey Land Co.* 29 N. J. Eq. (2 Stew.) 377. See *Rosche* v. *Kosmowski,* 61 App. Div. 23, 70 N. Y. Supp. 216.

But a trustee under a trust deed may bind the owner of the note which it secures by an agreement to extend the time of payment. *Kransz, as trustee, etc.* v. *Uedelhofen,* 193 Ill. 477, 62 N. E. 239.

§ 467. Consideration for extension of time.—In order to constitute a valid defence to an action to foreclose a mortgage, the contract for an extension of time must be founded upon a valuable new consideration.[65] But it has been said that mutual promises, on the one hand, to waive payment of an installment at the time when it matures, and to accept it at a later date, and, on the other hand, to pay the whole principal and the interest, at the expiration of the extended time, furnishes a sufficient consideration to sustain an extension of time.[66]

An agreement between a mortgagor and a mortgagee to raise the interest upon a bond and mortgage from six per centum to the highest rate allowed by law, in consideration of an extension of the time of payment, will constitute a valid consideration;[67] so, also, will the payment of interest[68] or of an installment of the principal in advance,[69] because payment before the day on which a debt matures, being a benefit

[65] *Pabodie* v. *King*, 12 Johns. (N. Y.) 426; *Hall* v. *Constant*, 2 Hall (N. Y.) 185; *Gibson* v. *Renne*, 19 Wend. (N. Y.) 317; *Harris* v. *Peirce*, 12 Wend. (N. Y.) 61, 63; *Reynolds* v. *Ward*, 5 Wend. (N. Y.) 501; *Miller* v. *Holbrook*, 1 Wend. (N. Y.) 317; *Harris* v. *Boone*, 69 Ind. 300; *Feldman* v. *Rockford Co.* 70 Misc. 66, 126 N. Y. Supp. 646; *Moser* v. *Walker*, 23 App. Div. 91, 48 N. Y. Supp. 341; *Hauser* v. *Capital City Brewing Co.* 57 Atl. 722 (N. J. Eq.) See *Sturgeon* v. *Mudd*, 190 Mo. 200, 88 S. W. 630.

[66] *Pierce* v. *Goldesberry*, 31 Ind. 52. See *Wakefield Bank* v. *Truesdell*, 55 Barb. (N. Y.) 602; *Clark* v. *Dales*, 20 Barb. (N. Y.) 42; *Burt* v. *Saxton*, 1 Hun (N. Y.) 551, 4 T. & C. (N. Y.) 109; *Preston* v. *Henning*, 6 Bush (Ky.) 556; *Bailey* v. *Adams*, 10 N. H. 162.

[67] *Haggarty* v. *Allaire*, 5 Sandf. (N. Y.) 230. See *Crosby* v. *Wiatt*, 10 N. H. 318; *Bailey* v. *Adams*, 10 N. H. 162.

[68] *Wakefield Bank* v. *Truesdell*, 55 Barb. (N. Y.) 602; *Maher* v. *Lanfrom*, 86 Ill. 513; *Pierce* v. *Goldsberry*, 31 Ind. 52; *Preston* v. *Henning*, 6 Bush (Ky.) 556. See also *Ganz* v. *Lancaster*, 169 N. Y. 357, 62 N. E. 413, 58 L.R.A. 151.

[69] *Newsam* v. *Finch*, 25 Barb. (N. Y.) 175. *In re Betts*, 4 Dill. C. C. 93, 7 Rep. 225.

But it has been said that the payment of the portion of a debt due is not a sufficient consideration to support a promise to give further time for the payment of the balance. *Hall* v. *Constant*, 2 Hall (N. Y.) 185.

to the creditor, is a good consideration for a promise.[70] The giving of additional security,[71] the improvement of the mortgaged premises by the mortgagor,[72] a reduction of the amount of a prior mortgage,[73] the assuming of the mortgage debt by a purchaser who relies upon an agreement of extension,[74] or the payment of an installment of interest by a grantee of the mortgagor not personally obliged to make such payment,[75] form sufficient considerations to support a promise for the extension of the time of payment.[76]

§ 468. Payment as a defense.—The existence and continuance of the debt is essential to the life of a mortgage given to secure it; whenever the debt is paid, discharged, released or barred by the statute of limitations, the mortgagee ceases and can no longer have any legal effect.[77] The mortgagor or other person liable for the payment of any deficiency that may arise on the sale of the mortgaged premises, as well as the owner of the equity of redemption, has a right to answer that the mortgage debt has been paid in whole or in part, and this will plead a good defence to a foreclosure.[78] And where

[70] *Austin* v. *Dorwin*, 21 Vt. 38, 44; *Pinnel's Case*, 5 Coke, 117.

[71] *Trayser* v. *Trustees of Indiana Asbury University*, 39 Ind. 556. See *Jester* v. *Sterling*, 25 Hun (N. Y.) 344; *Gibson* v. *Renne*, 19 Wend. (N. Y.) 389.

[72] *Roe* v. *Fleming*, 122 Pac. 496 (Okla.).

[73] *Bradley* v. *Glenmary Co.* 64 N. J. Eq. 77, 53 Atl. 49.

[74] *Jester* v. *Sterling*, 25 Hun (N. Y.) 344; *Burt* v. *Saxton*, 1 Hun (N. Y.) 551, 4 T. & C. 109.

[75] See *Grinnan* v. *Platt*, 21 Barb. (N. Y.) 328; *Jester* v. *Sterling*, 25 Hun (N. Y.) 344; *Krebs* v. *Carpenter*, 124 App. Div. 755, 109 N. Y. Supp. 482.

[76] Prevention of foreclosure of a second mortgage as consideration for extension, see *Priest* v. *Gumprecht*, 81 App. Div. 631, 80 N. Y. Supp. 759.

[77] *Emory* v. *Keighan*, 94 Ill. 543; *Lydon* v. *Campbell*, 204 Mass. 580, 134 Am. St. Rep. 702, 91 N. E. 151; *Hendricks* v. *Hess*, 112 Minn. 252, 127 N. W. 995; *Tobin* v. *Tobin, as adm'r etc.* 139 Wis. 494, 121 N. W. 144; *Carroll* v. *Haigh*, 97 Ill. App. 576.

[78] *Prouty* v. *Price*, 50 Barb. (N. Y.) 344. See *Lawson* v. *Barron*, 18 Hun (N. Y.) 414; *Garrison* v. *Parsons*, 45 Fla. 335, 33 So. 525; *Collins, as ex'r. etc.* v. *Hanson*, 2 Pennew. 155, 44 Atl. 624. See *Manley* v. *Felty*, 146 Ind. 194, 45 N. E. 74.

an action is brought to foreclose a mortgage for an unpaid installment, the payment of the amount due with costs will terminate the suit;[79] while payment in whole or in part, when properly alleged and proved, is a good defence for either a mortgagor or a junior incumbrancer,[80] yet where payment is set up as a defence, it must be clearly established.[81] Whenever a defendant pleads payment, it will be for the trial court to decide whether a proper defence is made justifying the suspension of judgment for the plaintiff, whose legal right of possession is not denied, until the determination of the question whether the mortgage debt has or has not been paid.[82]

A plea that the mortgage of an undivided interest in land, under the foreclosure of which plaintiff in partition claims title, had been paid before the foreclosure cannot be interposed by a co-tenant who does not claim under the mortgagor, the decree in foreclosure being conclusive as to him. *Sibley* v. *Alba,* 95 Ala. 191, 10 So. 831. And in a case where a mortgage was given to secure a debt in Confederate money, and large payments had been made upon it, nearly or quite sufficient to have extinguished the debt, and foreclosure proceedings were instituted for the principal and interest in full in the present currency, such payment in Confederate money was held to be a sufficient defense to such foreclosure. *Meeks* v. *Johnson,* 75 Ga. 629.

The supreme judicial court of Massachusetts, in the case of *Aldrich* v. *Aldrich,* 143 Mass. 45, 8 N. E. 870), say that under the statutes of that state (Mass. Pub. Stat. c. 167, § 42), if a supplemental answer does not with sufficient certainty allege that plaintiff had received rents and profits of the mortgaged property, of which he had taken possession in foreclosure, which ought to be applied toward the payment of the principal and interest on the mortgage debt, the court may permit the answer to be amended; and a pending objection to the admissibility of evidence in proof thereof will become immaterial.

[79] *Brown* v. *Thompson,* 29 Mich. 72. See *Dow* v. *Moor,* 59 Me. 118.

[80] *Prouty* v. *Price,* 50 Barb. (N. Y.) 344; *Prouty* v. *Eaton,* 41 Barb. (N. Y.) 409; *Edwards* v. *Thompson,* 71 N. C. 177; *Hendrix* v. *Gore,* 8 Oreg. 406.

But a mortgagor who has not paid the mortgage debt cannot set up a release executed by one who had no authority to execute it at the time. *Cornog* v. *Fuller,* 30 Iowa, 212. See *Boone* v. *Clark,* 129 Ill. 466, 21 N. E. 850, 5 L.R.A. 276.

[81] *Suhr* v. *Ellsworth,* 29 Mich. 57. See *Finlayson* v. *Lipscomb,* 16 Fla. 751; *Cameron* v. *Culkins,* 44 Mich. 531; *Richardson* v. *Tolman,* 44 Mich. 379.

[82] *Edwards* v. *Thompson,* 71 N. C. 177.

The equitable assignee of a mortgage, in order to protect his rights against the payment of the debt by the mortgagor to the mortgagee, should give actual or constructive notice of his assignment, either by placing the assignment on record or by giving notice thereof to the mortgagor personally. If he does neither, and there are no attending circumstances to put the mortgagor on inquiry as to the fact of the assignment, a payment of the debt to the mortgagee will satisfy the mortgage and defeat an action to foreclose.[83]

But payment to the mortgagee after the legal transfer of the note and mortgage before maturity will not satisfy the note, and the mortgage may be enforced.[84] It has been held that a mortgagor has a right to rely, where he does so in good faith, upon the statement of the mortgagee's administrator as to the ownership of the mortgage, and if he makes payments to the person who the administrator says owns the note and mortgage, they will be valid and may be set up as a defence in an action brought by the rightful owner to foreclose.[85] It has been said, however, that a mortgage may be kept alive even after payment in full, if such was the intention of the parties,[86] or if there are interests which require it for their protection; but where a mortgagor causes a first mortgage to be paid with his own money, his payment will extinguish such mortgage in law and in equity, as between the rights attaching to it and those attaching to a second mortgage.[87]

The payment of a mortgage debt before it becomes due will operate as a discharge of the lien, and will constitute a good defence to a foreclosure;[88] a tender or payment at

[83] See § 416, note 35.

[84] *Towner* v. *McClelland,* 110 Ill. 542.

[85] *Reynolds* v. *Smith,* 57 Mich. 194.

[86] See *Everett* v. *Gately,* 183 Mass. 503, 67 N. E. 598.

[87] *Loverin* v. *Humboldt Safe Deposit & Trust Co.* 113 Pa. St. 6.

[88] *Holman* v. *Bailey,* 44 Mass. (3 Metc.) 55.

maturity[89] will also discharge the lien,[90] and is a valid defence.[91] The title to the property will rest in the mortgagor free from the incumbrance.[92]

Payment by a third person will discharge the lien of a mortgage, although it may have been made without authority, if it was subsequently ratified by the mortgagor, in which case the payment by an agent will become equivalent to an original authorization to make it.[93]

§ 469. What amounts to a payment.—To constitute a payment there must be a full liquidation of the debt; hence, a mere change in the form of indebtedness will not operate as a payment.[94] Thus, it has been held that the fact, that the

[89] *Kortright* v. *Cady,* 21 N. Y. 343, 78 Am. Dec. 145; *Crain* v. *McGoon,* 86 Ill. 431, 29 Am. Rep. 37, 18 Am. L. Reg. N. S. 178, and notes 182 to 186.

[90] *Davies* v. *Dow,* 80 Minn. 223, 83 N. W. 50.

On sufficiency of tender to discharge the lien, see *Reynolds* v. *Price,* 88 S. C. 525, 71 S. E. 51; *Davies* v. *Dow,* 80 Minn. 223, 83 N. W. 50.

But see *Knollenberg* v. *Nixon,* 171 Mo. 445, 94 Am. St. Rep. 790, 72 S. W. 41, which holds that a tender after debt secured by trust deed or mortgage is due, only stops the running of interest on the debt, and in order to extinguish the lien it must be kept up. *Landis* v. *Saxton,* 89 Mo. 375; *Hudson* v. *Glencoe Gravel Co.* 140 Mo. 103, 62 Am. St. Rep. 722.

Tender of the debt will not release the lien of the mortgage, but will prevent foreclosure as long as the tender is kept alive. *Strickland* v. *Clements,* 83 Ark. 484, 104 S. W. 175; *Hamlett* v. *Tallman,* 30 Ark. 505; *Bloom* v. *McGehee,* 38 Ark. 329.

[91] *Merrill* v. *Chase,* 85 Mass. (3 Allen), 339; *Richardson* v. *Cambridge,* 84 Mass. (2 Allen), 118, 79 Am. Dec. 767; *Shields* v. *Lozear,* 34 N. J. L. (5 Vr.) 496, 3 Am. Rep. 256. See *Grover* v. *Flye,* 87 Mass. (5 Allen), 543.

[92] *Shields* v. *Lozear,* 34 N. J. L. (5 Vr.) 496, 3 Am. Rep. 256. See *Schilling* v. *Darmody,* 102 Tenn. 439, 52 S. W. 291, 73 Am. St. Rep. 892; *Bush* v. *Thomas,* 172 Ala. 77, 55 So. 622. See also *Welborn* v. *Dixon,* 70 S. C. 108, 49 S. E. 232; *Hussey* v. *Fisher,* 94 Me. 301, 47 Atl. 525.

[93] *Heermans* v. *Clarkson,* 64 N. Y. 171; *Commercial Bank of Buffalo* v. *Warren,* 15 N. Y. 577; *Hayes* v. *Kedzie,* 11 Hun (N. Y.) 577, 581.

[94] *Bray, as adm'r. etc.* v. *First Ave. Coal Mining Co.* 148 Ind. 599, 47 N. E. 1073; *Wilson* v. *Pickering,* 28 Mont. 435, 72 Pac. 821; *Artrip* v. *J. H. Rasnake & Son,* 96 Va. 277, 31 S. E. 4; *Hayhurst* v.

original notes secured by a mortgage have been surrendered and other forms of indebtedness taken in their stead, will not, as between the parties, while the original indebtedness still continues, deprive the creditor of the security afforded by his mortgage;[95] and a mortgage debt will not be satisfied by the mere giving of other notes in renewal, because it is the debt and not the mere evidence of it which is secured, and so long as the debt exists in any form, the mortgage will remain unsatisfied.[96] And the assignment of a lease as additional security will not operate as a discharge or payment.[97]

The acceptance of a mortgagor's note for the interest due on a mortgage, will not pay the debts nor discharge the lien of the mortgage for such interest.[98] Payment by a mortgagor to the next of kin of his deceased mortgagee is no defence to an action by the administrator for foreclosure;[99] and the payment of part of a mortgage debt after the commencement of proceedings to foreclose the mortgage, but before their termination, will not necessarily delay or prevent the continuance of the foreclosure.[1]

In a case where the amount of a mortgage was reduced by the court on an appeal by the mortgagor on a bill to set it aside, the complainant was allowed costs of both courts and was permitted to apply them, with taxes, as a payment *pro*

Morin, 104 Me. 169, 71 Atl. 707. See *Simmons Hardware Co.* v. *Thomas,* 147 Ind. 313, 46 N. E. 645; *Shipman, as trustee, etc* v. *Lord,* 58 N. J. Eq. 380, 44 Atl. 215; *Clarkson* v. *Graham,* 21 Tex. Civ. App. 355, 52 S. W. 269. See also *Christian* v. *Green,* 45 So. 425 (Miss.).

New mortgage accepted for old mortgage is a payment or satisfaction. *Baker* v. *Central National Bank of Ellsworth,* 86 Kan. 293, 120 Pac. 549.

[95] *Heively* v. *Matteson,* 54 Iowa, 505.

[96] *Bodkin* v. *Merit,* 86 Ind. 560. *White* v. *Stevenson,* 144 Cal. 104, 77 Pac. 828; *Greist* v. *Gowdy,* 81 Conn. 351, 71 Atl. 555; *Bonestell* v. *Bowie,* 128 Cal. 511, 61 Pac. 78. See *Wilkes* v. *Miller, as adm'r etc.* 156 N. C. 428, 72 S. E. 482; *Stein* v. *Kaun,* 244 Ill. 32, 91 N. E. 77.

[97] *Maloney* v. *Lafayette Building & Loan Ass'c.* 69 Ill. App. 35.

[98] *Hutchinson* v. *Swartzweller,* 31 N. J. Eq. (4 Stew.) 205.

[99] *Mitchell* v. *Moorman,* 1 Young, & J. 21. See *Story* v. *Kemp,* 51 Ga. 399.

[1] *Welch* v. *Stearns,* 74 Me. 71.

tanto on the mortgage.[2] In a case where the maker of a note, secured by mortgage, on the day of its maturity sent checks to the mortgagee for the amount thereof with the intention of paying it, and requested the same to be applied in payment of the note, the mortgagee objected to such application and requested that the checks should be applied towards the payment of an open account, stating that if insisted upon, the application would be made in payment of the note as required but that in such case the open account would be closed and payment required, and that further credit would not be given. The mortgagor did not expressly assent to this, though no further directions were given by him as to the application of the check and he did not make a demand for the note; the mortgagee credited the checks on the open account and delivered receipted vouchers therefor showing such application, and the mortgagor continued to purchase and the mortgagee to sell to him on credit. In an action brought to foreclose the mortgage, it was held that the checks were not a payment on the note, because the above facts showed the acquiescence of the mortgagor in the application as made on the open account.[3]

§ 470. Attorney's fees and taxes to be paid as part of mortgage debt.—Where a mortgage provided for the payment of an attorney's fee, "to become payable on filing the complaint for foreclosure," and after the commencement of an action to foreclose, the mortgagor paid the principal and interest, together with the court costs, but not the attorney's fee, and was informed by the plaintiff that by the terms of the mortgage there was an attorney's fee due, which would have to be paid before the mortgage would be discharged or the action dismissed, it was held that the plaintiff was entitled to proceed with the action to enforce the payment of the

[2] *Bowe* v. *Bowe,* 42 Mich. 195.

[3] *Pennsylvania Coal Co.* v. *Blake,* 85 N. Y. 226. See *post,* § 473.

attorney's fee.[4] And it has been held that the payment of the debt secured by a mortgage does not extinguish the lien of the mortgage as a security for taxes properly paid by the mortgagee to protect his mortgage security.[5]

§ 471. Payment of condemnation money to mortgagor instead of to mortgagee.—A mortgagee will not be barred of his right to foreclose by the payment to the mortgagor, instead of to him, of the condemnation money found to be due to the owner of the property, where such property is taken by the right of eminent domain.[6] Thus, where a railroad company, in the exercise of the power of eminent domain, seeks to appropriate private property to its own use for the purpose of a right of way, by condemnation and appraisement, all persons having an interest in the property, including the mortgagees, should be made parties to the proceeding by proper notice; and if such company fails so to do and pays the money to a person not entitled thereto, the proceeding and payment will be void as to all persons not parties to it and therefore not binding upon a mortgagee, who may foreclose his mortgage as against the railroad company.[7] Where the entire mortgaged premises are taken, the question as to whether, by the condemnation proceedings, the railroad company acquired the fee to the land or only an easement, is not material; the whole of the property being taken, the effect upon the mortgagee's security is the same.[8]

§ 472. Payment by deposit of collateral security or assumption of prior mortgage.—In a recent case [9] a party

[4] *Stockton Saving and Loan Soc.* v. *Donnelly*, 60 Cal. 481. See *Healy* v. *Protection Mutual Fire Ins. Co.* 213 Ill. 99, 72 N. E. 678; *Brand* v. *Kleinecke, as trustee, etc.* 77 Ill. App. 269.

[5] *Horrigan* v. *Wellmuth*, 77 Mo. 542. See also *Oliphant* v. *Burns*, 146 N. Y. 218, 40 N. E. 980.

[6] *Dodge* v. *Omaha & S. W. R. R. Co.* 20 Neb. 276.

[7] *Dodge* v. *Omaha & S. W. R. R. Co.* 20 Neb. 276.

[8] *Dodge* v. *Omaha & S. W. R. R Co.* 20 Neb. 276.

[9] *Green* v. *Fry*, 93 N. Y. 353.

purchased certain premises in reliance upon representations of the vendor that they were free and clear from all incumbrances, there being in fact a mortgage thereon at the time. Upon discovery of the fraud by the purchaser an oral agreement was made between him and his grantor, that he would assume the old mortgage and that the amount thereof should be credited as a payment upon a mortgage given by him to secure part of the purchase money. The vendor subsequently assigned his mortgage to parties who had no knowledge of the agreement. After the assignment, for the purpose of carrying out the oral agreement, the vendor executed to the purchaser a receipt for the amount of the old mortgage to be applied upon the purchase money mortgage. The mortgagor at that time had knowledge of the assignment. In an action to foreclose, it was held that the oral agreement was valid and effectual as a payment, and that its effect was not impaired by taking the receipt.

Where the attorney of a mortgagee refused to receive from the mortgagor a partial payment on the mortgage to stop the interest, but consented to receive it as a deposit, with the understanding that if the mortgagee would take the same as a payment and allow interest, it should be indorsed on the mortgage, and the mortgagee refused to receive the money unless the whole debt was paid, but subsequently accepted the money from his attorney with the undestanding that he was not to allow interest thereon until the residue was paid; the court held that the mortgagor was equitably entitled to have the money applied as a payment on the day it was made, and that it was *pro tanto* a defence to an action to foreclose.[10]

§ 473. **Application of payments—How to be made.**—A debtor has a right to direct the application of his pay-

[10] *Toll* v. *Hiller,* 11 Paige, Ch. (N. Y.) 228.

ments to any one of several debts owing by him to a creditor,[11] and such application by the creditor may be implied from attending circumstances.[12] Where the debtor fails to direct a specific application at the time of the payment, the creditor may make such application as he chooses.[13] Where neither party makes an application of the payment at the time it is made, the court may subsequently direct how it shall be made.[14]

If the application of payments is made by a court, it will be made according to the equitable rights of all interested parties.[15] Where a debtor owes his creditor upon various

[11] See *Bank of California* v. *Webb*, 94 N. Y. 467; *National Bank of Newburgh* v. *Bigler*, 83 N. Y. 51; *Harding* v. *Tifft*, 75 N. Y. 461; *Sheppard* v. *Steele*, 43 N. Y. 53, 3 Am. Rep. 660; *Butler* v. *American P. L. Ins. Co.* 42 N. Y. Supr. Ct. (10 J. & S.) 342; *Seymour* v. *Marvin*, 11 Barb. (N. Y.) 80; *Mann* v. *Marsh*, 2 Cai. (N. Y.) 99; *Baker* v. *Stackpoole*, 9 Cow. (N. Y.) 420; *Van Rensselaer* v. *Roberts*, 5 Den. (N. Y.) 470; *Allen* v. *Culver*, 3 Den. (N. Y.) 284; *Hall* v. *Constant*, 2 Hall (N. Y.) 185; *Patty* v. *Milne*, 16 Wend. (N. Y.) 557; *Stone* v. *Seymour*, 15 Wend. (N. Y.) 19; *Webb* v. *Dickinson*, 11 Wend. (N. Y.) 62; *Seymour* v. *VanSlyck*, 8 Wend. (N. Y.) 403; *King* v. *Andrews*, 30 Ind. 429; *Bacon* v. *Brown*, 1 Bibb (Ky.) 334, 4 Am. Dec. 640; *Champenois* v. *Fort*, 45 Miss. 355; *Leef* v. *Goodwin*, Tan. C. C. 460. See *ante*, § 469.

[12] *Seymour* v. *VanSlyck*, 8 Wend. (N. Y.) 403. See *Truscott* v. *King*, 6 N. Y. 147; *Robert* v. *Garnie*, 3 Cai. (N. Y.) 14; *Allen* v. *Garnie*, 3 Den. (N. Y.) 284; *Sone* v. *Seymour*, 15 Wend. (N. Y.) 19; *Webb* v. *Dickinson*, 11 Wend. (N. Y.) 62.

[13] *National Bank of Newburgh* v. *Bigler*, 83 N. Y. 51. See *Feldman* v. *Beier*, 78 N. Y. 293; *Harding* v. *Tifft*, 75 N. Y. 461; *Shipsey* v. *Bowery Nat. Bank*, 59 N. Y. 485; *Bank of California* v. *Webb*, 48 N. Y. Supr. Ct. (16 J. & S.) 175; *Seymour* v. *Marvin*, 11 Barb. (N. Y.) 80; *Mann* v. *Marsh*, 2 Cai. (N. Y.) 99; *Baker* v. *Stackpoole*, 9 Cow. (N. Y.) 420; *Van Rensselaer* v. *Roberts*, 5 Den. (N. Y.) 470; *Allen* v. *Culver*, 3 Den. (N. Y.) 284; *Hall* v. *Constant*, 2 Hall (N. Y.) 185; *Godfrey* v. *Warner*, Hill & Den. (N. Y.) 32; *Webb* v. *Dickinson*, 11 Wend. (N. Y.) 62; *Trotter* v. *Grant*, 2 Wend. (N. Y.) 413; *Waterman* v. *Younger*, 49 Mo. 413; *Howard* v. *McCall*, 21 Gratt. (Va.) 205; *Mayor* v. *Patten*, 8 U. S. (4 Cr.) 317, 2 L. ed. 632.

[14] *Allen* v. *Culver*, 3 Den. (N. Y.) 284; *Stone* v. *Seymour*, 15 Wend. (N. Y.) 19; *Righter* v. *Stall*, 3 Sandf. Ch. (N. Y.) 608; *Hargroves* v. *Cooke*, 15 Ga. 321; *Nutall* v. *Brannin*, 5 Bush (Ky.) 11; *Calvert* v. *Carter*, 18 Md. 73.

[15] *Jones* v. *Benedict*, 83 N. Y. 79.

debts, a portion of which are secured, the application of payments, if made by a court, will usually be made upon those that are secured, in order to release the securities.[16] But it is questionable whether in all cases, as between a mortgage and an open account, the court will apply a general payment upon the mortgage instead of upon the open account.[17] Some of the cases hold that such an application of general payments should be made as will be most beneficial to the debtor, and that generally such payments should be applied to extinguish the debts first due.[18]

Where payments are made by a party upon a mortgage debt in pursuance of the discharge of a duty, in the proper performance of which others are interested, such payments must be applied and allowed in satisfaction of the mortgage, and cannot be used by such party as a mere consideration for the assignment of the mortgage and debt to a third person.[19] And money once paid and appropriated by the parties to a note secured by a mortgage, and indorsed upon it, cannot by subsequent agreement be transferred to the credit

See *Griswold* v. *Onondaga Co. etc. Bank,* 93 N. Y. 301; *Truscott* v. *King,* 6 N. Y. 147; *Dows* v. *Morewood,* 10 Barb. (N. Y.) 183; *Baker* v. *Stackpoole,* 9 Cow. (N. Y.) 420; *Allen* v. *Culver,* 3 Den. (N. Y.) 284; *Stone* v. *Seymour,* 15 Wend. (N. Y.) 19; *Chester* v. *Wheelwright,* 15 Conn. 562; *Bacon* v. *Brown,* 1 Bibb. (Ky.) 334, 4 Am. Dec. 640; *Harker* v. *Conrad,* 12 Serg. & R. (Pa.) 301, 14 Am. Dec. 691; *Ayer* v. *Hawkins,* 19 Vt. 26; *Emery* v. *Titchout,* 13 Vt. 15; *Leef* v. *Goodwin,* Tan. C. C. 460.

[16] *Jones* v. *Benedict,* 83 N. Y. 79; *Thomas* v. *Kelsey,* 30 Barb. (N. Y.) 268; *Dows* v. *Morewood,* 10 Barb. (N. Y.) 183; *Wright* v. *Wright,* 7 Daly (N. Y.) 55; *Jackson* v. *Johnson,* 11 Hun (N. Y.) 509; *Callahan* v. *Boazman,* 21 Ala. 246; *Stamford Bank* v. *Benedict,* 15 Conn. 437; *Langdon* v. *Bowen,* 46 Vt. 512; *Vance* v. *Monroe,* 4 Gratt. (Va.) 53. But see *Field* v. *Holland,* 10 U. S. (6 Cr.) 8, 3 L. ed. 136.

[17] *Griswold* v. *Onondaga Co. etc. Bank,* 93 N. Y. 301.

[18] *Dows* v. *Morewood,* 10 Barb. (N. Y.) 183. See *Hunter* v. *Osterhoudt,* 11 Barb. (N. Y.) 33; *Allen* v. *Culver,* 3 Den. (N. Y.) 284; *Wheeler* v. *Cropsey,* 5 How. (N. Y.) Pr. 288; *Fairchild* v. *Holly,* 10 Conn. 176; *Sprague* v. *Hazenwinkle,* 53 Ill. 419; *Crompton* v. *Pratt,* 105 Mass. 255; *Langdon* v. *Bowen,* 46 Vt. 512.

[19] *Burnham* v. *Dorr,* 72 Me. 198.

of another debt, and such satisfied mortgage thereby become re-instated and made good as against a second mortgage.[20]

Where a mortgagee, subsequent to the execution of the mortgage, has become indebted to the mortgagor upon a book account, the owner of the equity of redemption or a junior mortgagee has a right to have such indebtedness, due from the prior mortgagee to the mortgagor, applied in satisfaction of the senior mortgage.[21] But it has been held, that the question, whether a balance on account in transactions between a mortgagee and a mortgagor after the execution of the mortgage, which is equal to the amount of the mortgage, is to be applied upon the payment of such mortgage, and to be regarded as a discharge thereof, depends upon the intention of the parties and is purely a question of fact;[22] if it was the intention and agreement of the parties, that the money secured by the mortgage should remain unpaid, irrespective of the current balance of accounts, the mortgagor will not be entitled, as against an assignee of the mortgage, to apply such balance to the satisfaction of the mortgage debt, or as a payment thereon *pro tanto*.[23] Where the mortgagor of land performs labor for the mortgagee, under an agreement that his wages shall be applied upon the mortgage debt, and earns more than enough to satisfy the same, the debt will nevertheless remain undischarged until the actual application of the amount to such payment; yet if such application is not made, and the condition of the mortgage is broken, the mortgagor may maintain an action to redeem.[24]

[20] *York Co. Savings Bank* v. *Roberts,* 70 Me. 384.

[21] *Prouty* v. *Price,* 50 Barb. (N. Y.) 344; *Rosevelt* v. *Bank of Niagara,* Hopk. Ch. (N. Y.) 579, aff'd 9 Cow. (N. Y.) 409.

[22] *Peck* v. *Minot,* 3 Abb. Ct. App. Dec. (N. Y.) 465. See *Bocks* v. *Hathorn,* 20 Hun (N. Y.) 503; *Toll* v. *Hiller,* 11 Paige Ch. (N. Y.) 228.

[23] *Peck* v. *Minot,* 3 Abb. Ct. App. Dec. (N. Y.) 465. See also *Sherman, as adm'r, etc.* v. *Matthieu,* 106 App. Div. 368, 94 N. Y. Supp. 565; *McKean* v. *German-American Savings Bank,* 118 Cal. 334, 50 Pac. 656.

[24] *Doody* v. *Pierce,* 91 Mass. (9 Allen) 141.

§ 474. **Payments by mortgagor after conveyance.**—A mortgage is valid and may be foreclosed as long as the debt which it secures is not barred by the statute of limitations; and a partial payment or an acknowledgment of the debt, which would prevent the statute from running against it, will also prevent the statute from running against the remedy on the security. Thus, it has been held that where a purchaser from the mortgagor has either actual notice of the mortgage at the time of his purchase, or constructive notice by means of public records, he will be bound by a previous acknowledgment of the debt made by his grantor within twenty years.[25]

It has been said that a grantee of mortgaged premises will be bound by the acts of the mortgagor, or other person under whom he claims, made subsequently to the vesting of his estate, as well as by those prior thereto; and that a payment or a new promise made by such person after the transfer of the property to the grantee, will keep the debt and security alive against the estate.[26] And it has been held that a payment of interest by a tenant for life, will keep the mortgage alive as against a person entitled to the mortgaged premises in remainder.[27] But it is also held that, where the mortgagor conveys the equity of redemption and ceases to pay interest on the mortgage note, the regular payment of interest by the grantee will not operate to prevent the running of the statute of limitations against the liability of the mortgagor on the mortgage and the note.[28] The doctrine, however, that a payment made by the mortgagor or other party liable for the debt after he has parted with all interest in the property, will keep alive the debt and the lien on

[25] See *Heyer* v. *Pruyn*, 7 Paige Ch. (N. Y.) 465, 34 Am. Dec. 355; *Hughes* v. *Edwards*, 22 U. S. (9 Wheat.) 489, 6 L. ed. 142. See *ante*, chap. IV.

[26] *N. Y. Life Ins. & Trust Co.* v. *Covert*, 6 Abb. (N. Y.) Pr. N. S. 154, 3 Abb. App. Dec. (N. Y.) 350, reversing 29 Barb. (N. Y.) 435; *Barrett* v. *Prentiss*, 57 Vt. 297.

[27] *Roddam* v. *Morley*, 1 De G. & J. 1.

[28] *Trustees of old Alms House Farm* v. *Smith*, 52 Conn. 434.

the property, is repudiated in California,[29] Kansas,[30] Massachusetts[31] and Texas.[32]

§ 475. Payments—How pleaded—Inability to find mortgagee.—Payment may be pleaded by answer and need not be set up as a counter-claim to be available. Thus, the defence that the mortgagee has received a conveyance of property or payments in money, which should be applied on the mortgage debt, may be taken by answer without filing a cross-bill.[33] And where a defendant in his answer to a complaint to foreclose a mortgage alleges that the debt has been fully paid, he will be entitled to prove on the trial that the plaintiff received money at different times, to be applied as payments on the mortgage, although he did not plead such payments as a counter-claim.[34] Where a mortgage contains a stipulation that the mortgagor may make payments before the debt falls due, at his option, he must distinctly and affirmatively elect to do so in order to make a valid tender of the whole amount secured; and if he relies upon such election and a tender thereunder as a defence against a foreclosure, he must not only allege it in his answer, but prove it.[35]

In an action brought to foreclose a mortgage, containing a clause making the principal due in case of default in paying the interest after a certain number of days, it is not a valid defence or ground of relief that the defendant could not find the holder of the mortgage until after the time for the payment of the interest had expired, where the answer does not set out a trick or fraud on the part of the plaintiff to prevent the payment of the interest.[36]

[29] *Low* v. *Allen*, 26 Cal. 141.

[30] *Schmucker* v. *Seibert*, 18 Kan. 104, 26 Am. Rep. 765.

[31] *Butler* v. *Price*, 115 Mass. 578; *Pike* v. *Goodnow*, 94 Mass. (12 Allen) 472.

[32] *Cason* v. *Chambers*, 62 Tex. 305.

[33] *Edgerton* v. *Young*, 43 Ill. 464.

[34] *Hendrix* v. *Gore*, 8 Oreg. 406.

[35] *Post* v. *Springsted*, 49 Mich. 90.

[36] *Dwight* v. *Webster*, 32 Barb. (N. Y.) 47. 10 Abb. (N. Y.) Pr. 128. See *Ferris* v. *Ferris*, 16 How. (N. Y.) Pr. 102. See also *Cunning-*

§ 476. Payment—How proved in defence.—Where the defendant sets up satisfaction of the debt as a defence, the only question being one of fact,[37] payment may be proved by parol,[38] or inferred from attending circumstances.[39] The burden of proof, however, is on the defendant.[40] Thus, in an action to foreclose a mortgage, which, by its terms, was given to secure the payment of moneys according to the conditions of a bond, where the defense of payment is interposed, the failure of the plaintiff to produce the bond will be evidence of the satisfaction of the mortgage debt, and, if unexplained, will be conclusive against the plaintiff's right to recover.[41] But the presumption of payment arising from the possession

ham v. *McCready*, 219 Pa. 594, 69 Atl. 82. But see *Weyand* v. *Park Terrace Co.* 202 N. Y. 231, 36 L.R.A.(N.S.) 308, 95 N. E. 723.

[37] See *Wells* v. *Lawrence*, 65 Iowa, 373.

[38] *Thornton* v. *Wood*, 42 Me. 282; *Ackla* v. *Ackla*, 6 Pa. St. 228; *McDaniels* v. *Lapham*, 21 Vt. 222.

[39] *Waugh* v. *Riley*, 49 Mass. (8 Metc.) 290; *Morgan* v. *Davis*, 2 Har. & McH. (Md.) 9; *Deming* v. *Comings*, 11 N. H. 474.

In the following cases the evidence was held sufficient to sustain the defense of payment; *Eakle, as adm'r, etc.* v. *Hagan*, 101 Md. 22, 60 Atl. 615; *Campbell, as receiver, etc.* v. *Miller*, 73 Neb. 779, 103 N. W. 434; *Marsh* v. *Vanness*, 75 N. J. Eq. 607, 74 Atl. 47; *Ellis* v. *Basher*, 17 Ida. 259, 105 Pac. 214; *In re Van Alstyne*, 142 App. Div. 209, 126 N. Y. Supp. 1078; *Blackfoot State Bank* v. *Crisler*, 20 Idaho, 279, 118 Pac. 775; *King* v. *Briarwood Land Co. of Jamaica*, 131 N. Y. Supp. 946. See also *Sears* v. *Allen*, 71 Iowa, 481, 33 N. W. 649; *Steger* v. *Kelley*, 136 S. W. 824 (Tex. Civ. App.); *Norris* v. *Ryno*, 169 Mich. 193, 135 N. W. 463; *Sager* v. *Hartshorn*, 163 Mich. 578, 128 N. W. 749.

In the following cases the evidence was held insufficient to sustain the defense of payment: *Hodge* v. *Scott*, 1 Neb. (Unof.) 619, 95 N. W. 837; *Douglas, as receiver, etc.* v. *Miller*, 102 App. Div. 94, 92 N. Y. Supp. 514; *Becker* v. *Bluemel*, 129 Wis. 491, 109 N. W. 534; *Morrison, as trustee, etc.* v. *Roehl*, 215 Mo. 545, 114 S. W. 981; *Mead, as adm's etc.* v. *Mead*, 132 N. W. 701 (S. D.) See also *York* v. *West*, 147 Mich. 549, 111 N. W. 164; *Gerardi* v. *Christie*, 148 Mo. App. 75, 127 S. W. 635; *Northland Produce Co.* v. *Stephens, as trustee, etc.* 116 Minn. 23, 133 N. W. 93.

[40] *Tisdale* v. *Mallett*, 73 Ark. 431, 84 S. W. 481; *Archibald* v. *Banks*, 203 Ill. 380, 67 N. E. 791; *Omaha Loan & Trust Co.* v. *Luellen*, 3 Neb. (Unof.) 709, 92 N. W. 734; *Smith, as adm'r, etc.* v. *Allmon*, 74 S. C. 502, 54 S. E. 1014; *Jamison* v. *Auxier*, 145 Iowa, 654, 124 N. W. 606.

[41] *Bergen* v. *Urbahn*, 83 N. Y. 49.

of the notes and mortgage by the mortgagor may be rebutted.[42] And the cancellation of a mortgage, unexplained by other evidence, being consistent only with the extinguishment of the instrument, raises a presumption to that effect.[43] This presumption may also be rebutted although a discharge is entered on the record by the mortgagee,[44] and even where the discharge is made under seal.[45]

Where no attempt is made to foreclose a mortgage for twenty [46] years after its maturity, payment will be presumed,[47] and will bar any future action to foreclose the mortgage.[48] But this presumption is repelled by any act recognizing the validity of the mortgage.[49]

§ 477. Alleging discharge and satisfaction of mortgage in defence.—What acts amount to a discharge of mortgage is a question of law for the court. And a court of equity will keep an incumbrance alive, or consider it extinguished, as will best serve the ends of justice and execute the acutal just intention of the parties.[50] The simple discharge of a mortgage of record is not necessarily a satisfaction of the debt, nor evidence of its payment, although it may be a complete bar to an action to foreclose.[51] Thus, innocent purchasers of land will take it discharged of a mortgage lien which has been

[42] *Crocker* v. *Thompson*, 44 Mass. (3 Metc.) 224; *Smith* v. *Smith*, 15 N. H. 55. See *Ward* v. *Ward*, 144 Fed. 308; *Montague* v. *Priester*, 82 S. C. 492, 64 S. E. 393.

[43] *Bower* v. *Bower, as ex'r, etc.* 78 N. J. L. 387, 74 Atl. 522.

[44] *Robbinson* v. *Sampson*, 23 Me. 388; *Trenton Banking Co.* v. *Woodruff*, 2 N. J. Eq. (1 H. W. Gr.) 117.

[45] *Fleming* v. *Perry*, 24 Pa. St. 47.

[46] In Vermont the time is fifteen years. *Sowles* v. *Minot*, 82 Vt. 344, 137 Am. St. Rep. 1010, 73 Atl. 1025.

[47] *Greenfield* v. *Mills*, 123 App. Div. 43, 107 N. Y. Supp. 705; *Morgan* v. *Pott*, 124 Mo. App. 371, 101 S. W. 717.

[48] *Swinley* v. *Force*, 78 N. J. Eq. 52, 78 Atl. 249.

[49] *Frye, as ex'r, etc.* v. *Hubbell*, 74 N. H. 358, 17 L.R.A.(N.S.) 1197, 68 Atl. 325; *Clark* v. *Clough*, 65 N. H. 43.

[50] *Russell* v. *Bosworth*, 106 Ill. App. 314; *Henschel* v. *Mamero*, 120 Ill. 665; *Roberts, as adm'r, etc.* v. *McNeal*, 80 Ill. App. 536.

[51] *Mason* v. *Beach*, 55 Wis. 607; *Taylor* v. *Godfrey*, 62 W. Va. 677,

satisfied of record, although the satisfaction was procured by fraud.[52]

Where a mortgage is given by a debtor to two persons to secure the payment of a sum of money owing to them jointly, a discharge by either on payment to him of the amount of the joint debt will be valid.[53] And where the holder of a note received a mortgage with the understanding that he was to retain it as security for the payment of the note, only until he could assure himself of the solvency of another party, who was offered as surety, and having satisfied himself on this point, he obtained the signature of the proposed surety to the note and thereafter kept the note without discharging the mortgage of record, it was held that this was an equitable discharge of the mortgage.[54] But where a mortgagee agreed to discharge a mortgage upon the consideration that the mortgagor would insure his life to secure the debt, which insurance was never obtained, and a power of attorney was written upon the mortgage authorizing the recorder to enter satisfaction thereof, which was never delivered, but was retained by the mortgagee, and a new note was taken and the old one was marked canceled, but was not surrendered, it was held that such authorization was not sufficient to show a discharge of the mortgage.[55]

Where the owner of the equity of redemption pays off a mortgage with his own funds for the purpose of re-pledging the land, such payment will constitute a satisfaction of the mortgage lien;[56] but it will be otherwise, if the owner of the equity of redemption pays off the mortgage with the funds of

59 S. E. 631. See also *Latton* v. *McCarty,* 142 Wis. 190, 125 N. W. 430.

[52] *Burton* v. *Reagan,* 75 Ind. 77.

For facts held sufficient to show satisfaction secured by fraud, see *Lyon* v. *Bailey,* 130 N. Y. Supp. 815.

[53] *Lyman* v. *Gedney,* 114 Ill. 388, 55 Am. Rep. 871.

[54] *Baile* v. *St. Joseph's Fire & Marine Ins. Co.* 73 Mo. 371.

[55] *National Bank* v. *Dayton,* 116 Ill. 257.

[56] *Denton* v. *Cole,* 30 N. J. Eq. (3 Stew.) 244.

a third person, for the purpose of purchasing the mortgage for such third person. Under such circumstances the mortgage will not be considered satisfied nor the lien discharged, either as to the owner or as to subsequent incumbrancers.[57] Where a mortgagee, after a foreclosure sale for an installment due and an entry on the premises, conveyed the land by warranty deed, it was held that such deed discharged the mortgage lien and released the indorsers of such notes as were secured by subsequent installments.[58]

Where a party holding a mortgage discharges it of record solely for the purpose of giving priority to a second mortgage held by another person, the first mortgage will still subsist as between the parties thereto and may be foreclosed against the mortgagor, the same as though no discharge had been made.[59] And where a mortgage is given to secure a debt, and the debt subsequently becomes merged in a judgment, the mortgage lien will not be thereby discharged, but will stand as security for the judgment. So, where a settlement is had between a mortgagor and a mortgagee and a new note is given for the balance due, upon which a judgment is subsequently taken by confession, the new note and judgment will not operate as a discharge of the mortgage.[60] Where a purchaser of land on which there is a trust deed gives a bond to the holder of a trust deed for a different amount, which the holder accepts on the condition that it is to be, when paid, a discharge of the debt secured by the trust deed, the holder making no guaranty of title and no misrepresentations about it, such acceptance of the bond does not discharge the trust deed; and the holder of the trust deed is not liable to the purchaser for expense in relieving the land of incumbrances discovered after the conveyance.[61]

[57] *Denton* v. *Cole,* 30 N. J. Eq. (3 Stew.) 244.

[58] *Bridgman* v. *Johnson,* 44 Mich. 491.

[59] *Wood* v. *Wood,* 61 Iowa, 56.

[60] *Darst* v. *Bates,* 95 Ill. 493.

[61] *Stimpson* v. *Bishop,* 82 Va. 190.

§ 478. Allegation of release of part of mortgaged premises.—A proper release of a mortgage discharges the released portion of the mortgaged premises from the lien of the mortgage debt, and is a good defence to a foreclosure; but a fraudulent release, or a release by a party having no authority to execute the same, will, of course, be void.[62]

And a release by a mortgagee, with notice of subsequent incumbrances, will not give priority to a fourth mortgage over the lien of the intermediate incumbrancers;[63] but where the holder of a mortgage takes a new mortgage as a substitute for an existing mortgage in ignorance of an intervening lien, equity will restore the lien of the first mortgage,[64] because a court will always keep an incumbrance alive to subserve the purposes of justice and to give effect to the actual intention of the parties.[65] Thus, the payee of a note has no authority after its transfer to release a mortgage executed to secure it.[66] And where notes and a mortgage were left with an attorney with power to cancel the original mortgage upon the receipt of a

[62] *Kendall* v. *Woodruff*, 87 N. Y. 1; *Kendall* v. *Niebuhr*, 58 How. (N. Y.) Pr. 156; *VanSlyke* v. *VanLoan*, 26 Hun (N. Y.) 344; *Darst* v. *Bates*, 95 Ill. 493; *Meacham* v. *Steele*, 93 Ill. 135; *Hawhe* v. *Snydaker*, 86 Ill. 197; *Dewey* v. *Ingersoll*, 42 Mich. 17; *Benton* v. *Nicoll*, 24 Minn. 221; *Mount* v. *Potts*, 23 N. J. Eq. (8 C. E. Gr.) 188; *Stillman* v. *Stillman*, 21 N. J. Eq. (6 C. E. Gr.) 126; *Hoy* v. *Bramhall*, 19 N. J. Eq. (4 C. E. Gr.) 563, 97 Am. Dec. 687; *Gaskill* v. *Sine*, 13 N. J. Eq. (2 Beas.) 400, 78 Am. Dec. 105; *Johnson* v. *Olcott*, 8 N. J. Eq. (4 Halst.) 561; *McIlvain* v. *Mutual Assurance Co.* 93 Pa. St. 30; *Kelley* v. *Whitney*, 45 Wis. 110, 30 Am. Rep. 697.

As to a fraudulent entry of satisfaction of a mortgage and its effects, see *Hays* v. *O'Connor*, 1 N. Y. Leg. Obs. 505; *Remann* v. *Buckmaster*, 85 Ill. 403; *Fine* v. *King*, 33 N. J. Eq. (6 Stew.) 108; *Wier* v. *Mosher*, 19 Wis. 311.

In the foreclosure of a mortgage, where the defendant sets up a written conditional release with condition performed, and the plaintiff claims that such release is a forgery, the action will be dismissed where the court is satisfied, from all the evidence, that the release is genuine. *Latourette* v. *Gardner*, 75 Mich. 134, 42 N. W. 610.

[63] *Taylor* v. *Wing*, 84 N. Y. 471. See *Bernhardt* v. *Lymburner*, 85 N. Y. 172.

[64] *Geib* v. *Reynolds*, 35 Minn. 331.

[65] *Sidener* v. *Pavey*, 77 Ind. 241.

[66] *Hagerman* v. *Sutton*, 91 Mo. 519.

new mortgage, and the attorney canceled the original mortgage without receiving such new mortgage, it was held that such cancellation was without authority.[67] A release of mortgaged lands at the instance of the mortgagor is not a good defence in an action to foreclose, where there was nothing to indicate that the release was against the rights of any of the defendants.[68]

If a release of a mortgage is relied upon as a defence in an action for foreclosure, the answer should either give a brief description of the release with averments of the facts connected therewith, or should set it out at length. An answer which merely alleges that the mortgage is of no binding effect and is not a lien upon the premises described, simply states a conclusion of law and is insufficient.[69] Where a mortgagee of land releases a portion thereof from the operation of his mortgage, with actual or constructive notice that any other part thereof has a right to exemption from contribution to the payment of his mortgage, such exemption may be pleaded as a defence to an action to foreclose, and the mortgagee will thereby be estopped from enforcing his mortgage against such exempt portion.[70] And a mortgagee who having notice of successive alienations of portions of the mortgaged premises, releases a part then liable for the payment of the debt, cannot, without first deducting the value of the portions released, charge the other portion of the premises.[71]

§ 479. Alleging release of part of mortgaged premises in defence.—The general rule that the release of the part of mortgaged premises still owned by the mortgagor, will operate as a discharge of the part aliened by him does not apply, unless the releasor has knowledge of the fact of the

[67] *Foster* v. *Paine,* 63 Iowa, 85.

[68] *Botsford* v. *Botsford,* 49 Mich. 29.

[69] *Caryl* v. *Williams,* 7 Lans. (N. Y.) 416.

[70] *George* v. *Wood,* 91 Mass. (9 Allen) 81, 85 Am. Dec. 741.

[71] *Boone* v. *Clark,* 129 Ill. 466, 5 L.R.A. 276, 21 N. E. 850.

alienation or notice sufficient to put him on inquiry.[72] A release of a part of the mortgaged premises given with knowledge of a prior conveyance of another part is not a technical discharge of the part conveyed; nor will it amount to an equitable release or discharge, unless, upon the principles of natural equity and justice, it ought thus to operate against the mortgage giving the release.[73] Where a release is made by the mortgagee of a portion of the premises, with full knowledge of a previous sale of the remaining portion, the payment of the purchase money and the fact that the vendee relied upon the transfer of the lien of the mortgage to the unsold portion, will discharge the entire mortgaged premises from the lien of the mortgage.[74] If the part of the premises released is not sufficient in value to discharge the debt, such release will be a discharge *pro tanto* of the portion previously conveyed.[75]

In determining whether the release of the remaining portion discharges, *pro tanto,* the portion conveyed, the valuation of the part released must be taken at the time when the mortgage was given.[76]

A mortgagee may release a part or the whole of the mortgaged premises without inquiring whether a junior incumbrancer has intervened, because it is the duty of the latter, if he intends to claim an equity through the prior incumbrance, to give the holder thereof notice in order that he may act understandingly; and if he fails to do so, the consequence of his neglect must be visited upon himself.[77]

[72] *Kendall* v. *Niebuhr,* 45 N. Y. Supr. Ct. (13 J. & S.) 542.

[73] *Kendall* v. *Woodruff,* 87 N. Y. 1; *Schrack* v. *Shriner,* 100 Pa. St. 451.

[74] *Schrack* v. *Shriner,* 100 Pa. St. 451.

[75] *Martin's Appeal,* 97 Pa. St. 85.

[76] *Stevens* v. *Cooper,* 1 Johns. Ch. (N. Y.) 425, 7 Am. Dec. 499; *Parkham* v. *Welch,* 36 Mass. (19 Pick.) 231; *Johnson* v. *Williams,* 4 Minn. 260.

[77] *McIlvain* v. *Assurance Co.* 93 Pa. St. 30; *Sherman* v. *Foster,* 158 N. Y. 587, 53 N. E. 504. But see *Howard* v. *Burns,* 73 Minn. 356, 76 N. W. 202; *Hazle* v. *Bondy,* 173 Ill. 302. 50 N. E. 671.

§ 480. Application of proceeds on release of part of mortgaged premises.—An agreement by a mortgagee with a mortgagor to release portions of the mortgaged premises, on the payment of specified sums, may be enforced.[78] Thus, where an arrangement was made with a mortgagee by which he was to receive the proceeds of certain lots whenever sold, and to release one lot from the lien of his mortgage for every $1,000 paid to him, and a larger amount of such proceeds was received by him in bonds, it was held that the excess should be applied in discharge of the mortgage.[79] In a recent case in New York,[80] the facts were as follows: A mortgage originally covered several pieces of land, all of which, except two pieces, were released on sales thereof made by the mortgagor, and the proceeds of such sales were applied upon the mortgage debt. Another parcel was sold and this also was released in accordance with the contract and a mortgage was taken for the purchase money, which was assigned to the original mortgagee. The original mortgagor was at this time indebted to the original mortgagee upon an unsecured account; no application of the assigned mortgage was made by either party. About ten years after such assignment the mortgagor conveyed the remaining parcel of land and requested the plaintiff to execute a discharge of the original mortgage on the ground that it was paid by the assignment of the purchase money mortgage. This the plaintiff declined to do, but for about seventeen years made no claim under his mortgage. In an action to foreclose such mortgage it was held, that equity

[78] See *Lane* v. *Allen,* 162 Ill. 426, 44 N. E. 831; *Gammel* v. *Goode,* 103 Iowa, 301, 72 N. W. 531; *Bartlett Estate Co.* v. *Fairhaven Land Co.* 49 Wash. 58, 15 L.R.A.(N.S.) 590, 126 Am. St. Rep. 856, 94 Pac. 900; *Hall* v. *Home Building Co.* 37 Atl. 1019 (N. J. Eq.)

[79] *Cook* v. *Woodruff,* 97 Ind. 134. It was held in this case that the plaintiff was subject to an examination in regard to an indemnifying bond, executed by parties in interest to secure the payment of the bonds received on the sales of the lots, to ascertain what application he had made of the proceeds thereof.

[80] *Griswold* v. *Onondaga Co. Savings Bank,* 93 N. Y. 301.

required the proceeds of the assigned mortgage to be applied as a payment upon the original mortgage instead of upon the open account.[81]

§ 481. Denial of personal liability on contract of assumption.—A mortgagee has a right to proceed in equity against one who has assumed and agreed to pay his mortgage.[82] But where the mortgagee seeks to hold the grantee of the mortgaged premises personally liable, such grantee may deny on the foreclosure of the mortgage, that he assumed the payment of the mortgage debt or any part thereof, and that he is personally liable. And where the deed makes the grantee liable for the mortgage debt, he may set up in defence and show by parol, that the deed under which he holds does not express the contract of the parties.[83]

Where the defendant has purchased the mortgaged premises and agreed to pay the mortgage debt or a portion thereof, his liability depends upon the nature of the dealing in which the assumption was made, and is subject to any condition or defeasance attached thereto.[84] If the consideration for the assumption fails, or there is a good defense to it, as between

[81] *Griswold* v. *Onondaga Co. Savings Bank,* 93 N. Y. 301.

It is not settled whether the court will in all cases, as between a mortgage and an open account, apply a general payment upon the mortgage. See *Dows* v. *Morewood,* 10 Barb. (N. Y.) 183; *Griswold* v. *Onondaga Co. Savings Bank,* 93 N. Y. 301. See *ante,* § 473.

[82] *Burr* v. *Beers,* 24 N. Y. 178, 80 Am. Dec. 327. See *Garnsey* v. *Rogers,* 47 N. Y. 236, 7 Am. Rep. 440; *Trotter* v. *Hughes,* 12 N. Y. 74, 62 Am. Dec. 137; *Russell* v. *Pistor,* 7 N. Y. 171, 57 Am. Dec. 509; *Cornell* v *Prescott,* 2 Barb. (N. Y.) 16; *Marsh* v. *Pike,* 10 Paige Ch. (N. Y.) 597; *King* v. *Whitely,* 10 Paige Ch. (N. Y.) 465; *Halsey* v. *Reed,* 9 Paige Ch. (N. Y.) 446; *Curtis* v. *Tyler,* 9 Paige Ch. (N. Y.) 432.

But this right does not embrace a claim to the purchase money on a sale of the mortgaged premises or to the vendor's lien to secure it. *Emley* v. *Mount,* 32 N. J. Eq. (5 Stew.) 470.

[83] *Selchow* v. *Stymus,* 26 Hun (N. Y.) 145.

[84] *Judson v. Dada,* 79 N. Y. 373, 379; *Garnsey* v. *Rogers,* 47 N. Y. 233, 7 Am. Rep. 440. See *ante, chap.* XI.

the parties, it is questionable whether it can be enforced by the mortgagee.[85] And a contemporaneous agreement by a separate instrument will qualify or control it even as to the mortgagee.[86] Hence, one who has purchased a part of the mortgaged lands and agreed with the mortgagor to assume and pay the whole mortgage, may discharge his land from the consequences of that assumption by an agreement made with the grantor while the latter was still the owner of the residue; and the grantee of such residue, after such discharge, cannot claim the benefit of the assumption, because the grantee succeeds only to the equities of his grantor existing at the time of the conveyance, and that without regard to any question of notice.[87]

[85] *Judson* v. *Dada*, 79 N. Y. 373, 379. See *Wadsworth* v. *Nevin*, 64 Iowa, 64.

[86] *Judson* v. *Dada*, 79 N. Y. 373, 379; *Flagg* v. *Munger*, 9 N. Y. 483.

[87] *Judson* v. *Dada*, 79 N. Y. 373, 379.

CHAPTER XX.

ANSWERS AND DEFENCES.

ADVERSE AND PARAMOUNT CLAIMS OF TITLE—DEFECTIVE TITLE—FIXTURES—EVICTION—OUTSTANDING TITLE—WANT OF TITLE.

§ 482. Adverse and paramount claims of title cannot be litigated in a foreclosure.
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§ 501. Denial of title in mortgagor at time of executing mortgage.

§ 482. Adverse and paramount claims of title cannot be litigated in a foreclosure.—It is well settled, that the object of an action to foreclose a mortgage is to bar the mortgagor and all parties claiming under him, subsequent to the mortgage, and that in such an action the plaintiff cannot be

required to litigate questions of adverse or paramount title;[88] neither can the legal title of the mortgagee be questioned.[89]

A foreclosure suit is not a proper proceeding in which to litigate the adverse and paramount title of a defendant who claims under the foreclosure of a prior mortgage, from which the complainant does not seek to redeem;[90] and in a suit to foreclose, the mortgagor, though in possession, cannot defend merely on the ground that the lien of the mortgage has been divested by the foreclosure of a prior mortgage.[91] The reason for this would seem to be that in the usual form of mortgage, the mortgagor covenants to warrant and defend, and one who has covenanted to defend the title against all adverse claims,

[88] *Hekla Fire Ins. Co.* v. *Morrison,* 56 Wis. 133; *Macloon* v. *Smith,* 49 Wis. 200. See *ante,* chap. ix. *Grosscup* v. *German Savings & Loan Society,* 162 Fed. 947; *Cady* v. *Purser,* 131 Cal. 552, 63 Pac. 844, 82 Am. St. Rep. 391; *Pearson* v. *Helvenston,* 50 Fla. 590, 39 So. 695; *Smith* v. *Kenny,* 89 Ill. App. 293; *Parlin & Orendorff Co.* v. *Galloway,* 95 Ill. App. 60; *Branch* v. *Wilkens,* 63 S. W. 1083 (Tex. Civ. App.); *Hampshire* v. *Greeves,* 130 S. W. 665 (Tex. Civ. App.); *Oates* v. *Shuey, as receiver, etc.* 25 Wash. 597, 66 Pac. 58. See *Ord* v. *Bartlett,* 83 Cal. 428, 23 Pac. 705; *Ludlow* v. *Ludlow,* 109 Ind. 199, 9 N. E. 769; *McEwen* v. *Beard* (Minn.) 59 N. W. 942; *Lebanon Savings Bank* v. *Walterman,* 65 N. H. 88, 19 Atl. 1000; *Van Denburgh* v. *New York City C. U. R. Co.* 25 Jones & S. (25 N. Y. Supr. Ct.) 285, 7 N. Y. Supp. 675, 28 N. Y. S. R. 578; *California Safe-Deposit Co.* v. *Cheney Electric-Light T. & P. Co.* 12 Wash. 138, 40 Pac. 732; *Farmers' Loan & T. Co.* v. *San Diego Street Car Co.* 40 Fed. 105; *Kiser* v. *Caufield,* 17 Wash. 417, 49 Pac. 1064; *Murray* v. *Etchepare,* 129 Cal. 318, 61 Pac. 930; *Mayer* v. *Margolies,* 47 Misc. 24, 95 N. Y. Supp. 204. See also *Larrimore* v. *Squires,* 30 Misc. 62, 62 N. Y. Supp. 885. See *ante,* § 213.

But see *Sielbeck* v. *Grothman,* 248 Ill. 435, where it is held that the question of a title being paramount or adverse should be raised in the foreclosure proceeding and not for the first time collaterally.

[89] *Skelton* v. *Scott,* 18 Hun (N. Y.) 375; *Cross* v. *Robinson,* 21 Conn. 379; *Palmer* v. *Mead,* 7 Conn. 149; *Broome* v. *Beers,* 6 Conn. 198. See *Holcomb* v. *Holcomb,* 2 Barb. (N. Y.) 20; *Eagle Fire Ins. Co.* v. *Lent,* 6 Paige Ch. (N. Y.) 637; *Frelinghuysen* v. *Colden,* 4 Paige Ch. (N. Y.) 206; *Lange* v. *Jones,* 5 Leigh (Va.) 192; *Stewart's Heirs* v. *Coalter,* 4 Rand. (Va.) 74, 15 Am. Dec. 731.

[90] *Bell* v. *Pate,* 47 Mich. 468.

[91] *Herber* v. *Christopherson,* 30 Minn. 395.

is estopped from alleging title paramount in a third person;[92] and where an action at law is brought to recover possession of the mortgaged premises, the mortgagor will be estopped by his deed from denying that he had title to the mortgaged premises at the time of making the mortgage.[93]

Where one holding a mortgage on upland property brings foreclosure he may litigate the question of conflicting rights as between himself and the holder of a mortgage covering the bed of the stream.[94]

A mortgagor who is bound to pay the taxes upon the mortgaged premises cannot acquire and hold a tax title as against his mortgagee; his purchase of the title at a tax sale will operate merely as a payment of the taxes.[95] A mortgagor cannot set up a matter going behind the mortgage as a defense to an action of foreclosure, where there has been neither fraud nor misrepresentation.[96]

§ 483. Defective title of mortgagor cannot be set up in defence.—In an action to foreclose a mortgage the mortgagor cannot plead as a defense a defect in his title at the time of the execution and delivery of the mortgage;[97] and the court has no authority to determine a controversy, be-

[92] *Macloon* v. *Smith,* 49 Wis. 200.

[93] *Concord M. F. Ins. Co.* v. *Woodbury,* 45 Me. 447.

[94] *Farmers' & Traders' National Bank* v. *Gates,* 33 Or. 388, 54 Pac. 205, 72 Am. St. Rep. 724.

[95] *Renshaw* v. *Stafford,* 30 La. An. 858; *Dunn* v. *Snell,* 74 Me. 22; *Allison* v. *Armstrong,* 28 Minn. 276, 41 Am. Rep. 281, 9 N. W. 806.

And a purchaser from a mortgagor stands in the same position as his grantor, and cannot defeat the mortgage by acquiring a tax title. *McEwen* v. *Beard,* 58 Minn. 176, 59 N. W. 942. But it is said in *Ludlow* v. *Ludlow* (109 Ind. 199, 58 Am. Rep. 387, 9 N. E. 769) that in an action to foreclose a mortgage a cross-complaint alleging in each paragraph that the cross-complainant is the owner of the property under a tax sale which antedated appellant's mortgage thereon, and that plaintiff and his co-defendants each claimed an interest in such property adverse to his title, is sufficient upon demurrer, under the Indiana statute. Ind. Rev. Stat. 1881, § 1070.

[96] *Northrop* v. *Sumney,* 27 Barb. (N. Y.) 196

[97] *Dime Savings Bank of Brooklyn* v. *Crook,* 29 Hun (N. Y.) 671.

tween defendants jointly liable on a note which the mortgage was given to secure, as to which of them was the principal debtor and which the surety.[98]

The foreclosure of a mortgage is not a proper action for the settlement of a disputed title,[99] and there is no reason why the court should entertain a question concerning the title to the premises. Thus, a mortgagee seeking to foreclose his mortgage and having no interest in a litigation between the defendants on a cross-bill by one of them for the specific performance of an alleged contract for the sale of the equity of redemption, will not be compelled to wait for a decree of sale until such other litigation has been decided.[1] The purchaser at a sale, made under a decree of foreclosure, will acquire whatever interest the mortgagor had in the premises at the time of the execution of the mortgage.[2] A title, which was before defeasible, will become absolute upon sale; if there is a dispute respecting its nature and extent, it must be adjudicated in some form of action in which the pleadings and proceedings are adapted to that purpose.[3]

§ 484. Claim of paramount title cannot be pleaded in answer.—The only questions that can be determined concerning a title upon the foreclosure of a mortgage are such as affect the equity of redemption;[4] the plaintiff has no right to make a third person, who claims an adverse title not derived

[98] *Hovenden* v. *Knott,* 12 Oreg. 267. See *Handley* v. *Munsell,* 109 Ill. 362.

[99] *Hazeldine* v. *McVey,* 67 N. J. Eq. 275, 63 Atl. 165.

[1] *Handley* v. *Munsell,* 109 Ill. 362. See N. Y. Code Civ. Proc. §§ 521, 1205.

[2] N. Y. Code Civ. Proc. § 1632.

[3] *Dime Savings Bank of Brooklyn* v. *Crook,* 29 Hun (N. Y.) 671.

[4] A mortgagee's right to foreclose his mortgage against any one going into possession subsequent to its execution is not affected by a tax sale for taxes or assessments which are not shown to have been liens on the lands when his mortgage was executed, unless notice thereof and opportunity to redeem was given him or the mortgagor. *Ruyter* v. *Reid,* 121 N. Y. 498, 25 N. E. 377, 24 N. E. 791, 33 N. Y. S. R. 590. And it has been said that where the holder of a tax certificate on lands who is made

from either the mortgagor or the mortgagee and who cannot be affected by the judgment, a defendant for the purpose of litigating his claim to a paramount title.[5]

The only proper parties to a foreclosure are the mortgagor and the mortgagee, and those who have acquired rights or interests under them subsequent to the execution and delivery of the mortgage, for they are the only persons who have any rights or obligations growing out of the mortgage, or who can be affected in any manner by the litigation. A stranger claiming adversely to the title of the mortgagor can in no way be affected by the foreclosure suit. It can make no difference to him whether the mortgage is valid or invalid, whether it is discharged or foreclosed, or whether the estate mortgaged, the only estate which can be affected by the decree, remains in the mortgagor, or is transferred to another.

a party to a suit to foreclose a mortgage thereon, permits judgment to go by default, his assignee of the certificate, who subsequently receives a tax deed, cannot escape the effect of the judgment by having previously served a notice to redeem on the mortgagor. *Clark* v. *Lock,* 31 N. Y. S. R. 37, 9 Supp. 918.

[5] *Emigrant Industrial Savings Bank* v. *Goldman,* 75 N. Y. 127; *Rathbone* v. *Hooney,* 58 N. Y. 463; *Merchants' Bank* v. *Thomson,* 55 N. Y. 7; *Frost* v. *Koon,* 30 N. Y. 428; *Lewis* v. *Smith,* 9 N. Y. 502, 61 Am. Dec. 706; *Corning* v. *Smith,* 6 N. Y. 82; *Banks* v. *Walker,* 3 Barb. Ch. (N. Y.) 438; *Bank of Orleans* v. *Flagg,* 3 Barb. Ch. (N. Y.) 316, 318; *Brundage* v. *Domestic and Foreign Missionary Society,* 60 Barb. (N. Y.) 204; *Holcomb* v. *Holcomb,* 2 Barb. (N. Y.) 20, 22; *Meigs* v. *Willis,* 66 How. (N. Y.) Pr. 466; *Emigrant Industrial Savings Bank* v. *Clute,* 33 Hun (N. Y.) 82; *Eagle Fire Ins. Co.* v. *Lent,* 6 Paige Ch. (N. Y.) 635; *Jones* v. *St. John,* 4 Sandf. Ch. (N. Y.) 208; *City of San Francisco* v. *Lawton,* 21 Cal. 589, 79 Am. Dec. 187; *Bozarth* v. *Landers,* 113 Ill. 181; *Banning* v. *Bradford,* 21 Minn. 308, 18 Am. Rep. 398; *Dorr* v. *Leach,* 58 N. H. 18; *Kinsley* v. *Scott,* 58 Vt. 470; *Hekla Fire Ins. Co.* v. *Morrison,* 56 Wis. 133; *Macloon* v. *Smith,* 49 Wis. 200; *Roberts* v. *Wood,* 38 Wis. 60; *Supervisors* v. *Mineral Point R. R. Co.* 24 Wis. 93, 120, 121; *Roche* v. *Knight,* 21 Wis. 324; *Palmer* v. *Yager,* 20 Wis. 91; *Pelton* v. *Farmin,* 18 Wis. 222; *Straight* v. *Harris,* 14 Wis. 509; *Strobe* v. *Downer,* 13 Wis. 10, 80 Am. Dec. 709; *Peters* v. *Bowman,* 98 U. S. (8 Otto) 56, 25 L. ed. 91; *Dial* v. *Reynolds,* 96 U. S. (6 Otto) 340, 25 L. ed. 644. See *ante,* chap. ix.

As such adverse claimant is a stranger to the mortgage and to the mortgaged estate, he can have no interest in the subject matter of the action; there is no privity between him and the plaintiff, and the plaintiff has no right to make him a party defendant to a foreclosure, for the purpose of trying his adverse title.[6]

§ 485. Effect of making owner of paramount title a defendant.—But where a person claiming a paramount title is made a party to a foreclosure, under an allegation that he claims an interest in, title to, or a lien upon the property mortgaged subsequent to the plaintiff's mortgage, and such party answers by filing a general denial, the decree will be binding on him, if a judgment is rendered against all the defendants foreclosing their equity of redemption, and he will not be again entitled to litigate matters which he could have set up in the forclosure.[7] And where in an action of foreclosure the defendants, claiming under a title paramount to the mortgage, set up their claim by answer, and the same was litigated without objection, and decided in their favor, the judgment should not be reversed on appeal on the ground that the question could not properly be litigated in the action. Both parties having appeared and having actually litigated the issue in this form, will be bound by the judgment.[8]

[6] *Frost* v. *Koon*, 30 N. Y. 428, 444; *Lewis* v. *Smith*, 9 N. Y. 502, 61 Am. Dec. 706; *Corning* v. *Smith*, 6 N. Y. 82; *Holcomb* v. *Holcomb*, 2 Barb. (N. Y.) 20; *Eagle Fire Ins. Co.* v. *Lent*, 6 Paige Ch. (N. Y.) 635; *Hibernia S. & L. Co.* v. *Ordway*, 38 Cal. 79; *City of San Francisco* v. *Lawton*, 21 Cal. 589, 79 Am. Dec. 187; *Wright* v. *Dudley*, 8 Mich. 74, 115; *Chamberlain* v. *Lyell*, 3 Mich. 448; *Banning* v. *Bradford*, 21 Minn. 308, 18 Am. Rep. 398; *Newman* v. *Home Ins. Co.* 20 Minn. 422; *Pelton* v. *Farmin*, 18 Wis. 222, 1 Dan. Ch. Pr. 3d Am. ed.) 239, 330, 331, 582, 605; Story Eq. Pl. §§ 226, 227, 230, 231, 262, 513, 517, 519.

[7] *Wolfinger* v. *Betz*, 66 Iowa, 594. See *Newby* v. *Caldwell*, 54 Iowa, 102; *Mally* v. *Mally*, 52 Iowa, 654; *Patten* v. *Loughridge*, 49 Iowa, 218; *Painter* v. *Hogue*, 48 Iowa, 426; *Lawrence Savings Bank* v. *Stevens*, 46 Iowa, 429; *Hackworth* v. *Zollars*, 30 Iowa, 433.

[8] *Helck* v. *Reinheimer*, 105 N. Y.

But where a party, who is made a defendant as a subsequent incumbrancer or purchaser, sets up in his answer a claim of title prior to the mortgage, such title cannot properly be investigated, and the complaint of the plaintiff should be dismissed as to such defendant,[9] unless the plaintiff is prepared to prove that such claim in fact arose subsequent to the mortgage. Where this is not done and a judgment in the usual form is entered against all the defendants, it will not bind his prior interest and will be reversed on appeal, even though made after a hearing on the pleadings and proofs,[10] because there can be no foundation in the complaint for a decree upon a question of paramount title.[11]

In an action to foreclose a mortgage the validity of a trust deed executed prior to the mortgage cannot be tried, where there is no allegation of fraud.[12] The validity of such a deed is a paramount question of law and should be decided in an action for ejectment.[13] A foreclosure is not a proper proceeding in which to litigate the adverse and paramount title of a defendant who claims under the foreclosure of a previous mortgage, from which the plaintiff does not seek to redeem.[14]

A person who accepts a mortgage on real estate will be estopped from claiming title thereto.[15] And a mortgagee in possession of lands, being required to pay taxes thereon, can-

470. See *Barnard* v. *Onderdonk*, 98 N. Y. 158, 163; *Jordon* v. *Van-Epps*, 85 N. Y. 427, 435.

[9] *Smith* v. *Kenny*, 89 Ill. App. 293. See *Illinois National Bank* v. *Trustees of Schools*, 111 Ill. App. 189.

[10] *Corning* v. *Smith*, 6 N. Y. 82. See *Merchants' Bank* v. *Thomson*, 55 N. Y. 7; *Barker* v. *Burton*, 67 Barb. (N. Y.) 458; *Lee* v. *Parker*, 43 Barb. (N. Y.) 611; *Summers* v. *Bromley*, 28 Mich. 125; *Wurcherer* v. *Hewitt*, 10 Mich. 453; *Chamberlain* v. *Lyell*, 3 Mich. 448.

[11] See cases cited above; also *Moran* v. *Palmer*, 13 Mich. 367; *Wright* v. *Dudley*, 8 Mich. 115.

[12] *Helck* v. *Reinheimer*, 105 N. Y. 470.

See *Barnard* v. *Onderdonk*, 98 N. Y. 158, 163; *Jordan* v. *VanEpps*, 85 N. Y. 427, 435, 436.

[13] *Davison* v. *The Associates of the Jersey Co.* 71 N. Y. 333, 340. See also *Helck* v. *Reinheimer*, 105 N. Y. 470.

[14] *Bell* v. *Pate*, 47 Mich. 468.

[15] *Voss* v. *Eller*, 109 Ind. 260. Estoppel from asserting title under a prior mortgage should be set up by amendment to the complaint in

not set up against the mortgagor a tax title acquired while thus in possession.[16]

§ 486. Paramount title by widow's right of dower.— Where a married woman was made a party to an action to foreclose a mortgage, under the general allegation that she had, or claimed to have, some interest in or lien upon the mortgaged premises, or some part thereof, which had accrued subsequently to the lien of the mortgage, and she answered, setting forth a statement of facts upon which she claimed a right of dower in the property superior to the mortgage, and upon a trial of the issues thus presented, introduced evidence having some tendency to establish the correctness of her answer, and the court directed a judgment in the usual form, barring and foreclosing the defendants of all right, claim, interest and equity of redemption in the mortgaged premises and every part thereof; it was held on appeal, that the complaint should have been dismissed as to her in so far as the action had a tendency to affect the paramount right claimed in her behalf, or else that her interest should have been protected by an express qualification in the judgment.[17]

§ 487. Answers by prior lien holders as defendants.— The holder of a mortgage, prior in record, but subsequent in fact, to a mortgage under foreclosure, may be made a defendant to the action; and it will be sufficient to allege that he has, or claims to have, some lien upon or interest in the mortgaged premises, or some part thereof, which lien or interest, if any, is subsequent to the plaintiff's mortgage; special allegations will not be necessary.[18]

foreclosure. *Connerton* v. *Millar*, 41 Mich. 608.

[16] *Schenck* v. *Kelley*, 88 Ind. 444.

[17] *Lanier* v. *Smith*, 37 Hun (N. Y.) 529. See *Barker* v. *Burton*, 67 Barb. (N. Y.) 458; *Elias* v. *Verdugo*, 27 Cal. 418; *City of San Francisco* v. *Lawton*, 21 Cal. 589, 79 Am. Dec. 187. See *ante*, §§ 154–159.

[18] *Constant* v. *American Bap. &c. Soc.* 53 N. Y. Supr. Ct. (21 J. & S.) 170.

A prior mortgagee or lien holder, who is made a party to a foreclosure, is not obliged to set up his rights by an answer in order to protect them.[19] But where in an action to foreclose a mortgage a person holding a subsequent mortgage is made a defendant, and such defendant is also the owner of mortgages prior to that of the plaintiff, he may answer in the action and ask to have such prior mortgages paid out of the proceeds of the sale, before any portion thereof is applied to the satisfaction of the plaintiff's claim.[20]

Where a prior mortgagee is made a party defendant and does not answer, the entrance of a decree of foreclosure will not exclude him from his interest in the equity of redemption. This rule applies to all holders of prior liens and interests as well as to prior mortgagees; thus, it applies to prior incumbrancers by judgment,[21] or mechanic's lien,[22] to a life estate not bound by the mortgage,[23] and to a claim to an inchoate right of dower by a wife who did not join her husband in the execution of a mortgage.[24]

Where, on foreclosure of a mortgage, a defendant mortgagee, whose mortgage is put upon an equal footing with the one foreclosed, sets up that his mortgage is a prior incumbrance, the question of the equality of the mortgages should be tried.[25]

§ 488. Pleading in defence paramount title subsequently acquired by mortgagor.—A sale under a decree of foreclosure can have no broader effect than to vest in the purchaser the title which the mortgagor held at the time of the

[19] *Payn* v. *Grant*, 23 Hun (N. Y.) 134.

[20] *Doctor* v. *Smith*, 16 Hun (N. Y.) 245. See *ante*, § 211.

[21] *Frost* v. *Koon*, 30 N. Y. 428; *Payn* v. *Grant*, 23 Hun (N. Y.) 134.

[22] *Emigrant Industrial Savings Bank* v. *Goldman*, 75 N. Y. 127.

[23] *Rathbone* v. *Hooney*, 58 N. Y. 463.

[24] *Merchants' Bank* v. *Thomson*, 55 N. Y. 7; *Lewis* v. *Smith*, 9 N. Y. 502, 61 Am. Dec. 706.

[25] *Wade, as ex'r. etc.* v. *Strever*, 166 N. Y. 251, 59 N. E. 825.

execution of the mortgage.[26] It is held in some states that a purchaser at a tax sale, after the execution of a mortgage, may be made a defendant, and that his title will be barred under a foreclosure.[27]

It has been stated as a general rule, that where a mortgagor has acquired a paramount title subsequently to the execution of a mortgage, that such title will not be affected by a foreclosure and sale.[28] There is an exception to this rule, however, where the mortgagor has, subsequently to the execution of the mortgage, acquired a title which inures by way of estoppel to the benefit of the mortgagee. In such a case a sale under foreclosure will pass the subsequently acquired title to the same extent as if originally held by the mortgagor.[29]

[26] *City of San Francisco* v. *Lawton,* 21 Cal. 589; *Bozarth* v. *Landers,* 113 Ill. 181. See N. Y. Code Civ. Proc. § 1632.

[27] *Lyon* v. *Powell,* 78 Ala. 351; *Randle* v. *Boyd,* 73 Ala. 282. On a bill in chancery to foreclose a mortgage, the complainant also sought to have a tax deed of the premises covered by the mortgage set aside, as an alleged cloud upon his title. The plaintiff made the alleged owner of the tax deed a party defendant, averring that his claim of title was acquired under a tax sale which was void, and that whatever interest he had in the premises was subordinate to the rights of the mortgagee. For want of any answer by such defendant, the bill was taken as confessed against him, and a final decree was entered annulling and setting aside his tax deed as a cloud upon the complainant's title. Upon the question as to the right of the court below, to entertain the bill at all, in so far as it concerned the alleged claim under the tax deed, the appellate court said that there seemed to be a misapprehension as to the true scope and effect of the decision in *Gage* v. *Perry,* 93 Ill. 176, where it was held that a court of equity had no right, upon a bill to foreclose a mortgage, to consider and pass upon an independent adverse claim of title, unconnected with that under which the mortgagee claimed, and alleged to be a cloud upon the mortgagee's title. In that case the owner of the tax title, which constituted the alleged cloud, appeared and answered, setting up his title as adverse to, and independent of the supposed title of the mortgagor or of the mortgagee. That decision should be limited to the facts so disclosed. In this case no such defence was set up, and the allegations of the bill were admitted by the default to be true; *Chicago Theological Sem.* v. *Gage,* 103 Ill. 175.

[28] *Weil* v. *Uzzell,* 92 N. C. 515.

[29] *City of San Francisco* v. *Lawton,* 21 Cal. 589.

Thus, where a mortgagor in his mortgage warrants the title to lands which he really does not possess, and subsequently acquires title thereto, the title subsequently acquired will inure to the benefit of the mortgagee, the same as if the entire title had been originally possessed by the mortgagor,[30] and will estop such mortgagor,[31] and all persons claiming under him, from subsequently asserting any title against the mortgagee and those claiming under him.[32] The reason for this seems to be that the mortgagor will not be permitted to attack a title, the validity of which he has covenanted to maintain.[33]

The supreme court of the United States held, in the case of VanRensselaer v. Kearney,[34] that "whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument by way of recital or averment, that the grantor is seized or possessed of a particular estate in premises, and which estate the deed purports to convey; or what is the same thing, if the seizin or possession of the particular estate is affirmed

[30] *Vallejo Land Assoc.* v. *Viera,* 48 Cal. 572, 579; *City of San Francisco* v. *Lawton,* 21 Cal. 589, 79 Am. Dec. 187; *Clark* v. *Baker,* 14 Cal. 612, 76 Am. Dec. 449; *Pancoast* v. *Travelers' Ins. Co.* 79 Ind. 176, 177; *Marrier* v. *Lee,* 2 Utah, 462.

[31] *Clark* v. *Baker,* 14 Cal. 612, 76 Am. Dec. 449. See also *Jackson* v. *Hubble,* 1 Cow. (N. Y.) 613; *Edwards* v. *Varick,* 5 Den. (N. Y.) 665; *Jackson* v. *Wright,* 14 Johns. (N. Y.) 193; *Varick* v. *Edwards,* 11 Paige Ch. (N. Y.) 289; *Jackson* v. *Waldron,* 13 Wend. (N. Y.) 178; *Pelletreau* v. *Jackson,* 11 Wend. (N. Y.) 110; *Jackson* v. *Bradford,* 4 Wend. 619; *Dart* v. *Dart,* 7 Conn. 250; *Comstock* v. *Smith,* 30 Mass. (13 Pick.) 116, 23 Am. Dec. 670; *Some* v. *Skinner,* 20 Mass. (3 Pick.) 52; *Kimball* v. *Blaisdell,* 5 N. H. 533, 22 Am. Dec. 476; *Kinsman* v. *Loomis,* 11 Ohio, 475; *Doswell* v. *Buchanan,* 3 Leigh (Va.) 365, 23 Am. Dec. 280.

[32] See *Camp* v. *Grider,* 62 Cal. 20, 25; *Sherman* v. *McCarthy,* 57 Cal. 507; *Vallejo Land Assoc.* v. *Viera,* 48 Cal. 579; *Christy* v. *Dana,* 34 Cal. 548, 42 Cal. 179; *Green* v. *Clark,* 31 Cal. 593; *Kirkaldie* v. *Larrabee,* 31 Cal. 457, 89 Am. Dec. 205; *Lent* v. *Morrill,* 25 Cal. 500; *City of San Francisco* v. *Lawton,* 21 Cal. 589, 79 Am. Dec. 187; *Baxter* v. *Bradbury,* 20 Me. 260, 37 Am. Dec. 49; *McWilliams* v. *Nisley,* 2 Serg. & R. (Pa.) 507, 7 Am. Dec. 654; *Marrier* v. *Lee,* 2 Utah, 462.

[33] *Hoppin* v. *Hoppin,* 96 Ill. 272.

[34] 25 U. S. (11 How.) 297, 325, 13 L. ed. 703.

in the deed, either in express terms of by necessary implication, the grantor, and all persons in privity with him, shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate and binds the after acquired title as between parties and privies.

"The reason is, that the estate thus affirmed to be in the party at the time of the conveyance must necessarily have influenced the grantee in making the purchase. And hence, the mortgagor and those in privity with him, in good faith and fair dealing, should be forever thereafter precluded from gainsaying it." [35]

§ 489. What claims as to priority may be set up in answer.—The court may entertain questions which are necessary to be determined in order that complete justice may be done between the parties whose rights in the equity of redemption are to be barred by the decree of foreclosure.[36] A party asserting a right under the mortgagor prior to the mortgage, is sometimes a proper party to an action to foreclose the mortgage, and the question of priority is then a proper one to be determined.[37] It is held that, in an action to foreclose a mortgage, defendants claiming under an at-

[35] See also *Crews* v. *Burcham,* 66 U. S. (1 Black) 357, 17 L. ed. 93.

[36] A corporation which became the owner of the corporation plant under a foreclosure decree and sale made expressly subject to complainant's claim for moneys paid on the mortgage cannot urge any equitable defense against his right to a decree for the amount of such judgments against the mortgaged premises, save that they were made with the funds of the corporation. *Bush* v. *Wadsworth,* 60 Mich. 255, 27 N. W. 532.

[37] *Brown* v. *Volkening,* 64 N. Y. 76; *Bank of Orleans* v. *Flagg,* 3 Barb. Ch. (N. Y.) 316; *Board of Supervisors of Iowa Co.* v. *Mineral Point R. R. Co.* 24 Wis. 93. See *ante,* §§ 209, 211. See *Sammons* v. *Kearney Power & Irrigation Co.* 77 Neb. 588, 8 L.R.A. (N. S.) 404, 110 N. W. 308; *Pettus* v. *Gault,* 81 Conn. 415, 71 Atl. 509. See also *Metropolitan Trust Co.* v. *Dolgeville Electric Light & Power Co.* 34 Misc. 354, 69 N. Y. Supp. 822.

tachment lien accruing after the mortgage was given, are entitled to prove the existence of their lien and to show that, in consequence of certain acts of the plaintiff set forth in their answer, their lien under the attachment is superior to the lien of the mortgage.[38] And it is said to be proper to determine in a foreclosure suit a controversy between the plaintiff and the grantee of the mortgagor, as to the right of the latter to remove a building erected by him on the land; and the court may, by a provision in the judgment, in case the right is established, protect it by authorizing the removal of the building before sale or by directing that the sale shall be made subject to such right.[39]

The holder of a mortgage, dated and recorded prior to a deed of the same property, is entitled to treat all subsequent rights under the deed as subordinate; and on a foreclosure of his mortgage such rights need not be brought into issue by him.[40] But where a person executes a mortgage upon premises which he had previously contracted to sell, and the mortgagees file a complaint to foreclose such mortgage, making the purchaser a party thereto, if they claim to be entitled to a preference over such purchaser as *bona fide* mortgagees without notice, the complaint will not be sufficient, if it merely alleges generally that such purchaser has or claims to have some interest in the premises which is subsequent to their mortgage; it should state that such purchaser claims an interest under a contract to purchase, prior to the mortgage, and that if he had any such interest the complainants had no notice or knowledge thereof at the time they took their mortgage. The complaint should also show the other facts which are necessary to entitle the complainants to protection as *bona fide* mortgagees.[41]

[38] *Scrivener* v. *Dietz*, 68 Cal. 1.

[39] *Brown* v. *Keeney Settlement Cheese Assoc.* 59 N. Y. 242.

[40] *Shelden* v. *Warner*, 45 Mich. 638.

[41] *Bank of Orleans* v. *Flagg*, 3 Barb. Ch. (N. Y.) 316.

§ 490. Pleading ownership of fixtures in answer.— Personal property attached to the land will be regarded as a fixture, where it is necessary for the full enjoyment of the freehold, and will pass under a foreclosure to the purchaser of the premises.[42] Thus, fencing material, accidentally or temporarily detached from the realty after having been used as a part of a fence,[43] or placed along the line of a contemplated fence,[44] machinery in a building fitted up as a manufactory by the owner and essential to the purposes thereof;[45] manure produced upon a farm;[46] hop poles, although pulled

[42] *Voorhees* v. *McGinnis*, 48 N. Y. 278, 289. See *Sisson* v. *Hibbard*, 75 N. Y. 542, 544; *Tifft* v. *Horton*, 53 N. Y. 380, 13 Am. Rep. 537; *Sheldon* v. *Edwards*, 35 N. Y. 283; *Ford* v. *Cobb*, 20 N. Y. 344; *Main* v. *Schwarzwaelder*, 4 E. D. Smith (N. Y.) 275; *Eaves* v. *Estes*, 10 Kan. 314, 15 Am. Rep. 345; *Pierce* v. *George*, 108 Mass. 78, 15 Am. Rep. 345; *Richardson* v. *Borden*, 42 Miss. 71, 2 Am. Rep. 595; *Wadleigh* v. *Janvrin*, 41 N. H. 503, 77 Am. Dec. 780; *Potts* v. *New Jersey Arms & Ordinance Co.* 17 N. J. Eq. (2 C. E. Gr.) 395; *Hill* v. *Wentworth*, 28 Vt. 428. See *post*, § 714.

[43] *Goodrich* v. *Jones*, 2 Hill (N. Y.) 142.

[44] *Conklin* v. *Parsons*, 1 Chand. (Wis.) 240.

[45] *Ottumwa Woolen Mill Co.* v. *Hawley*, 44 Iowa, 57, 24 Am. Rep. 719; *Farrar* v. *Stackpole*, 6 Me. (6 Greenl.) 154, 19 Am. Dec. 201; *Green* v. *Phillips*, 26 Gratt. (Va.) 752, 21 Am. Rep. 323; *Longbottom* v. *Berry*, L. R. 5 Q. B. 123; *Reg.* v. *Inhabitants of the Parish of Lee*, L. R. 1 Q. B. 241; *Hubbard* v. *Bagshaw*, 4 Sim. 326. See *Stockwell* v. *Campbell*, 39 Conn. 362, 12 Am. Rep. 393; *McConnell* v. *Blood*, 123 Mass. 47, 25 Am. Rep. 12; *Pierce* v. *George*, 108 Mass. 78, 11 Am. Rep. 310, 314; *McMillan* v. *Fish*, 29 N. J. Eq. 610, 6 Rep. 661; *Meig's Appeal*, 62 Pa. St. 28, 1 Am. Rep. 372; *Hill* v. *National Bank*, 97 U. S. (7 Otto) 450, 24 L. ed. 1051; *Holland* v. *Hodgson*, L. R. 7 C. P. 328, 41 L. J. C. P. (N. S.) 146, 20 W. R. 990; *Boyd* v. *Shorrock*, L. R. 5 Eq. 72, 16 W. R. 102; *Hutchinson* v. *Kay*, 23 Beav. 413; *Wynne* v. *Ingleby*, 1 D. & R. 247; *Jenkins* v. *Gething*, 2 Johns. & Hem. 520; *Walmsley* v. *Milne*, 7 C. B. N. S. 115, 6 Jur. N. S. 125, 29 L. J. C. P. 97, 1 L. T. N. S. 92; *Mather* v. *Fraser*, 2 K. & J. 536, 2 Jur. N. S. 900, 25 L. J. Ch. 361; *Ex parte Reynal*, 2 M. D. & DeG. 443. See also *McRea* v. *Central National Bank*, 66 N. Y. 489; *Eaves* v. *Estes*, 10 Kan. 314, 15 Am. Rep. 345.

If a part of a machine is an immovable fixture, and another part thereof is movable without any damage to the freehold, the latter must also be treated as realty. *Mather* v. *Fraser*, 2 K. & J. 536, 2 Jur. N. S. 900, 25 L. J. Ch. 361

[46] *Chase* v. *Wingate*, 68 Me. 204, 28 Am. Rep. 36; *Kittredge* v. *Woods*, 3 N. H. 503, 14 Am. Dec.

up and piled upon the land at the time of the conveyance;[47] a bell hung upon a frame and fastened to it by a hasp, the frame being nailed to the cupola of a barn,[48] or otherwise permanently attached; platform scales bolted and fastened to sills laid upon a brick wall set in the ground, and intended for permanent use on a farm in weighing stock and grain;[49] a sugar mill on a plantation;[50] a hot air furnace in a house;[51] a cotton-gin and stand;[52] salt pans in use in salt works;[53] a threshing machine fastened in a barn by means of bolts and screws[54] and tapestry, pictures in panels, frames filled with satin and attached to the walls of a house, statues, figures,

393. See *Goodrich* v. *Jones*, 2 Hill (N. Y.) 142; *Middlebrook* v. *Corwin*, 15 Wend. (N. Y.) 169; *Parsons* v. *Camp*, 11 Conn. 525; *Gallagher* v. *Shipley*, 24 Md. 418, 428, 87 Am. Dec. 611; *Fletcher* v. *Herring*, 112 Mass. 382, 384; *Strong* v. *Doyle*, 110 Mass. 92; *Perry* v. *Carr*, 49 N. H. 65; *Plumer* v. *Plumer*, 30 N. H. 558. *Contra*, *Ruckman* v. *Outwater*, 28 N. J. L. (4 Dutch.) 581; *Sanders* v. *Ellington*, 77 N. C. 255; *Smithwick* v. *Ellison*, 2 Ired. (N. C.) L. 326, 38 Am. Dec. 697; *Lewis* v. *Jones*, 17 Pa. St. 262, 264, 55 Am. Dec. 550; *Wing* v. *Gray*, 36 Vt. 261, 267.

But where the manure is not made in the course of husbandry, it is personalty and does not pass with the estate. *Proctor* v. *Gilson*, 49 N. H. 62. See *Lassell* v. *Reed*, 6 Me. (6 Greenl.) 222; *Daniels* v. *Pond*, 38 Mass. (21 Pick.) 367, 32 Am. Dec. 269.

[47] See *Bishop* v. *Bishop*, 11 N. Y. 123, 62 Am. Dec. 68; *Walker* v. *Sherman*, 20 Wend. (N. Y.) 636, 655.

It is said in *Noyes* v. *Terry*, 1 Lans. (N. Y.) 222, that *Bishop* v. *Bishop*, *supra*, carried the rule to the extremest point and is only to be sustained on the ground that, as the hop root was perennial and would pass with a conveyance, so the pole, which is used exclusively in connection with the root and is indispensable to its cultivation, would pass also. The growing crop of hops upon the vines is regarded as personalty. *Frank* v. *Harrington*, 36 Barb. (N. Y.) 415.

[48] *Weston* v. *Weston*, 102 Mass. 514.

[49] *Arnold* v. *Crowder*, 81 Ill. 56, 25 Am. Rep. 260. See *Bliss* v. *Whitney*, 91 Mass. (9 Allen) 114, 85 Am. Dec. 745.

[50] *Hutchins* v. *Masterson*, 46 Tex. 551, 26 Am. Rep. 286.

[51] *Jarechi* v. *Philharmonic Society*, 79 Pa. St. 403, 21 Am. Rep. 78, 80 and note.

[52] *Richardson* v. *Borden*, 42 Miss. 71, 2 Am. Rep. 599.

[53] *Lawton* v. *Salmon*, 1 H. Bl. 259.

[54] *Wiltshear* v. *Cottrell*, 1 E. & Bl. 674.

vases and stone garden seats,[55] as between a mortgagor and a mortgagee, have been held to be a part of the realty and to pass with the estate.[56]

§ 491. Gas fixtures, burners, brackets and chandeliers.—Regarding gas fixtures, such as burners, brackets, chandeliers and the like, there is a conflict in the decisions; but by the weight of American authority they are not regarded as fixtures, but as mere articles of furniture, and do not pass with a conveyance of the premises,[57] though as to gas fittings or pipes, to which the fixtures are attached, the rule is different.[58]

In Vaughen v. Haldeman[59] the supreme court of Pennsylvania, in holding that gas fixtures are personal property and do not pass with the land, said that there is "really nothing to distinguish this new apparatus from the old lamps, candle sticks and chandeliers, which have always been considered as personal chattels. Gas stoves are largely used for bath and other rooms, and are necessarily connected with the gas pipes in the same way, but no one would think of saying that they are fixtures which it would be waste to remove. It is, therefore, more simple to consider all these gas fixtures, whether stoves, chandeliers, hall and entry lamps, drop lights

[55] *D'Eyncourt* v. *Gregory*, L. R. 3 Eq. Cas. 382, 36 L. J. Ch. 107, 15 W. R. 186.

[56] *Witmer's Appeal*, 45 Pa. St. 462, 84 Am. Dec. 505; *Rogers* v. *Gilinger*, 30 Pa. St. 189, 72 Am. Dec. 694; *Heaton* v. *Findlay*, 12 Pa. St. 307; *Covey* v. *Pittsburgh, F. W. & C. R. Co.* 3 Phila. (Pa.) 173; *Lemar* v. *Miles*, 4 Watts. (Pa.) 332; *Morgan* v. *Arthurs*, 3 Watts. (Pa.) 140; *Voorhis* v. *Freeman*, 2 Watts. & S. (Pa.) 119, 37 Am. Dec. 490.

[57] See *Rogers* v. *Crow*, 40 Mo. 91, 93 Am. Dec. 299; *Jarecki* v. *Philharmonic Society*, 79 Pa. St. 404, 21 Am. Rep. 78; *Vaughen* v. *Haldeman*, 33 Pa. St. 522, 75 Am. Dec. 622; *Montague* v. *Dent*, 10 Rich. (S. C.) L. 135, 67 Am. Dec. 572; *Sewell* v. *Angerstein*, 18 L. T. N. S. 300.

[58] *Lawrence* v. *Kemp*, 1 Duer (N. Y.) 363; *Wall* v. *Hinds*, 70 Mass. (4 Gray) 256, 64 Am. Dec. 64; *Rogers* v. *Crow*, 40 Mo. 91, 93 Am. Dec. 299; *Montague* v. *Dent*, 10 Rich. (S. C.) 135, 67 Am. Dec. 572; Ewell on Fixtures, 299; Tyler on Fixtures, 396, *et seq;* Brown on Fixtures, appx. A.

[59] 33 Pa. St. 522, 75 Am. Dec. 622.

or table lamps, as governed by the same rules as the article for which they were substituted;" and this decision was approved by the same court in the later case of Jarechi v. Philharmonic Society.[60] The supreme court of Missouri,[61] following the Pennsylvania cases, has held that the fixtures of a church are movable chattels.[62]

The doctrine laid down in these cases is evidently too broad, because gas fixtures may or may not become attached to the realty, and pass by a conveyance of the land, according to the particular circumstances of each case and the intention of the parties.[63] In a late case in New Jersey,[64] which was a suit between the mortgagee of chattels on certain premises and a subsequent mortgagee of the realty on which the chattels were situated, it was held that the gas burners were fixtures. The court held that they were in no sense furniture, but mere accessories to the building.[65]

While it is true that personal property attached to the land will be regarded as fixtures, where such is the manifest intention of the parties,[66] yet under certain circumstances such chattels remain personal property and may be removed with-

[60] 79 Pa. St. 404, 21 Am. Rep. 78.

[61] *Rogers* v. *Crow,* 40 Mo. 91, 93 Am. Dec. 299.

[62] This decision is apparently based upon the additional cases of *Lawrence* v. *Kemp,* 1 Duer (N. Y.) 363, and *Wall* v. *Hinds,* 70 Mass. (4 Gray) 256, 64 Am. Dec. 64; but the court seems to have overlooked the fact that these were cases between landlord and tenant.

[63] *Sewell* v. *Angerstein,* 18 L. T. N. S. 300.

[64] *Keeler* v. *Keeler,* 31 N. J. Eq. (4 Stew.) 191.

In *Johnson's Ex'rs* v. *Wiseman,* 4 Met. (Ky.) 361, 83 Am. Dec. 475. the court held that, "the question whether chattels are to be regarded as fixtures depends less upon their manner of acquisition to the freehold, than upon their own nature and their adaptation to the purposes for which they are used." See, sustaining this doctrine, *McRea* v. *Central National Bank,* 66 N. Y. 494; *Hoyle* v. *Pittsburgh & M. R. R. Co.* 54 N. Y. 314, 324, 13 Am. Rep. 595; *Voorhees* v. *McGinnis,* 48 N. Y. 278, 324; *Potter* v. *Cromwell,* 40 N. Y. 287, 100 Am. Dec. 485; *Quinby* v. *Manhattan C. & P. Co.* 24 N. J. Eq. (9 C. E. Gr.) 260.

[65] See *Hutchinson* v. *Kay,* 23 Beav. 414, where the gas light was said to be a necessary part of a mill.

[66] See authorities cited above in this section.

out the consent of the owner of the land or those claiming under him; thus, where rails are built into a fence by a tenant under an agreement that he may remove them from the land, they are, it seems, as between such tenant and the owner of the soil, personal property.[67] It is proper to determine in a foreclosure suit a controversy between a mortgagee and the grantee of the mortgagor, as to the right of the latter to remove an erection made by him on the land, and the court may, by a provision in the judgment, in case the right is established, protect it by authorizing the removal of the building before the sale, or by providing that the sale shall be subject to the right.[68]

§ 492. Fixtures where land leased for a term of years.— As between a mortgagor and a mortgagee, fixtures placed upon land leased for a term of years, become a part of the realty and will pass under a mortgage of the land.[69] The rule in respect to what fixtures shall be deemed a part of the realty, is more liberally construed in favor of a mortgagor than in favor of a tenant holding under the mortgagor. All fixtures attached to the land and which are habitually used and enjoyed therewith, whether for the purposes of trade and manufacture or not, pass with the freehold; and as between the mortgagee and a tenant of the mortgagor, they are a part of the realty.[70] But it has been held that machinery attached to a building for manufacturing purposes and connected with the motive power by leather belts, and not otherwise annexed to the building than by screws holding it to the floor, which keep it steady while working, and which can be removed without injury to the machinery or building, is a chattel and

[67] *Mott* v. *Palmer,* 1 N. Y. 564. See *Ford* v. *Cobb,* 20 N. Y. 344.

[68] *Brown* v. *Keeney Settlement Cheese Assoc.* 59 N. Y. 242.

[69] *Day* v. *Perkins,* 2 Sandf. Ch. (N. Y.) 359.

[70] *Breese* v. *Bange,* 2 E. D. Smith (N. Y.) 474. See *Sands* v. *Pfeiffer,* 10 Cal. 258; *Sparks* v. *State Bank,* 7 Blackf. (Ind.) 469; *Fullam* v. *Stearns,* 30 Vt. 443.

not a part of the realty, and does not pass with the land under a mortgage.[71]

While it is true that all the cases upon this subject cannot be reconciled, and that no rule can be stated in exact terms, which will furnish a clear guide for every case, yet the true doctrine, as established in New York and in other states, seems to be that, where the chattel, as attached to the realty, is useful and necessary to its enjoyment, and adds value thereto, and when detached loses its character and usefulness, then the chattel becomes a fixture and passes with the freehold. Applying this principle to the case of a factory, the wheel or engine which furnishes the motive power, and all that part of the gearing and machinery which has special relation to the building with which it is connected, would belong to the freehold, while an independent machine, like a loom, which, if removed, still remains a loom, and can be used as such wherever it is wanted and power can be applied to it, will retain its character as a chattel. With the rule, as thus stated, a majority of the cases coincide.[72]

It is stated as a rule of law in respect to mills and manufactories, that in the absence of custom or agreement, anything that can be removed without injury to itself or to the freehold, is a chattel and does not pass with the conveyance of the realty.[73] Thus, machines and such articles as may be used in any other building, as well as in that in which they

[71] *Murdock* v. *Gifford,* 18 N. Y. 28.

[72] *Vanderpoel* v. *VanAllen,* 10 Barb. (N. Y.) 157; *Cresson* v. *Stout,* 17 Johns. (N. Y.) 116, 117, 7 Am. Dec. 373; *Swift* v. *Thompson,* 9 Conn. 63, 21 Am. Dec. 718; *Gale* v. *Ward,* 14 Mass. 352, 7 Am. Dec. 223; *Teaff* v. *Hewitt,* 1 Ohio St. 511, 59 Am. Dec. 634; *Powell* v. *Monson,* 3 Mason C. C. 459.

[73] See *Voorhees* v. *McGinnis,* 48 N. Y. 283; *Walker* v. *Sherman,* 20 Wend. (N. Y.) 636, 657; *Wade* v. *Johnston,* 25 Ga. 331; *Richardson* v. *Copeland,* 72 Mass. (6 Gray) 536, 66 Am. Dec. 424; *Hill* v. *Sewald,* 53 Pa. St. 274, 91 Am. Dec. 209; *Sweetzer* v. *Jones,* 35 Vt. 317, 82 Am. Dec. 639; *Fullam* v. *Stearns,* 30 Vt. 443; *Hill* v. *Wentworth,* 28 Vt. 436; *Walmsley* v. *Milne,* 7 C. B. N. S. 115.

are placed, are ordinarily deemed to be chattels, if they can be removed without injury to the freehold.[74]

§ 493. Settlement of equities between mortgagees.— In an action of foreclosure the court may adjust all rights and equities between incumbrancers. The rights and equities of the parties are sometimes as much affected by the order in which separately encumbered pieces of land are to be sold, as by the determination which is the primary and which the auxiliary security. Thus, it has been held that where one holds a mortgage on real estate to secure the payment of money owing to him, and before the payment of the money secured by the mortgage, such mortgagee becomes indebted to the mortgagor on a book account, a junior incumbrancer, whether general or specific, of the mortgaged premises, will have a right to have such indebtedness applied in extinguishing the mortgage debt.[75] This right of a junior incumbrancer is absolute, and cannot be defeated by the parties to the mortgage in the absence of equities in favor of the mortgagee.[76]

And where a mortgagor makes general advances to his mortgagee, although such advances may not be applied upon the mortgage by the parties, yet if they are such that the mortgagee would have the right to employ them as a satisfaction of the mortgage debt, a judgment recovered against the mortgagor by a third person will determine the application, so far as to give the judgment creditor a right to demand such set-off, and to compel a reduction of the amount of the prior mortgage, which right the parties to the mortgage cannot defeat.[77]

[74] *Vanderpoel* v. *VanAllen,* 10 Barb. (N. Y.) 157; *Swift* v. *Thompson,* 9 Conn. 63, 21 Am. Dec. 718; *Gale* v. *Ward,* 14 Mass. 352, 7 Am. Dec. 223.

[75] *Prouty* v. *Price,* 50 Barb. (N. Y.) 344.

[76] *Rosevelt* v. *Bank of Niagara,* Hopk. Ch. (N. Y.) 579, aff'd 9 Cow. (N. Y.) 409.

[77] *Bank of Niagara* v. *Rosevelt,* 9 Cow. (N. Y.) 409, aff'g Hopk. Ch. (N. Y.) 579.

Where a mortgagee has a lien upon several distinct parcels of land, and some of the lands still belong to the person who in equity ought to pay and discharge the debt, and other parcels have been sold by him, the lands still belonging to such person are in equity first chargeable with the payment of the debt. And if the person who ought to pay the mortgage has conveyed the several parcels of the land upon which it is a lien at different times to *bona fide* purchasers, the lands, as between the purchasers, will be chargeable with the payment of the debt in the inverse order of their alienation,[78] on the principle that as between equal equities, he who is prior in time is strongest in right.[79] The first purchaser from the mortgagor will have a prior equity, although his consideration may not actually be paid until after the other portion of the lands is sold and paid for.[80]

§ 494. Demand in answer for sale in inverse order of alienation.—The rule that the lands are to be sold to satisfy the mortgage debt in the inverse order of their alienation, is not confined to the original alienation of the mortgagor who is personally liable for the debt. It is equally applicable to the several conveyances of the separate parcels of the mortgaged premises made at different times by his grantees who convey with a warranty.[81] And where there are general liens upon the whole land, and subsequent mortgages upon parts of such land, the parts of the land not covered by

[78] *Crafts* v. *Aspinwall*, 2 N. Y. 289; *Skeel* v. *Spraker*, 8 Paige Ch. (N. Y.) 182. See *Clowes* v. *Dickenson*, 5 Johns. Ch. (N. Y.) 235; *Gill* v. *Lyon*, 1 Johns. Ch. (N. Y.) 447; *Rathbone* v. *Clark*, 9 Paige Ch. (N. Y.) 648; *Schryver* v. *Teller*, 9 Paige Ch. (N. Y.) 173; *Guion* v. *Knapp*, 6 Paige Ch. (N. Y.) 35, 29 Am. Dec. 741; *Gouverneur* v. *Lynch*, 2 Paige Ch. (N. Y.) 300.

[79] *Skeel* v. *Spraker*, 8 Paige Ch. (N. Y.) 182. *Qui prior est tempore, potior est jure.* See *James* v. *Morey*, 2 Cow. (N. Y.) 246, 316 14 Am. Dec. 475; *Berry* v. *Mutual Ins. Co.* 2 Johns. Ch. (N. Y.) 603.

[80] *Gouverneur* v. *Lynch*, 2 Paige Ch. (N. Y.) 300.

[81] *Guion* v. *Knapp*, 6 Paige Ch. (N. Y.) 35, 29 Am. Dec. 741.

the subsequent mortgages are primarily chargeable with the prior liens covering the whole land, and the property so mortgaged is chargeable in the inverse order of the mortgages.[82]

And where mortgaged premises are sold subsequent to the date of the mortgage to different purchasers in parcels, such parcels, upon the foreclosure of the mortgage, are to be sold in the inverse order of their alienation, so as to protect the equitable rights of the defendants respectively, as between themselves, in reference to the payment of the mortgage which is a lien upon the equity of redemption in all the parcels.[83] This principle is also applicable to subsequent incumbrancers upon different parcels of the mortgaged premises either by mortgage, judgment or otherwise.[84]

The right of the subsequent grantee of a part of mortgaged premises, to have the different parcels charged with the debt in the inverse order of their alienation, is an equitable and not a strictly legal right, and is governed by the same principles upon which a court of equity protects the rights of sureties or those standing in the situation of sureties.[85]

The duties of the party who holds the incumbrance will not be affected, unless he is informed of the existence of facts upon which the right depends, or he has a sufficient notice of the probable existence of such a right, to make it his duty to inquire for the purpose of ascertaining whether any equities in fact exist.[86] Thus, the recording of a subsequent deed given by a mortgagor, is not constructive notice to the mortgagee of the equitable right of the grantee to have the residue of the mortgaged premises, not embraced in his deed,

[82] *Schryver* v. *Teller,* 9 Paige Ch. (N. Y.) 173.

[83] *Stuyvesant* v. *Hall,* 2 Barb. Ch. (N. Y.) 151; *New York Ins. & Trust Co.* v. *Milnor,* 1 Barb. Ch. (N. Y.) 353; *Guion* v. *Knapp,* 6 Paige Ch. (N. Y.) 35, 29 Am. Dec. 741.

[84] *Stuyvesant* v. *Hall,* 2 Barb. Ch. (N. Y.) 151.

[85] *Guion* v. *Knapp,* 6 Paige Ch. (N. Y.) 35, 42, 29 Am. Dec. 741. See *Stuyvesant* v. *Hall,* 2 Barb. Ch. (N. Y.) 151, 158.

[86] *Stuyvesant* v. *Hall,* 2 Barb. Ch. (N. Y.) 151, 159.

first charged with the payment of the amount due upon the mortgage.[87]

§ 495. Allegation of outstanding title or incumbrance.—In an action to foreclose a mortgage, the defendant will not be permitted to allege, by way of defence, that there is an outstanding title or incumbrance prior to the mortgage,[88] for it is a well settled principle that, where no fraud is alleged, and where the grantee or the person claiming under him entered into possession on receiving the conveyance and continued in possession without disturbance, and the deed conveying the premises contains covenants of seizin and warranty,[89] in an action to foreclose a mortgage given to secure a part of the purchase money, the defendant cannot have relief against the mortgage on the ground of an outstanding incumbrance or of a failure of title.[90] The defendant will be

[87] *Stuyvesant* v. *Hall*, 2 Barb. Ch. (N. Y.) 151, 159; *Guion* v. *Knapp*, 6 Paige Ch. (N. Y.) 35, 42, 29 Am. Dec. 741.

[88] *Parkinson* v. *Sherman*, 74 N. Y. 88, 30 Am. Rep. 268; *Glenn* v. *Whipple*, 12 N. J. Eq. (1 Beas.) 50; *Van Waggoner* v. *McEwen*, 2 N. J. Eq. (1 H. W. Gr.) 412; *Shannon* v. *Marselis*, 1 N. J. Eq. (Saxt.) 413, 426. See *Odell* v. *Wilson*, 63 Cal. 159; *Doss* v. *Ditmars*, 70 Ind. 451; *Joslin* v. *Williams*, 61 Neb. 859, 86 N. W. 473.

[89] *Edwards* v. *Bodine*, 26 Wend. (N. Y.) 109.

But it seems that the rule will be otherwise, if the deed does not contain a covenant of warranty. *Grant* v *Tallman*, 20 N. Y. 191, 75 Am. Dec. 374; *Tallmage* v. *Wallis*, 25 Wend. (N. Y.) 107.

[90] *Parkinson* v. *Sherman*, 74 N. Y. 88, 30 Am. Rep. 268, *sub nom.* *Parkinson* v. *Jacobson*, 13 Hun (N. Y.) 317; *York* v. *Allen*, 30 N. Y. 104; *Curtiss* v. *Bush*, 39 Barb. 661; *Burke* v. *Nichols*, 34 Barb. (N. Y.) 430, 21 How. (N. Y.) Pr. 459, aff'd 2 Keyes (N. Y.) 670; *Sandford* v. *Travers*, 7 Bosw. (N. Y.) 498; *Leggett* v. *McCarty*, 3 Edw. Ch. (N. Y.) 124; *Denston* v. *Morris*, 2 Edw. Ch. (N. Y.) 37; *Gouverneur* v. *Elmendorf*, 5 Johns. Ch. (N. Y.) 79; *Chesterman* v. *Gardner*, 5 Johns. Ch. (N. Y.) 29, 9 Am. Dec. 265; *Abbott* v. *Allen*, 2 Johns. Ch. (N. Y.) 519, 7 Am. Dec. 554; *Bumpus* v. *Platner*, 1 Johns. Ch. (N. Y.) 213, 218; *Banks* v. *Walker*, 2 Sandf. Ch. (N. Y.) 344; *Stahl* v. *Hammontree*, 72 Ind. 103; *Mahoney* v. *Robbins*, 49 Ind. 146; *Hulfish* v. *O'Brien*, 20 N. J. Eq. (5 C. E. Gr.) 230; *Hill* v. *Butler*, 6 Ohio St. 207; *Pharis* v. *Surrett*, 54 Mo. App. 9; *Adams* v. *Fry*, 29 Fla. 318, 10 So. 559; *Edgar* v. *Golden*, 36 Or. 448, 60 Pac. 2; *Redrow* v.

left to his remedy on the covenants in the deed.[91] The reason for this rule is that the incumbrance, if let alone, may never be asserted against the property, as it may be paid off or satisfied in some other way; it would then be inequitable that any part of the purchase money should be retained.[92]

§ 496. When purchaser may set up outstanding title as a defence.—Where there has been an imposition or fraud upon the purchaser by the vendor, through any willful misrepresentation or concealment, it will take the case out of the general rule and entitle the purchaser to redress in equity in addition to and beyond its covenants.[93] Where a tax deed is set up in an action to foreclose a mortgage, with a view to extinguishing the mortgage lien, the mortgagee will have a right to litigate the validity of the tax deed; and in such case a tender of the taxes paid will not be necessary.[94] And where the mortgagor has been evicted,[95] or an ejectment

Sparks, 76 N. J. Eq. 133, 79 Atl. 450; *State Mutual Building & Loan Ass'c.* v. *Batterson,* 65 N. J. Eq. 610, 56 Atl. 703. See *Pennsylvania Insurance Co., as adm'r. etc.* v. *Beaumont, as adm'r. etc.* 190 Pa. St. 101, 42 Atl. 522. But see *Roake* v. *Sullivan,* 69 Misc. 429, 125 N. Y. Supp. 835.

[91] *Parkinson* v. *Sherman,* 74 N. Y. 88, 92, 30 Am. Rep. 268; *York* v. *Allen,* 30 N. Y. 104; *Curtiss* v. *Bush,* 39 Barb. (N. Y.) 661. See *Withers* v. *Morrell,* 3 Edw. Ch. (N. Y.) 560; *Glenn* v. *Whipple,* 12 N. J. Eq. (1 Beas.) 50; *Abbott* v. *Allen,* 2 Johns. Ch. (N. Y.) 519, 7 Am. Dec. 554; *Bumpus* v. *Platner,* 1 Johns. Ch. (N. Y.) 213; *Redrow* v. *Sparks,* 76 N. J. Eq. 133, 79 Atl. 450.

[92] *Grant* v. *Tallman,* 20 N. Y. 191, 195, 75 Am. Dec. 374.

[93] *Denston* v. *Morris,* 2 Edw. Ch. (N. Y.) 37. See *Gouverneur* v. *Elmendorf,* 5 Johns. Ch. (N. Y.) 79; *Chesterman* v. *Gardner,* 5 Johns. Ch. (N. Y.) 29, 9 Am. Dec. 265; *Johnson* v. *Gere,* 2 Johns. Ch. (N. Y.) 546; *Abbott* v. *Allen,* 2 Johns. Ch. (N. Y.) 519, 7 Am. Dec. 554; *Bumpus* v. *Platner,* 1 Johns. Ch. (N. Y.) 213. See also *Legge* v. *Croaker,* 1 Bal. & B. 506, 514.

[94] *Hoffman* v. *Groll,* 35 Kan. 652.

[95] *Ryerson* v. *Willis,* 81 N. Y. 277; *Tallmage* v. *Wallis,* 25 Wend. (N. Y.) 107; *Price* v. *Lawton,* 27 N. J. Eq. (12 C. E. Gr.) 325; *Hile* v. *Davison,* 20 N. J. Eq. (5 C. E. Gr.) 228; *Glenn* v. *Whipple,* 12 N. J. Eq. (1 Beas.) 50; *VanWaggoner* v. *McEwen,* 2 N. J. Eq. (1 H. W. Gr.) 412; *Shannon* v. *Marselis,* 1 N. J. Eq. (Saxt.) 413. Where there has been an eviction, and the pur-

suit has been commenced against him on an outstanding title,[96] or the defendant has paid or discharged the incumbrance, or a part thereof,[97] the court will interfere,[98] and will enjoin a foreclosure until the action in ejectment has been determined, even though the mortgage contains a power of sale not requiring a foreclosure by action.[99]

§ 497. Payment of an outstanding claim by purchaser as a defence.—Where a defendant has paid and caused an incumbrance to be discharged to protect his title, he must show, in order to avail himself of such defence, either that what he paid was actually due, or that he had given notice to his vendor requiring him to satisfy the incumbrance within a limited time. Some of the authorities establish the rule,

chaser is liable to the true owner for mesne profits to an amount equal to the sum demanded by his vendor, he may plead such facts in bar of an action for the breach as showing a total failure of consideration; whether a total or a partial failure of consideration by reason of defective title can be shown where the conveyance was with warranty and there has not been an eviction, *quære*. *Tallmage* v. *Wallis*, 25 Wend. (N. Y.) 107.

[96] *Price* v. *Lawton*, 27 N. J. Eq. (12 C. E. Gr.) 325; *Hile* v. *Davidson*, 20 N. J. Eq. (5 C. E. Gr.) 228; *Glenn* v. *Whipple*, 12 N. J. Eq. (1 Beas.) 50; *Van Waggoner* v. *McEwen*, 2 N. J. Eq. (1 H. W. Gr.) 412.

[97] *Grant* v. *Tallman*, 20 N. Y. 191, 75 Am. Dec. 384; *Coy* v. *Downie*, 14 Fla. 544. It has been said that the court will not relieve against a mortgage, on the ground of any outstanding claim which the mortgagor for greater security to his title has paid off, without any judicial investigation or decision on such claim in a proceeding in which all proper persons were made parties and were called on to bring forward their title. *Lee* v. *Porter*, 5 Johns. Ch. (N. Y.) 268.

[98] It was held in *Coy* v. *Downie*, 14 Fla. 544, that the defendant, in an action to foreclose a mortgage, may resist the foreclosure by recoupment or off-set of damages for a breach of the covenant to the extent of the damages sustained for the failure or partial failure of the title. But it has been questioned in Indiana whether there can be any defense by way of recoupment before an actual eviction. *Church* v. *Fisher*, 40 Ind. 145.

[99] *Johnson* v. *Gere*, 2 Johns. Ch. (N. Y.) 546; *Edwards* v. *Bodine*, 26 Wend. (N. Y.) 109; *Peters* v. *Bowman*, 98 U. S. (8 Otto), 56, 25 L. ed. 84. *Contra*, *Platt* v. *Gilchrist*, 3 Sandf. (N. Y.) 118.

without any qualification, that the purchaser may set off or recover the amount paid by him to protect his title; but it seems reasonable that a vendor who has been innocent of any fraud should have an opportunity to correct the mistake, before being obliged to pay more than the amount actually due on the incumbrance.[1]

Thus, where the grantee of land was allowed to withhold part of the consideration for a specified time in order to take up an outstanding title, and, as a security for the money withheld, gave a mortgage to the vendor, in an action to foreclose the mortgage it was held, that it was no defence that in order to perfect his title he had paid the amount withheld to a person who claimed to have obtained a quit claim of the outstanding title, where it was neither averred in the answer nor shown by the proof that the claim on which the money was paid was valid or enforceable.[2]

§ 498. **Eviction as a defence.**—In an action to foreclose a mortgage given to secure part of the purchase money, where the defendant has been evicted from the premises under a paramount title, such eviction will afford a complete bar to the foreclosure.[3] To constitute an eviction, a forcible dispossession of the premises, or a actual physical expulsion, is not necessary.[4] An eviction cannot be more than an ouster, and a constructive eviction will be as effective as an actual eviction.[5]

[1] *Grant* v. *Tallman,* 20 N. Y. 191, 75 Am. Dec. 384; *Richardson* v. *Tolman,* 44 Mich. 379.

[2] *Richardson* v. *Tolman,* 44 Mich. 379.

[3] *Coudrey* v. *Coit,* 44 N. Y. 382, 4 Am. Rep. 690; *Curtiss* v. *Bush,* 39 Barb. (N. Y.) 661; *Banks* v. *Walker,* 2 Sandf. Ch. (N. Y.) 344. See *Frenche* v. *McConnell,* 38 Atl. 687 (N. J. L.).

[4] *Coudrey* v. *Coit,* 44 N. Y. 382, 386, 4 Am. Rep. 690; *Dyett* v. *Pendleton,* 8 Cow. (N. Y.) 727.

[5] *Dyett* v. *Pendleton,* 8 Cow. (N. Y.) 727, 731; *Whitney* v. *Dinsmore,* 60 Mass. (6 Cush.) 124, 126; *Whitney* v. *Whiting,* 44 Mass. (3 Metc.) 81; *Sprague* v. *Baker,* 17 Mass. 586; *Hamilton* v. *Cutts,* 4 Mass. 349, 3 Am. Dec. 222.

Lord Mansfield says: "Some ambiguity seems to have arisen from the term 'actual ouster,' as if

The peaceful surrender of property under and in pursuance of a judgment directing the delivery of possession in an action, which the mortgagor is unable to resist, constitutes an eviction,[6] and this may be accomplished without suffering an actual change of possession, as by the purchase of the property under the foreclosure of a prior incumbrance,[7] or by being compelled to purchase an outstanding paramount title in order to protect his interest.[8]

It was held at one time that to constitute an eviction "there must be a disturbance of the premises by legal process," but such is not now the rule; possession, without a struggle to maintain it, may be surrendered to persons holding a paramount title;[9] in such a case the burden will be on the defendant to show that the title to which he yielded possession was paramount. He cannot voluntarily surrender the possession to one having no title and then set up the defence of an eviction.[10] And it has been held that an eviction may be established by proof that at the time of the purchase, the lands sold were actually occupied under a valid hostile title, so that the purchaser could not obtain possession of them, and that in consequence he never obtained actual possession.[11]

it meant some act accompanied by real force, and as if a turning out by the shoulders were necessary; but this is not so." *Fisher* v. *Prosser*, Cowp. 217.

[6] *Coudrey* v. *Coit*, 44 N. Y. 382, 4 Am. Rep. 690.

[7] *Coudrey* v. *Coit*, 44 N. Y. 382, 4 Am. Rep. 690; *Tucker* v. *Cooney*, 34 Hun (N. Y.) 227.

[8] *Whitney* v. *Dinsmore*, 60 Mass. (6 Cush.) 124. See *Coudrey* v. *Coit*, 44 N. Y. 382, 4 Am. Rep. 690; *Tucker* v. *Cooney*, 34 Hun (N. Y.) 227; *Loomis* v. *Bedell*, 11 N. H. 74; *Foote* v. *Burnet*, 10 Ohio, 330, 36 Am. Dec. 90; *King* v. *Kerr*, 5 Ohio, 158, 22 Am. Dec. 777; *Brown* v. *Dickerson*, 12 Pa. St. 372; *Stewart* v. *Drake*, 9 N. J. L. (4 Halst.) 139; *Davenport* v. *Bartlett*, 9 Ala. 179. See *Bender* v. *Fromberger*, 4 U. S. (4 Dall.) 436, 1 L. ed. 898.

[9] *Coudrey* v. *Coit*, 44 N. Y. 382, 386, 4 Am. Rep. 690; *Simers* v. *Saltus*, 3 Den. (N. Y.) 214, 217; *Greenvault* v. *Davis*, 4 Hill (N. Y.) 643, 645, 646.

[10] *York* v. *Allen*, 30 N. Y. 104.

[11] *Withers* v. *Powers*, 2 Sandf. Ch. (N. Y.) 350, note; *Banks* v. *Walter*, 2 Sandf. Ch. (N. Y.) 344.

§ 499. Defence of want of title.— A defendant may plead as a defence to the foreclosure of a mortgage a want of or a defect in the title. Thus, where a person purchases land and gives his note secured by a mortgage for the whole or a part of the purchase price, but really acquires no interest in the land because of defects in the title of his vendor, in an action on the note and mortgage the defendant may set up such defects in his vendor's title as a bar to the action,[12] if the property was conveyed with covenants of warranty; but if the conveyance was made without covenants with regard to the title, the failure thereof is said to be no defence to an action upon the note given for the purchase money.[13]

Where a mortgage was given upon one tract of land to secure the purchase money of another tract, which latter tract the mortgagee covenanted by his bond to convey with covenants of warranty, in an action to foreclose such mortgage, the failure of the title of the vendor was said to be a good defence, upon the ground that the mortgagor undertook to pay the mortgage, only on condition that the mortgagee had a good title to the tract he agreed to convey.[14] It has been said, that upon principle of natural justice the defendant cannot be required under such circumstances to pay for lands which can never be conveyed to him by the party contracting to convey.[15]

Where a note secured by a mortgage is negotiable in form, title to it may be passed by indorsement and delivery. In an action brought by an assignee of such a note to foreclose the mortgage, failure of title to a portion of the premises for which the note was given as a part of the purchase price,

[12] *Frisbee* v. *Hoffnagle,* 11 Johns. (N. Y.) 50; *Tyler* v. *Young,* 3 Ill. (2 Scam.) 444, 447, 35 Am. Dec. 116. See *Dickinson* v. *Hall,* 31 Mass. (14 Pick.) 217, 25 Am. Dec. 390; *Hunt* v. *Livermore,* 22 Mass. (5 Pick.) 395. See *ante,* § 495.

[13] *Owinger* v. *Thompson,* 4 Ill. (3 Scam.) 502, 508.

[14] *Smith* v. *Newton,* 38 Ill. 230.

[15] *Tyler* v. *Young,* 3 Ill. (2 Scam.) 444, 447, 35 Am. Dec. 116.

constitutes no defence if such assignee had no notice of such failure of title.[16]

§ 500. **Allegation of failure of title.**—Failure of title may be pleaded as a defence to an action to foreclose a mortgage, whether the failure is as to the whole or only as to a part of the property purchased;[17] and a failure of title may be shown although the deed contains covenants of warranty.[18] Where there is only a partial failure of title it will be a defence *pro tanto*.[19]

It has been held that in a suit upon a promissory note and to foreclose a mortgage given for the purchase money of real estate, an answer attempting to set up a failure of title, but which does not set out a deed or any covenants therein, or allege fraud, is insufficient.[20] It is a general rule that a purchaser who has paid part of the purchase money, and given notes secured by a mortgage for the residue, will not be relieved against an action to foreclose such mortgage, on the ground of defect of title where there is no allegation of fraud in the sale, and he has not been evicted.[21] In such

[16] *Dutton* v. *Ives*, 5 Mich. 515. See *Stillwell* v. *Kellogg*, 14 Wis. 461; *Cornell* v. *Hichens*, 11 Wis. 353; *Croft* v. *Bunster*, 9 Wis. 503.

[17] See *Banks* v. *Walker*, 2 Sandf. Ch. (N. Y.) 344; *Pacific Iron Works* v. *Newhall*, 34 Conn. 67, 77, 78; *Robinson* v. *Wilson*, 19 Ga. 505; *Smith* v. *Newton*, 38 Ill. 230; *Conway* v. *Case*, 22 Ill. 127; *Tyler* v. *Young*, 2 Scam. (3 Ill.) 444, 35 Am. Dec. 116.

[18] *Banks* v. *Walker*, 2 Sandf. Ch. Ch. (N. Y.) 344. See *ante*, § 495. *Roake* v. *Sullivan*, 69 Misc. 429, 125 N. Y. Supp. 835.

[19] *Pacific Iron Works* v. *Newhall*, 34 Conn. 67, 77, 78; *Avery* v. *Brown*, 31 Conn. 398.

[20] *Church* v. *Fisher*, 40 Ind. 145. See *McClerkin* v. *Sutton*, 29 Ind. 407; *Jenkinson* v. *Ewing*, 17 Ind. 505; *Woodford* v. *Leavenworth*, 14 Ind. 311; *Laughery* v. *McLean*, 14 Ind. 106.

[21] *Ryerson* v. *Willis*, 81 N. Y. 277. See *Platt* v. *Gilchrist*, 3 Sandf. (N. Y.) 118; *Conwell* v. *Clifford*, 45 Ind. 392; *Key* v. *Jennings*, 66 Mo. 356, 368; *Wheeler* v. *Standley*, 50 Mo. 509; *Glenn* v. *Whipple*, 12 N. J. Eq. (1 Beas.) 50; *Hill* v. *Butler*, 6 Ohio St. 207; *Darling* v. *Osborne*, 51 Vt. 148; *Booth* v. *Ryan*, 31 Wis. 45. But compare *Wilber* v. *Buchanan*, 85 Ind. 42; *Chambers* v. *Cox*, 23 Kan. 393; *Mendenhall* v. *Steckel*, 47 Md. 453, 28 Am. Rep.

cases the purchaser will be confined to his remedy at law upon the covenants contained in his deed.[22]

If there is an entire failure of title to the land conveyed and the purchaser is unable to obtain possession under it, such failure to obtain possession will constitute a defence to an action to foreclose a mortgage, given for the purchase price, and no personal judgment can be rendered in such action because of the failure of consideration, even in the absence of covenants of title in the deed of conveyance; [23] but it would seem that where the vendee acquires any title whatever under his purchase, or even possession, if there is no fraud, he cannot have such relief.[24] And the fact that a purchaser who has obtained possession, has been sued by persons claiming title paramount to his deed, for the purpose of recovering such possession, will not constitute a defence to an action to foreclose a purchase money mortgage.[25]

§ 501. Denial of title in mortgagor at time of executing mortgage.[26]—Generally a mortgagor in possession can not set up an outstanding title in a third person as a bar to a bill for the foreclosure of a mortgage; nor can a purchaser in possession set up outstanding title as a defence to a bill to enforce the vendor's lien for the purchase money, because each is alike estopped from denying the title asserted against

481; *Hall* v. *Gale,* 14 Wis. 54; *Redrow* v. *Sparks,* 76 N. J. Eq. 133, 79 Atl. 450.

[22] *Ryerson* v. *Willis,* 81 N. Y. 277, 280; *Abbott* v. *Allen,* 2 Johns. Ch. (N. Y.) 519, 7 Am. Dec. 554; *Bumpus* v. *Platner,* 1 Johns. Ch. (N. Y.) 213, 218; *Patton* v. *Taylor,* 48 U. S. (7 How.) 132, 12 L. ed. 637.

[23] *Shattuck* v. *Lamb,* 65 N. Y. 499, 22 Am. Rep. 656; *Sandford* v. *Travers,* 40 N. Y. 140; *Banks* v. *Walker,* 2 Sandf. Ch. (N. Y.) 344, aff'd 3 Barb. Ch. (N. Y.) 438; *Withers* v. *Powers,* 2 Sandf. Ch. (N. Y.) 350, note.

[24] *Abbott* v. *Allen,* 2 Johns. Ch. (N. Y.) 519, 7 Am. Dec. 554.

[25] *Miller* v. *Avery,* 2 Barb. Ch. (N. Y.) 582. See *Banks* v. *Walker,* 2 Sandf. Ch. (N. Y.) 344, aff'd 3 Barb. Ch. (N. Y.) 438; *Platt* v. *Gilchrist,* 3 Sandf. (N. Y.) 118. *Contra, Johnson* v. *Gere,* 2 Johns. Ch. (N. Y.) 546.

[26] See *ante,* § 452.

him.[27] A mortgagor who has covenanted to defend the title against all adverse claims, is estopped from alleging title paramount in a third person.[28]

It would seem that in an action to foreclose a mortgage, the defendant may deny any title to the premises covered by the mortgage at the time it was executed,[29] especially where there is no recital of a particular fact forming an inducement for the contract, general words not being sufficient to create an estoppel. When the mortgagor conveys without title, but with covenants of warranty, he will be concluded, and an after acquired estate will pass to the mortgagee, not because the mortgagor had a title at the time of the execution of the mortgage, but because his deed will raise an equitable estoppel.[30]

[27] *Strong* v. *Waddell,* 56 Ala. 471.

[28] *Macloon* v. *Smith,* 49 Wis. 200.

[29] See *Sparrow* v. *Kingman,* 1 N. Y. 242, 246; *National Fire Ins. Co.* v. *McKay,* 43 N. Y. Supr. Ct. (1 Sheld.) 138; *Van Amburgh* v. *Cramer,* 16 Hun (N. Y.) 205.

[30] *Sparrow* v. *Kingman,* 1 N. Y. 242, 246.

CHAPTER XXI.

PRACTICE ON FAILURE TO ANSWER—DEFAULT—PRACTICE ON TRIAL AFTER ISSUE JOINED.

REFERENCE TO COMPUTE AMOUNT DUE—POWERS AND DUTIES OF REFEREE—REPORT OF REFEREE—DECREE OF FORECLOSURE AND SALE—PROCEEDINGS ON TRIAL.

§ 502. Introductory.
§ 503. When notice of motion for order of reference not necessary.
§ 504. When such notice is necessary.
§ 505. Upon what papers motion made.
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§ 507. Reference to compute amount due—Who may be referee.
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§ 529. Proceedings on trial after issue joined—General rules.
§ 530. Proceedings after issue joined—Where part only of the defendants have answered.
§ 531. Proceedings after default or issue joined—Where some of the defendants are infants or absentees.
§ 532. Proceedings where the bill is taken as confessed.

§ 502. Introductory.—In an action to foreclose a mortgage, if the defendants fail to answer within the time allowed by law for that purpose, or the rights of the plaintiff, as stated in the complaint, are admitted by the answer, the plaintiff may apply for an order of reference to some suitable person to compute the amount due to him, and to such of the defendants as are prior incumbrancers, and, where the whole amount secured by the mortgage is not due, to ascertain whether the mortgaged premises can be sold in parcels. If any of the defendants are infants who have put in a general answer by their guardian *ad litem,* or are absentees, the order of reference must direct the person to whom the cause is referred to take proof of the facts and circumstances stated in the complaint, to examine the plaintiff or his agent on oath as to any payments which have been made, and to compute the amount due upon the mortgage, preparatory to the application for a decree of foreclosure and sale of the premises.[31]

In an action to foreclose a mortgage, a judgment by default against one who was properly made a party to the action, and duly served with process, and required to answer as to any interest he might have or claim in the premises, will be conclusive as to any prior claim of interest or title adverse to the plaintiff.[32]

Where there are two or more defendants upon default of one defendant in a mortgage foreclosure, a decree may

[31] N. Y. Supreme Court Rule 60. See *post,* § 509.

[32] *Barton* v. *Anderson,* 104 Ind. 578. See *San Gabriel Valley Bank* v. *Lake View Town Co.* 86 Pac. 727 (Cal.) See also *Northern Trust Co.* v. *Crystal Lake Cemetery Asso'c,* 67 Minn. 131, 69 N. W. 708.

properly be entered against him without waiting for the determination of the issues joined by another defendant, and upon such determination a second decree may be entered against the latter.[33]

§ 503. When notice of motion for order of reference not necessary.—The order of reference, in an action for the foreclosure of a mortgage, generally known as the interlocutory order to compute the amount due upon default, is made *ex parte* and without notice to any one, if it appears from the papers presented to the court that no appearance has been made by any defendant.[34] A notice of motion for an order of reference can be dispensed with only in case no appearance has been made by any defendant; the motion is generally governed by the rules applicable to *ex parte* motions in other actions. It has been the practice for many years, according to the rule handed down from the court of chancery, in case a notice of motion is made for the relief demanded in the complaint, or for judgment, to dispense with a separate notice of motion for an order of reference to compute the amount due on the mortgage.[35]

§ 504. When such notice is necessary.—A notice of motion for an order of reference must be served upon such of the defendants as have appeared in the action, at least eight days before the hearing of the motion. Failure to serve such notice is an irregularity for which the court may subsequently cause the order to be set aside, if objected to.[36]

[33] *Small* v. *Wicks*, 82 Iowa, 744, 47 N. W. 1031.

[34] N. Y. Supreme Court Rule 60. *Winkleman* v. *White*, 147 Ala. 481, 42 So. 411.

[35] *Kelly* v. *Searing*, 4 Abb. (N. Y.) Pr. 354. This case reviews the history of the present N. Y. Supreme Court Rule 60, as transmitted from the rules of the court of chancery in force in 1844, being a substitute for rule 134 of that year; it also states the best practice upon default in foreclosure cases. But see *Citizens' Savings Bank* v. *Bauer*, 14 Civ. Proc. (N. Y.) 340, 343, holding that a separate notice of motion for judgment is necessary.

[36] N. Y. Supreme Court Rule 60; N. Y. Code Civ. Proc. § 780. See

The motion is generally made without placing the cause on the calendar.[37] It must be made at a term of the court, and not before a judge at chambers; it must also be made in the district in which the property is located and in which the action is triable, or in an adjoining county.[38]

§ 505. Upon what papers motion made.—The motion for an order of reference is always based upon the pleadings, and upon an affidavit stating the facts, by reason of which the plaintiff claims to be entitled to the order of reference. The affidavit may be verified by the plaintiff or by any person who has a knowledge of the facts. The steps which have been taken in the action may be shown by the affidavit of the plaintiff's attorney or of the attorney's clerk.[39] If it is desired upon the motion to show the time of filing the complaint and the *lis pendens,* it may be done by affidavit or by the certificate of the county clerk.[40]

The affidavits of the persons who served the summons on the different defendants should accompany these papers. If service has been made by publication, or without the state, or by any form of substituted service, all of the papers showing such service to be regular and complete, should accompany the motion papers, or at least be referred to therein as on file with the clerk of the court. All papers used upon the motion should be filed at the time of making the motion.

§ 506. What must be shown by the motion papers.—Upon an application for a reference to compute the amount due and for judgment of foreclosure and sale, it must appear that proper and complete service of the summons has been made upon each of the defendants,[41] or that they have ap-

Winkleman v. *White,* 147 Ala. 481, 42 So. 411.

[37] N. Y. Supreme Court Rule 60.

[38] N. Y. Code Civ. Proc. § 769. But see *Bank of Hampton* v. *Fennell,* 55 S. C. 379, 33 S. E. 485.

[39] N. Y. Supreme Court Rule 60.

[40] N. Y. Supreme Court Rule 60.

[41] An action cannot be referred while any defendant against whom the plaintiff seeks to recover a judgment for deficiency has not been

peared, and that the time allowed by law for serving an answer or demurrer has expired, and that the attorney of the plaintiff has not been served with a copy of an answer or of a demurrer. The affidavits should show that the bill is taken as confessed, and that the money secured by the mortgage is due and payable; also that a *lis pendens* with the complaint was filed at least twenty days prior to the application.[42] The affidavit of regularity,[43] which was required to be made by the solicitor of the complainant, under the chancery practice prior to the Code, is not necessary under the present practice.[44]

§ 507. Reference to compute amount due—Who may be referee.—Where a defendant interposes an answer raising a material issue, but fails to appear at the trial, the plaintiff cannot have an order of reference to compute the amount due as upon default.[45] Where an answer sets up a defence, or what is claimed to be a defence, the correct practice, if no demurrer is interposed, and a motion is not made to strike out the answer as irrelevant, nor for judgment upon it as a frivolous pleading, is to place the cause upon the calendar, and at the trial to demand judgment upon the pleadings.[46]

The referee appointed in foreclosure cases to compute the amount due, or to sell the mortgaged premises, must be selected by the court; and the court cannot appoint as such referee a person named by either of the parties to the action or by their attorneys.[47] Any suitable person may be appointed

served with the summons, or has been served only with a notice of no personal claim, and has not appeared. *Goodyear* v. *Brooks,* 4 Robt. (N. Y.) 682, 2 Abb. (N. Y.) Pr. N. S. 296.

[42] N. Y. Supreme Court Rule 60.

[43] As to the requisites of the affidavit of regularity under the old practice, see *Nott* v. *Hill,* 6 Paige Ch. (N. Y.) 9.

[44] Laws of 1840, chap. 342, as amended by laws of 1844, chap, 346.

[45] *Exchange Fire Ins. Co.* v. *Early,* 4 Abb. (N. Y.) N. C. 78.

[46] *Stuyvesant* v. *Browning,* 33 N. Y. Supr. Ct. (1 J. & S.) 203, 207; *Boyce* v. *Brown,* 7 Barb. (N. Y.) 81; *VanValen* v. *Lapham,* 13 How. (N. Y.) Pr. 243. See N. Y. Supreme Court Rule 60.

[47] N. Y. Supreme Court Rule 61.

referee. It is not necessary that he should be an attorney, although the usual practice is to appoint an attorney or an attorney's clerk as referee;[48] yet it has been held that the court cannot appoint as a referee to sell, the notary before whom the affidavit, upon which the application for the reference is based, was verified.[49]

§ 508. Contents of order—Whole amount due, and not due.—Where the whole amount secured by a mortgage is due,[50] and none of the defendants are infants or absentees, the order of reference should simply direct a computation of the amount due to the plaintiff, and to such of the defendants as are prior incumbrancers of the mortgaged premises, if there are any such. The referee may also be required to compute the amount due on other mortgages set up in the answer, and to ascertain whether there are any prior liens upon such premises.[51] Such an order of reference is to be regarded as an interlocutory decree,[52] made by the court and not by a judge in chambers, and is not appealable;[53] but as

It was held in *White* v. *Coulter*, 1 Hun (N. Y.) 357, 3 T. & C. (N. Y.) 608, that the appointment of a referee who is nominated by one of the parties in a mortgage foreclosure and approved by the other, is not an irregularity.

[48] No clerk, deputy clerk, or assistant clerk of any court of record, or of the surrogate's court of the counties of New York and Kings, shall be appointed referee in a mortgage foreclosure case under any order or judgment of any court, unless the parties to the action mutually agree to such referee. See Laws of 1876, chap. 205.

[49] *Steward* v. *Bogart* (N. Y. Sup. Ct.) 2 Month. L. Bull, 94.

[50] The United States circuit court of appeals, for the Seventh circuit, in the case of *Grape Creek Coal Company* v. *Farmers' Loan and Trust Company*, 12 C. C. A. 350, 63 Fed. 891, say that a decree for the foreclosure of a mortgage should find the amount unpaid upon the principal, and decree its payment out of the proceeds of the sale, whether the principal is due or not.

[51] *Chamberlain* v. *Dempsey*, 36 N. Y. 144, 1 Trans. App. 257, reversing 9 Bosw. (N. Y.) 540, 15 Abb. (N. Y.) Pr. 1.

[52] *Roberts* v. *White*, 39 N. Y. Supr. Ct. (7 J. & S.) 272, 275. See *Chamberlain* v. *Dempsey*, 15 Abb. (N. Y.) Pr. 1; *Johnson* v. *Everett*, 9 Paige Ch. (N. Y.) 636.

[53] *Gray* v. *Fox*, 1 N. Y. Code Rep. N. S. 334; *Dickenson* v. *Mitchell*, 19 Abb. (N. Y.) Pr. 286; *Harris* v.

an order of reference is in aid of final judgment, an appeal from the final judgment will bring up for review all previous interlocutory orders and decrees.[54]

In cases where the whole amount secured by the mortgage has not become due, the order of reference should also require the referee "to examine and report whether the mortgaged premises can be sold in parcels." [55] Where the referee reports that the premises can be sold to advantage in parcels, he should also report the order in which the sale of parcels should be made, so that the court may direct the order in which such parcels shall be sold, so as to protect the rights of the different parties interested in the equity of redemption.[56]

§ 509. Contents of order—When infant and absentee defendants.—Where any of the defendants are infants or absentees, the order of reference, besides providing for the computation of the amount due, must also direct the referee to take proof of the facts and circumstances set forth in the complaint, and to report to the court the evidence taken before him.[57] The court is bound to protect the interests of infant litigants, whether represented by their guardians or not.[58]

Mead, 16 Abb. (N. Y.) Pr. 257; *Ubsdell* v. *Root,* 3 Abb. (N. Y.) Pr. 142; *McLean* v. *East River Ins. Co.* 8 Bosw. (N. Y.) 700; *Smith* v. *Dodd,* 3 E. D. Smith (N. Y.) 348; *Dean* v. *Empire Mut. Ins. Co.* 9 How. (N. Y.) Pr. 69; *Bryan* v. *Brennon,* 7 How. (N. Y.) Pr. 359. But where an order of reference is directed in a case in which a reference is not authorized by law, it will be appealable. *Cram* v. *Bradford,* 4 Abb. (N. Y.) Pr. 193; *Whitaker* v. *Desfosse,* 7 Bosw. (N. Y.) 678, 680.

[54] *Chamberlain* v. *Dempsey,* 36 N. Y. 144; N. Y. Code Civ. Proc. § 1316.

[55] N. Y. Supreme Court Rule 60.

[56] See *Erie Co. Savings Bank* v. *Roop,* 48 N. Y. 292, 298; *Ferguson* v. *Kimball,* 3 Barb. Ch. 616; *Rathbone* v. *Clark,* 9 Paige Ch. 648; *Jumel* v. *Jumel,* 7 Paige Ch. 591.

[57] *Wolcott* v. *Weaver,* 3 How (N. Y.) Pr. 159; N. Y. Supreme Court Rule 60.

Rule 60 is designed for the protection of infants or absentees and not to facilitate plaintiffs. *Godwin* v. *Liberty-Nassau Bldg. Co. as trustees, etc.* 144 App. Div. 164, 128 N. Y. Supp. 791.

[58] *Sheahan* v. *Wayne Circuit Judge,* 42 Mich. 69. General guardians do not represent their infant

Where a non-resident defendant has not been personally served with the summons, and does not appear in the action, a judgment cannot be rendered against him, except on the report of the referee as to the truth of the facts and circumstances stated in the complaint.[59]

The evidence required of the plaintiff to establish the allegations of his complaint must be legal proof; secondary evidence will not be sufficient.[60] Where an order has been made, upon the pleadings and upon affidavits in a mortgage foreclosure, appointing a referee to compute the amount due, and to inquire into the facts and circumstances set forth in the plaintiff's complaint, such referee cannot receive an affidavit verified before a commissioner of deeds as evidence of any such facts.[61] But the testimony on such a reference, being in the nature of affidavits, a husband and wife may testify in behalf of each other.[62]

Where any of the defendants are infants or non-appearing absentees, the order of reference, besides providing for the computation of the amount due and for taking proof of the facts and circumstances alleged in the complaint, should also require that the referee examine the plaintiff, or his agent, under oath, as to any payments which have been made on the mortgage debt.[63] In cases where proofs have been taken in chief, prior to entering an order of reference, upon a proper application made to the court, permission will be granted to

wards in foreclosure proceedings, and the solicitors of the guardians cannot bind the rights of the infants; nor can guardians *ad litem* bind the infants, except in strict accordance with the rules for their protection. *Sheahan* v. *Wayne Circuit Judge, supra.*

[59] *Corning* v. *Baxter,* 6 Paige Ch. (N. Y.) 179.

[60] *Wolcott* v. *Weaver,* 3 How. (N. Y.) Pr. 159.

[61] *Security Fire Ins. Co.* v. *Martin,* 15 Abb. (N. Y.) Pr. 479.

[62] *Laing* v. *Titus,* 18 Abb. (N. Y.) Pr. 388.

[63] N. Y. Supreme Court Rule 60. See *Franklin, as ex'r, etc.* v. *Di Clemente,* 123 App. Div. 664, 108 N. Y. Supp. 123; *Smith* v. *Warringer,* 41 Misc. 94, 83 N. Y. Supp. 655, on necessity for compliance with Rule 60.

the plaintiff to use such proofs upon the reference against an absentee.[64]

§ 510. Miscellaneous matters in order of reference—Changing referee.—An order of reference to compute the amount due, and to take proof of the facts and circumstances alleged in the complaint, and to examine the defendant, or his agent, as to any payments that have been made, should define the duties of the referee and limit the scope of the reference, and should also require him to report the proofs and evidence taken before him.[65] An order of reference to compute the amount due, granted against a non-answering defendant, should not combine with it a reference of the whole issue as to other defendants who contest the plaintiff's claims. They are separate proceedings, and their union in the same order will be irregular as to the non-answering defendant, though regular as to the contesting defendants.[66]

Where there has been a reference in a mortgage foreclosure to compute the amount due, to take proof of the facts and circumstances alleged in the complaint, and to examine the plaintiff or his agent on oath as to payments, the matter cannot be withdrawn from the referee named without a special order of the court;[67] and such an order will not be granted, unless it is made to appear that there are special reasons therefor, such as the inability of the referee, because of illness or pressure of private business, to proceed with reasonable dispatch in hearing and determining the matter

[64] *Corning* v. *Baxter,* 6 Paige Ch. (N. Y.) 178.

[65] *Wolcott* v. *Weaver,* 3 How. (N. Y.) Pr. 159.

[66] *Cram* v. *Bradford,* 4 Abb. (N. Y.) Pr. 193. See *post,* § 530.

[67] But it seems that where a referee is appointed by the court, and by stipulation of the parties, without an order from the court, another person is substituted in the place of the referee originally appointed, such substituted referee will possess all the powers of the one originally appointed. *Chatfield* v. *Hewlett,* 2 Dem. (N. Y.) 191, 196, citing *Nason* v. *Luddington,* 56 How. (N. Y.) Pr. 172; *Leaycroft* v. *Fowler,* 7 How. (N. Y.) Pr. 259, 260; *Whalen* v. *Board of Supervisors,* 6 How. (N. Y.) Pr. 278.

referred to him, or that there has been unreasonable delay on the part of the referee to proceed with the examination, or that he has adjourned the proceedings for an unreasonable length of time, against the wishes of a party to the suit,—either of which reasons will be a sufficient cause to justify a change of a referee.[68]

§ 511. Proceedings on reference—General rules.—The proceedings on a reference in a mortgage foreclosure, are, in general, similar to those on other interlocutory references, and are governed by the same rules. The referee should be duly sworn before entering upon his official duties,[69] unless the parties, being of full age and competent, either by written stipulation or orally, expressly waive such oath.[70] Such waiver should be entered in the minutes of the referee.[71] Should the referee fail to take the oath prescribed, it will be an irregularity; but such irregularity will be deemed waived, if the parties proceed with the reference without objection.[72]

[68] *Forrest* v. *Forrest,* 3 Bosw. (N. Y.) 650. See *Rathbun* v. *Ingersoll,* 34 N. Y. Supr. Ct. (2 J. & S.) 211, 214.

[69] It has been held that a referee to compute the amount due in a foreclosure, should take the oath of office prescribed by § 1016 of the N. Y. Code of Civil Procedure. *Exchange Fire Ins. Co.* v. *Early,* 4 Abb. (N. Y.) N. C. 78, 54 How. (N. Y.) Pr. 279. See *Browning* v. *Marvin,* 5 Abb. (N. Y.) N. C. 285. But it is said in *McGowan* v. *Newman,* 4 Abb. (N. Y.) N. C. 80, that no oath of office is required from a referee appointed under and in pursuance to § 1215 of the N. Y. Code of Civil Procedure; that the provisions of § 1016 of the Code, relate solely to referees appointed as prescribed in that section, which relates to trials without jury, and are applicable to cases where issue is joined, but cannot be extended so as to apply to referees appointed under § 1215.

[70] *Exchange Fire Ins. Co.* v. *Early,* 4 Abb. (N. Y.) N. C. 78.

[71] *Malcolm* v. *Foster,* 5 N. Y. Week. Dig. 310; *Browning* v. *Marvin,* 5 Abb. (N. Y.) N. C. 285. *In re Vilmar,* 10 Daly (N. Y.) 15.

[72] See *Malcolm* v. *Foster,* 5 N. Y. Week. Dig. 310; *Bucklin* v. *Chapin,* 53 Barb. (N. Y.) 488; *Bonner* v. *McPhail,* 31 Barb. (N. Y.) 111; *Garcie* v. *Shelden,* 3 Barb. (N. Y.) 232; *Keator* v. *Ulster & Delaware Plank Road Co.* 7 How. (N. Y.) Pr. 41; *Story* v. *De Armond,* 179 Ill. 510, 53 N. E. 990.

§ 512. Who to prosecute reference—Service of order.—The order appointing a referee in a foreclosure is his commission to act, and until such order has actually been entered, and a certified copy served upon him, he should not proceed with the reference, for the validity of all his proceedings will depend entirely upon the extent and scope of the order from which he derives his authority.[73]

It is the general rule that the party who obtains an order of reference, is entitled to the prosecution thereof in the first instance, unless the court in making it commits the prosecution to some other party; but where both parties are alike interested, the plaintiff's counsel will be entitled to prosecute the reference in the first instance.[74] Should the party entitled to prosecute the reference in the first instance, neglect to proceed within a reasonable time after the entry of the order, any person interested in the reference may apply to the court for an order requiring the party entitled to prosecute it, to show cause why such prosecution should not be taken from him and committed to another.[75]

§ 513. Examination on reference—Evidence.—Where in an action of foreclosure an order has been granted upon the pleadings and affidavits, appointing a referee to compute the amount due, to examine the plaintiff as to payments, and to take proof of the facts and circumstances alleged in the bill, the referee has no discretionary powers, but must be confined to the scope and authority of the order appointing him; he cannot go into an examination of the plaintiff as

[73] *Bonner* v. *McPhail*, 31 Barb. (N. Y.) 106, 116. See *Bucklin* v. *Chapin*, 53 Barb. (N. Y.) 488, 491.

[74] *Quackenbush* v. *Leonard*, 10 Paige Ch. (N. Y.) 131.

[75] Such was the practice in the former court of chancery. See *Quackenbush* v. *Leonard*, 10 Paige Ch. (N. Y.) 131; *Holley* v. *Glover*, 9 Paige Ch. (N. Y.) 7; N. Y. Chancery Rule 101; such also is the established English practice, *Powell* v. *Walworth*, 2 Madd. Ch. 436; and as the Code of Civil Procedure contains no provision inconsistent therewith, such, doubtless, is still the correct practice.

to any facts except those relating to payments on the mortgage, nor can he examine an absent defendant in behalf of his co-defendant as to any defence set up in an answer.[76]

On a reference, on default in a mortgage foreclosure, to compute the amount due and to take proof of the facts and circumstances stated in the complaint, the referee should require legal proof of every fact embraced in the subject of the reference; secondary evidence is inadmissible.[77] He cannot receive an affidavit verified before a commissioner of deeds as evidence of the amount due on the mortgage, or of any other fact to be established;[78] but he may receive the recital of the bond in the mortgage set out in the complaint as evidence of its execution, if the bond has been lost.[79] On a reference to compute the amount due in a foreclosure, the testimony of the witnesses need not be signed by them.[80]

Where there are infant or absentee defendants, and the plaintiff or his agent is to be examined on oath by the referee as to any payments that may have been made on the bond and mortgage, the examination of the witnesses should be full and exhaustive.

§ 514. Computing amount due—Statement of items—Allowance for repairs and payment of prior liens.—Upon a reference to compute the amount due upon a bond and mortgage, the referee is not limited by the penalty of the bond. Where the principal and interest exceed such penalty, the mortgagee has a lien upon the whole land for the amount of principal and interest due, according to the conditions of

[76] *McCrackan* v. *Valentine Ex'rs.* 9 N. Y. 43.

[77] *Wolcott* v. *Weaver,* 3 How. (N. Y.) Pr. 159.

[78] *Security Fire Ins. Co.* v. *Martin,* 15 Abb. (N. Y.) Pr. 479 .

[79] *Cooper* v. *Newland,* 17 Abb. (N. Y.) Pr. 342; *Knickerbocker Life Ins. Co.* v. *Hill,* 16 Abb. (N. Y.) Pr. N. S. 321. The proper practice as to the method of proving the bond and mortgage on the reference in a mortgage foreclosure, is discussed by counsel with full citations in *Knickerbocker Life Ins. Co.* v. *Hill,* 16 Abb. (N. Y.) Pr. N. S. 321, 323.

[80] N. Y. Supreme Court Rule 30.

the mortgage, although such amount may exceed the penalty of the bond.[81] The burden of showing that the amount due and unpaid on the mortgage under foreclosure is less than the plaintiff claims, is on the defendant.[82]

In computing the amount due in a mortgage foreclosure, the referee is not obliged to set out the several items constituting the sum found due, because they will be covered by the general finding, although not stated in detail. In Sidenberg v. Ely,[83] objection was taken to the refusal of the referee to specify the several sums which constituted the gross sum set out in his findings, and the court held that such refusal was not error. It was held in this case, that "these items are covered by the general finding, and it was not necessary to state them specifically; nor does the request made embrace facts material to the issue and the proper disposal of the case."

A mortgagee in possession before foreclosure, who purchases or pays off an outstanding lien for the purpose of protecting his possession, may be allowed what he has paid with legal interest and no more.[84] And where a mortgagee pays taxes and other prior claims to protect his lien, he cannot be allowed more than the statutory rate of interest on such advances, as against a junior incumbrancer in a foreclosure proceeding, though he may have an agreement with the mortgagor for interest at the rate of ten per centum.[85]

[81] *Mower* v. *Kip,* 6 Paige Ch. (N. Y.) 88, 29 Am. Dec. 748. See *Griffiths* v. *Hardenbergh,* 41 N. Y. 464, 471; *Lyon* v. *Clark,* 8 N. Y. 148, 153; *Smedes* v. *Houghtaling,* 3 Cai. (N. Y.) 49, 2 Am. Dec. 250; *Moffat* v. *Barnes,* 3 Cai. (N. Y.) 49, note; *Clark* v. *Bush,* 3 Cow. (N. Y.) 151; *Lyon* v. *Hall,* 1 E. D. Smith, (N. Y.) 250; *State* v. *Wayman,* 2 Gil. & J. (Md.) 254; *Harris* v. *Clapp,* 1 Mass. 308, 2 Am. Dec. 27; *Tenant's Ex'rs* v. *Gray,* 5 Munf. (Va.) 494; *Perit* v. *Wallis,* 2 U. S. (2 Dall.) 252, 1 L. ed. 370. Contra, *United States* v. *Arnold,* 1 Gall C. C. 348; *Lonsdale* v. *Church,* 2 T. R. 388; *Holdipp* v. *Otway,* 2 *Saund.* 106. See also *Sachs* v. *American Surety Co.* 72 App. Div. 60, 76 N. Y. Supp. 335.

[82] *Lyon* v. *McDonald,* 51 Mich. 436.

[83] 90 N. Y. 257, 43 Am. Rep. 163, 11 Abb. (N. Y.) N. C. 354.

[84] *Comstock* v. *Michael,* 17 Neb. 288.

[85] *Butterfield* v. *Hungerford,* 68 Iowa, 249.

It was held in Barthell v. Syverson,[86] that the cost of repairs made upon the mortgaged premises by a mortgagee, cannot be added to the mortgage debt. This was a case in which the plaintiff held a mortgage on a flouring mill, which was out of repair; the plaintiff took out a defective piece of machinery and replaced it with a new piece. The court held that the plaintiff could not tack the amount paid for such machinery to his mortgage, and have the same made a charge on the real estate. The reason for this is that the mortgagee cannot tack to his mortgage debts not secured thereby, and require their payment.[87] A mortgagee in possession after a sale on foreclosure is not entitled to compensation for repairs and improvements.[88]

§ 515. Computing amount on building and loan association mortgage—Fines and dues.—Mortgages to building and loan associations are governed by the laws relating to and governing mortgages generally, but in such mortgages there are usually conditions for the payment of fines and dues in accordance with the by-laws and regulations of the associations.

In an early case in New York,[89] it was held that a mortgage to a building and loan association, in the usual form, is a valid security only for the monthly payments stipulated to be made, and not for fines and other dues. It is a well settled rule of law that penalties agreed upon for the breach of a contract are illegal.[90] And it has been said, that there is nothing in the character of building and loan associations to except them from the doctrine of equity, applicable to other cases of penalty for the non-payment of money, which prohibits the enforcement and collection of such fines and penalties.[91]

[86] 54 Iowa, 160.

[87] *Bacon* v. *Cottrell,* 13 Minn. 194.

[88] *Marshall* v. *Stewart,* 80 Ind. 189.

[89] *Hamilton Building Assoc.* v. *Reynolds,* 5 Duer (N. Y.) 671.

[90] *Ocmulgee Building & Loan Assoc.* v. *Thomson,* 52 Ga. 427.

[91] *Mulloy* v. *Fifth Ward Building Assoc.* 2 Mc. & Ar. (D. C.) 594, 597.

It has been said that a covenant to pay "all fines imposed by the articles of the association," does not make such articles a part of the mortgage and does not authorize the court to consider them in construing it; because, in case of a foreclosure and sale, the court cannot look beyond the mortgage itself to ascertain the sum due, unless the rules and articles of the building and loan association are made a part of the mortgage, or so referred to in it as to call the attention of the court to them.[92] But it seems that where a mortgage makes no mention of fines or of any liability to pay them, if the mortgagor has actually paid such fines, he cannot recover them back; and in an action brought to foreclose, he will not be entitled to have them applied towards the satisfaction of the mortgage.[93]

But it was held in the Juniata Building and Loan Association v. Mixwell,[94] that where a married woman unites with her husband in executing a mortgage on her separate property to secure a loan for her husband, which he, as a stockholder, procured from a building and loan association, it is a valid mortgage on her separate property under the married woman's act of 1859, and covers the premiums due from her husband, as such stockholder, and also the fines incurred by reason of default in the payment of dues, although under the act of 1859, a married woman's mortgage of her separate estate to a building and loan association to secure the payment of her own debt could bind her property only to the extent of the amount actually advanced with interest.[95] It is held in some of the states and in England, however, where a fine is imposed by a building and loan association, when a borrowing member becomes in arrears in the payment of his dues, that such fine is imposed as interest and not by way of penalty, and that the

[92] *Robertson* v. *American Homestead Assoc.* 10 Md. 397, 69 Am. Dec. 145.

[93] *Clarksville Building & Loan Assoc.* v. *Stephens,* 26 N. J. Eq. (11 C. E. Gr.) 351.

[94] 84 Pa. St. 313.

[95] *Wolbach* v. *The Lehigh Building Assoc.* 84 Pa. St. 211.

above rule of equity will not entitle the borrowing member to relief.[96]

§ 516. Allowance on reference of taxes and assessments paid by mortgagee.—Where the owner of mortgaged premises neglects or refuses to pay the taxes or assessments imposed thereon, which he should pay,[97] the owner or the holder of the mortgage may pay such taxes to protect his security,[98] although there may be no clause in the mortgage permitting him to do so;[99] and where a mortgagee pays such taxes and redeems the property from a tax sale, he will be subrogated to the rights of the state and will be entitled to a lien on the mortgaged premises for the amount of the taxes thus paid, in addition to the amount of his mortgage.[1] To

[96] See *Ocmulgee Building & Loan Assoc.* v. *Thomson,* 52 Ga. 427; *Shannon* v. *Howard Mut. Assoc.* 36 Md. 383; *Juniata Building & Loan Assoc.* v. *Mixell,* 84 Pa. St. 313; *Parker* v. *Butcher,* L. R. 3 Eq. 762, 36 L. J. Ch. 552; *Matterson* v. *Elderfield,* L. R. 4 Ch. App. 207, 20 L. T. N. S. 503, 33 J. P. 326, 17 W. R. 422; *Thompson* v. *Hudson,* L. R. 2 Ch. App. 255.

[97] The owner of an undivided half interest in real estate is under no obligations to one to whom he has mortgaged his said one-half interest to pay the whole tax levied upon the premises, but is bound to pay only one-half thereof, and in case the mortgagee pays the whole of the tax in order to preserve his lien, he will be allowed to recover only one-half of the amount so paid from the proceeds of the sale arising upon a foreclosure of his mortgage. *Weed* v. *Hornby,* 35 Hun (N. Y.) 580.

[98] *Sidenberg* v. *Ely,* 90 N. Y. 257, 43 Am. Rep. 163; *Kepley* v. *Jansen,* 107 Ill. 79; *Broquet* v. *Sterling,* 56 Iowa, 357; *Leitzbach* v. *Jackman,* 28 Kan. 524; *Walton* v. *Hollywood,* 47 Mich. 385; *Southard* v. *Dorrington,* 10 Neb. 122.

[99] *Sidenberg* v. *Ely,* 90 N. Y. 257, 43 Am. Rep. 163.

[1] *Sidenberg* v. *Ely,* 90 N. Y. 257, 43 Am. Rep. 163; *Faure* v. *Winans,* Hopk. Ch. (N. Y.) 283, 14 Am. Dec. 545; *Sharp* v. *Thompson,* 100 Ill. 447, 39 Am. Rep. 61; *Broquet* v. *Sterling,* 56 Iowa, 357; *Baker* v. *Clark,* 52 Mich. 22; *Walton* v. *Hollywood,* 47 Mich. 385; *Horrigan* v. *Wellmuth,* 77 Mo. 542. Whether taxes paid by a mortgagee upon the property, in the absence of an agreement, can be tacked to the mortgage debt, is questioned in *Barthell* v. *Syverson,* 54 Iowa, 160; *Stinson* v. *Connecticut Mutual Life Insurance Co.* 174 Ill. 125, 66 Am. St. Rep. 262, 51 N. E. 193; *Abbott* v. *Stone,* 172 Ill. 634, 64 Am. St. Rep. 60, 50 N. E. 328; *Jefferson County Bank* v. *Hummel,* 11 Colo. App. 337, 53 Pac. 286; *Douglass* v.

give the owner of a mortgage this right, it is not necessary for him to wait until the premises are sold, or offered for sale, for such taxes and assessments, before paying the same.[2]

His claim, however, must be enforced as a part of the mortgage debt and not by an independent action against the mortgagor, as for money paid to his use, or under a claim of subrogation to the lien of the state or municipality,[3] because money paid by the holder of a mortgage to redeem the premises from a tax sale does not constitute a lien apart from the mortgage, but will be discharged when the mortgage is satisfied; and whether the amount paid is or is not included in the sum for which the mortgage is foreclosed, no subsequent or separate proceeding can be maintained against the mortgagor to enforce its payment.[4]

Even the owner of an invalid mortgage is entitled to a lien upon the premises for taxes paid by him upon the same.[5] And where a subsequent mortgage lien is cut off by the foreclosure of a prior mortgage, if the amount paid for

Miller, 102 Ill. App. 345; *Leavitt* v. *Bell,* 55 Neb. 57, 75 N. W. 524. See *Worcester* v. *City of Boston,* 179 Mass. 41, 60 N. E. 410; *Walsh* v. *Robinson,* 135 Mich. 16, 97 N. W. 55; *Farmers' Loan & Trust Co.* v. *Denver, L. & G. R. R. Co.* 126 Fed. 46, 60 C C. A. 588; *Sands* v. *Kaukauna Water Power Co.* 115 Wis. 229, 91 N. W. 679. But see *Pollard* v. *American Freehold Land Mortgage Co.* 139 Ala. 183, 35 So. 767; *Jamaica Savings Bank* v. *Howard's executor,* 79 Vt. 372, 65 Atl. 92.

He is also entitled to the interest on such taxes. *Wright, as trustee, etc.* v. *Conservative Investment Co.* 49 Or. 177, 89 Pac. 387. See also *Pollard* v. *American Freehold Land Mortgage Co.* 139 Ala. 183, 35 So. 767; *Stinson* v. *Connecticut Mutual Life Insurance Co.* 174 Ill. 125, 66 Am. St. Rep. 262, 51 N. E. 193.

Mortgagee may recover for taxes paid after foreclosure commenced. *Barnwell* v. *Marion,* 60 S. C. 314, 38 S. E. 593; *Brockway* v. *McClun,* 243 Ill. 196, 90 N. E. 374. See *Commercial National Bank* v. *Gaukler,* 130 N. W. 655 (Mich); *Jehle* v. *Brooks,* 112 Mich. 131, 70 N. W. 440; *Loewenstein* v. *Rapp,* 67 Ill. App. 678.

[2] *Sidenberg* v. *Ely,* 90 N. Y. 257, 43 Am. Rep. 163; *Williams* v. *Townsend,* 31 N. Y. 414; *Eagle Fire Ins. Co.* v. *Pell,* 2 Edw Ch. (N. Y. 631.

[3] *Horrigan* v. *Wellmuth,* 77 Mo. 542; *Young* v. *Brand,* 15 Neb. 601.

[4] *Vincent* v. *Moore,* 51 Mich. 618.

[5] *Aultman* v. *Jenkins,* 19 Neb. 209.

taxes has been added to the latter incumbrance, the lien therefor will not be extinguished with the mortgage.[6] On a foreclosure the mortgagee will not be entitled to recover taxes paid on a tract of land not covered by the mortgage;[7] neither will the mortgagee or the assignee of a mortgage be entitled to recover as taxes paid by himself or his agent, sums expended in purchasing the mortgaged premises at a tax sale.[8] And where a mortgagee in possession suffers the land to be sold for taxes, he will not be permitted to recover on foreclosure, the amount paid by him to redeem from such sale, but only the actual amount of the taxes with interest.[9]

§ 517. Computing amount due on failure to pay taxes and assessments.—In computing the amount due, where the owner of the mortgaged property has failed to pay taxes, assessments or liens of a like nature imposed upon it, and the mortgagee or the assignee of the mortgage has paid them in order to protect his security, the referee should include the amount thus paid with interest, and add it to the mortgage debt in his report as to the amount due.[10]

If the referee should find that the mortgage is upon an undivided one-half interest in real estate, and that the mortgagee, in order to protect his lien, has paid the tax or assessment levied against the whole premises, he should allow the

[6] *Connecticut Mut. Life Ins. Co.* v. *Bulte,* 45 Mich. 113.

[7] *Crane* v. *Aultman Taylor Co.* 61 Wis. 110.

[8] *Maxfield* v *Willey,* 46 Mich. 253. See *Williams* v. *Townsend,* 31 N. Y. 411; however, a contrary doctrine was held in *Allison* v. *Armstrong,* 28 Minn. 276, 41 Am. Rep. 281.

[9] *Moshier* v. *Norton,* 100 Ill. 63.

[10] *Sidenberg* v. *Ely,* 90 N. Y. 257, 263, 43 Am. Rep. 163, 11 Abb. (N. Y.) N. C. 354; *Robinson* v. *Ryan,* 25 N. Y. 320, 327; *Eagle Fire Ins. Co.* v. *Pell,* 2 Edw. Ch. (N. Y.) 631, 634; *Faure* v. *Winans,* Hopk. Ch. (N. Y.) 283, 14 Am. Dec. 545; *Brevoort* v. *Randolph,* 7 How. (N. Y.) Pr. 398; *Burr* v. *Veeder,* 3 Wend. (N. Y.) 412. See *Williams* v. *Townsend,* 31 N. Y. 411, 414; *Dale* v. *McEvers,* 2 Cow. (N. Y.) 118; *Sharp* v. *Thompson,* 100 Ill. 447, 39 Am. Rep. 61; *Waterson* v. *Devoe,* 18 Kan. 223; *Sharp* v. *Barker,* 11 Kan. 381; *Stanclift* v. *Norton,* 11 Kan. 218; *Leland* v. *Collver,* 34 Mich. 418; *Johnson* v. *Payne,* 11 Neb. 269.

mortgagee only one-half of the tax so paid, in computing the amount due, because the mortgagor is under no obligations to the person to whom he has mortgaged his interest in such real estate, to pay the whole of the tax or assessment levied against the premises, but is bound to pay only one-half thereof.[11] Where the referee finds that the mortgage is upon a lease-hold interest, and that the mortgagor has covenanted to pay the rent charges, but has failed to do so, and that to protect his interest, the mortgagee has been compelled to pay the same, he should allow the amount thus paid in computing the amount due on the mortgage.[12]

§ 518. Allowance of insurance premiums paid by mortgagee.—Where a mortgage contains a clause requiring the mortgagor to keep the premises insured for the benefit and protection of the mortgagee, and agreeing that in case of his failure to do so the mortgagee shall have the right to insure the same, all moneys paid by the mortgagee for insurance, because of the mortgagor's failure to procure insurance, will be a charge upon the premises and collectible under the mortgage;[13] and the moneys so paid may be included in the amount of the judgment of foreclosure, even though the insurance was taken for the full term of the mortgage.[14] But in an action to foreclose, in the absence of a supplemental complaint, the plaintiff will not be entitled to recover moneys

[11] *Weed* v. *Hornby*, 35 Hun (N. Y.) 580.

[12] *Catlin* v. *Grissler*, 57 N. Y. 363; *Robinson* v. *Ryan*, 25 N. Y. 320. If the stipulation of the mortgagor to pay rent charges does not appear on the face of the mortgage, the mortgagee will not be entitled to enforce his rights under such agreement, as against subsequent *bona fide* grantees without notice. See *Robinson* v. *Ryan*, 25 N. Y. 320; *St. Andrew's Church* v. *Tompkins*, 7 Johns. Ch. (N. Y.) 14; *Frost* v. *Beekman*, 1 Johns. Ch. (N. Y.) 288.

[13] *Neal* v. *Albertson*, 39 N. J. Eq. (12 Stew.) 384; *Overby* v. *Fayettville Building & Loan Assoc.* 81 N. C. 56. See *Sanford* v. *Litchenberger*, 62 Neb. 501, 87 N. W. 305.

[14] *Walton* v. *Hollywood*, 47 Mich. 385. See *Germania Savings Bank* v. *Lemley*, 50 La. Ann. 1289, 23 So. 874; *Grunewald* v. *Commercial Soap, Starch & Candle Manufactory*, 49 La. Ann. 489, 21 So. 646.

paid for insurance premiums after the commencement of the action.[15]

In the absence, however, of an express agreement on the part of the mortgagor to keep the mortgaged premises insured for the benefit and protection of the mortgagee, the premiums paid by him for insurance against fire cannot be charged upon the mortgaged premises;[16] and on a reference to compute the amount due in such a case, the referee cannot allow any premiums paid by the mortgagee for insurance.[17] In an early case[18] in New York, it was held that "insurance stands on a different footing from taxes, as it may be effected by the mortgagee for his own security. But taxes are a legal charge upon the estate, not upon the mortgagee."

§ 519. Powers and duties of referees—Generally.—The general powers and duties of a referee appointed to compute the amount due on a mortgage, to examine the plaintiff or his agent as to any payments made on the mortgage debt, and to take proof of the facts and circumstances stated in the complaint in a foreclosure suit, not being prescribed by the Code of Civil Procedure nor provided for by the rules of practice, and being the same powers as were formerly possessed and exercised by a master in chancery, the referee in his proceedings will be governed by the rules and the former practice of the court of chancery, as far as they are applicable under the Code.[19] It is the duty of the referee "to report the proofs and examinations had before him,"[20] that the court may make

[15] *Washburn* v. *Wilkinson,* 59 Cal. 538. Contra, *Jehle* v. *Brooks,* 112 Mich. 131, 70 N. W. 440.

[16] *Miller* v. *Hunt,* 6 Idaho, 523, 57 Pac. 315.

[17] *Faure* v. *Wymans,* Hopk. Ch. (N. Y.) 283, 14 Am. Dec. 545.

[18] *Faure* v. *Wymans,* Hopk. Ch. (N. Y.) 283, 14 Am. Dec. 545.

[19] *Ketchum* v. *Clark,* 22 Barb. (N. Y.) 319. See *Palmer* v. *Palmer,* 13 How. (N. Y.) Pr. 363; *VanZant* v. *Cobb,* 10 How. (N. Y.) Pr. 348; *Graves* v. *Blanchard,* 4 How. (N. Y.) Pr. 300.

[20] *Wolcott* v. *Weaver,* 3 How. (N. Y.) Pr. 159. Baylies says, however, that the referee is no longer required to report the evidence had before him, and that he should simply state his conclusions of fact, and not give the evidence on which

such order thereon as shall be just. It will not be sufficient for the referee simply to report the result of his examination of the witnesses, or his own conclusions from the evidence; but the proofs, whether documentary or oral, should be fully reported to the court.[21]

It has been said that the referee should perform his duty as though he were an examiner; and where, under such an order, a report was made which did not set out a certificate of acknowledgment by the mortgagor of the execution of the mortgage, but merely referred to the mortgage by a brief statement of its date and conditions, giving the names of the parties thereto, with the additional fact that it had been acknowledged by the mortgagor, the report was held defective, because it did not contain such a statement as was required by the statute to make it evidence of the execution of the mortgage by the defendant.[22]

§ 520. Finding as to how property should be sold.— Under an order of reference in foreclosure cases, if the whole amount secured by the mortgage is not due, it is the duty of the referee after computing the amount due on the mortgage, to ascertain whether the mortgaged premises are so situated that they can be sold in parcels, without injury to the interested parties.[23] Should the referee find that the property cannot be sold in parcels, as he is bound to do in cases where it cannot be divided to advantage, such finding will practically end his duties under the order.

But should he find that the mortgaged premises consist of distinct parcels of land, whose relative values are entirely independent of one another, he should so report; he should also report the order in which they can best be sold. Should

such conclusions are based. See Baylies' Tr. Pr. 319; also N. Y. Supreme Court Rule 60.

[21] *Wolcott* v. *Weaver,* 3 How. (N. Y.) Pr. 159.

[22] *Wolcott* v. *Weaver,* 3 How. (N. Y.) Pr. 159.

[23] N. Y. Supreme Court Rule 60.

the premises consist of a single tract of land, the referee may, under direction of the court, inquire whether such tract can be subdivided and sold in distinct parcels without impairing its aggregate value, and if so, in what parcels, or whether the premises are so situated that a sale of the whole in one parcel will be most beneficial to the parties interested. In other words, the duty of the referee under such an order will be to inquire and to report how the mortgaged premises may be sold so as realize the largest sum.[24]

Where the referee finds that the mortgage covers several lots owned separately by different defendants, he should report the order in which the sale should be made.[25]

§ 521. Conduct of reference—Discretion and authority of referee—Where reference to be held.—In computing the amount due, taking proof of the facts and circumstances alleged in the complaint, and in examining the plaintiff or his agent under oath, as to payments on the mortgage, in cases of default, it is within the discretion of the referee to determine how he will conduct the proceedings.[26]

Upon an ordinary reference to compute the amount due in a mortgage foreclosure, if the plaintiff claims priority, and the claim is denied by the defendant's answer, the referee will have no power or authority to examine into and to settle questions of priority between the parties; such questions must be left to be passed upon by the court upon the trial of the cause.[27]

[24] *Gregory* v. *Campbell,* 16 How. (N. Y.) Pr. 417. The sale of the whole premises in one parcel can be most beneficial to the parties only when the mortgagee will receive, and the mortgagor pay, from the sale thereof, the largest amount of the mortgage debt, or leave the largest surplus after payment of the whole debt.

[25] *Bard* v. *Steele,* 3 How. (N. Y.) Pr. 110.

[26] *Pratt* v. *Stiles,* 17 How. (N. Y.) Pr. 211, 223, 9 Abb. (N. Y.) Pr. 150, 157; *Palmer* v. *Palmer,* 13 How. (N. Y.) Pr. 363; *McCarten* v. *VanSyckel,* 10 Bosw. (N. Y.) 694.

[27] *Harris* v. *Fly,* 7 Paige Ch. (N. Y.) 421.

Where a reference to compute the amount due is directed in a mortgage foreclosure, it is not necessary that it be executed in the county in which the venue of the action is placed.[28] Thus, where an action was commenced in Westchester county to foreclose a mortgage, and a reference to compute the amount due was made to the clerk of the court, who held the reference in Kings county where the court was sitting at the time, objection was made that the reference should have been executed in Westchester county where the action was triable, instead of in Kings county where the court was sitting. The court held that, "If the court has the power to devolve upon its clerk, or other suitable person, the duty of making this computation, in order to proceed at once to render judgment upon the main application, it cannot be required that the clerk, or referee, must go to another county, it may be at the extremity of the district, to perform his duty. If he must, the very object of the reference is defeated. Instead of expediting, it will delay the proceedings." [29]

§ 522. Report of referee.—The referee, having computed the amount due and discharged the other duties required in the order of reference, must make a report thereof to the court as to the basis for a judgment and decree of sale. The report of the referee should show the facts upon which his conclusions are based;[30] it should also contain the proofs and examinations had before him, and be accompanied by an abstract of the documentary evidence produced on the reference.[31]

On a reference in an action to foreclose a mortgage, the referee should report upon all the matters embraced in the order of reference. Thus, where the defendant in a fore-

[28] *Kelly* v. *Searing*, 4 Abb. (N. Y.) Pr. 354, 357.

[29] *Kelly* v. *Searing*, 4 Abb. (N. Y.) Pr. 354, 357.

[30] *Wolcott* v. *Weaver*, 3 How. (N. Y.) Pr. 159. See *Schenck* v. *Sedam*, 51 Atl. 492 (N. J. Eq.)

[31] *Security Fire Ins. Co.* v. *Martin*, 15 Abb. (N. Y.) Pr. 497. See *ante*, § 519.

closure alleges numerous payments on account, exceeding the amount of the debt, and sets up a counter-claim for the balance due him, the reference should state an account between the parties.[32] But the referee should not report matters not fully within the issues referred to him. Thus, where in an action to foreclose a mortgage the defendant by counter-claim sets up a prior mortgage and seeks to have the priority established, to which there is filed a reply of general denial and payment, a special finding by the referee that the defendant's mortgage, although it describes the property embraced in plaintiff's mortgage, was not so intended, and a conclusion of law that it is not a prior lien, are not within the issues and are therefore irrelevant, and an exception thereto will be sustained.[33]

On a reference to ascertain the facts, the report of the referee, to be sufficient, must clearly report all the facts pertinent to the issue. Thus, upon an issue as to whether one of the defendants had authority to execute a note and mortgage in the name of another, as her attorney in fact, a finding by the referee that the note and mortgage purported to be executed in the name of the latter by the former as her attorney in fact, and that the attorney assumed to be authorized to execute the note and mortgage, is not a sufficient finding of fact.[34]

On a reference to compute the amount due and to report as to the manner of the sale of the property, if the referee should find that a sale of the whole of the premises is necessary, he should also give the reasons upon which his opinion is founded. If he finds that the property should be sold in parcels, he must then state in his report the relative situation and value of the several parcels, and what part of the premises should be sold first, together with all the facts necessary

[32] *Killops* v. *Stephens,* 66 Wis. 571.

[33] *Porter* v. *Reid,* 81 Ind. 569.

[34] *Hibernia Sav. & Loan Soc.* v. *Moore,* 68 Cal. 156.

to enable the court to render such judgment as will be most beneficial to the parties in interest.[35]

§ 523. Filing and confirming referee's report—Exceptions thereto—New hearing.—Upon the coming in of the report of the referee, it must be filed with the clerk; a note of the day of filing should also be entered in the proper book under the title of the cause or proceeding, and notice of the filing must be given to the attorneys of such of the parties as were entitled to notice of the execution of the reference.[36] Such report shall become absolute and stand confirmed in all things, unless exceptions thereto are filed within eight days after the service of notice of filing the same.[37]

If any party is dissatisfied with the report of the referee appointed to compute the amount due in a mortgage foreclosure, he may file exceptions to the report, and the court may, on the evidence, overrule the computation of the ref-

[35] *Ontario Bank* v. *Strong,* 2 Paige, Ch. (N. Y.) 301.

[36] *Somers* v. *Milliken,* 7 Abb. (N. Y.) Pr. 524. See *Chamberlain* v. *Dempsey,* 36 N. Y. 144; *Morgan* v. *Stevens,* 6 Abb. (N. Y.) N. C. 356; *American Exchange Bk.* v. *Smith,* 6 Abb. (N. Y.) Pr. 1. See N. Y. Supreme Court Rule 30.

[37] N. Y. Supreme Court Rule 30. See *Kelly* v. *Searing,* 4 Abb. (N. Y.) Pr. 354. In the case of *Somers* v. *Milliken,* 7 Abb. (N. Y.) Pr. 524, the attention of the court was called to the proper construction to be given to N. Y. Supreme Court Rule 32 (now Rule 30) in regard to filing reports of referees other than for the trial of issues. The court held: (1) that all such reports must be filed, and a note of the day of filing be made by the clerk; (2) that in all cases where any of the defendants appear, so as to be entitled to notice, such report cannot be confirmed until eight days after service of notice of the filing of the same; (3) that all the parties who have appeared in the cause or proceeding, may consent in writing to waive the delay of eight days and have the same confirmed at once; (4) that in cases where no one appears for the defendant, the report may be presented to the court for the final order of confirmation and for judgment without waiting eight days. See *Voorhis's* Code (9th ed.) 861, 862.

Irregularities are waived where no objection is made before entry of judgment. *Val Blatz Brewing Co.* v. *Dalrymple,* 18 S. D. 97, 99 N. W. 851.

eree.[38] Where any of the defendants desire to take exceptions to the computation and to the report of the referee, they should attend at the time appointed for the application for judgment, and present their objections to the court.[39] If exceptions are filed and served within the time required by the rule, or within such time as the court shall fix, they may be brought to a hearing at any special term thereafter, on notice by any party interested therein.[40]

The report of the referee appointed to compute the amount due and to take proofs, must be presented to the court at a special term thereof for confirmation.[41] Upon confirmation of the referee's report, his computation of the amount due becomes the act of the court, as fully as though originally made by the court itself.[42]

Where the reference to compute the amount due on a mortgage has been executed, either party may apply for an order directing a new hearing, upon proof by affidavit that an error has been committed to his prejudice, either upon the hearing or in the report. In a proper case the application may be granted even after judgment has been entered. Where the application is granted after judgment, the judgment may be set aside either then or after the new hearing.[43]

§ 524. Application for judgment — What must be shown.—After the referee appointed to compute the amount due has made his report, the plaintiff is entitled to

[38] *Crine* v. *White,* 1 Month. Law Bull (N. Y.) 92. See *Richardson* v. *Horton,* 139 Ala. 350, 35 So. 1006.

[39] 5 Wait Pr. 215, 216.

[40] N. Y. Supreme Court Rule 30. The supreme court of Arkansas, in the case of *Johnson* v. *Meyer* (54 Ark. 442, 16 S. W. 123), say that it is not error to enter a decree in foreclosure without passing upon exceptions to a master's report, the question raised by the exceptions being involved in the final determination and therefore determined by the decree.

[41] *Swarthout* v. *Curtis,* 4 N. Y. 415, 5 How. (N. Y.) Pr. 198.

[42] *McGowan* v. *Newman,* 4 Abb. (N. Y.) N. C. 80.

[43] See N. Y. Code Civ. Proc. § 1232.

move for judgment.[44] The motion for judgment, if the suit is brought in the supreme court, must be made at a special term thereof, held within the judicial district in which the action is triable, or in a county adjoining that in which it is triable; except that where it is triable in the first judicial district, the motion must be made in that district.[45] The application for judgment in the first judicial district may be made to a judge of the court,[46] and the motion cannot be made in the first judicial district where the action is triable elsewhere.[47]

Upon appointing a referee to compute the amount due in the action for the foreclosure of a mortgage, the court cannot direct that, upon the coming in of the report of the referee, the same be confirmed and the plaintiff have the usual judgment of foreclosure and sale without further notice. Notice of motion for judgment is indispensable. In a recent case[48] it was held that, "No court can be certain in advance what will be the contents of a referee's report; and to direct that it shall be confirmed before it is made, is to go beyond the competent exercise of judicial authority. The question of the propriety of its confirmation cannot be intelligently determined until it is laid before the court."

Upon an application for judgment upon default in an action to foreclose a mortgage, the plaintiff must show, by affidavit or otherwise, whether any of the defendants who have not appeared are absentees; and if any of them are absentees, he must produce the report of the referee as to the proof of the facts and circumstances stated in the complaint, and as to the examination of the plaintiff or his agent on oath as to any payments which have been made, together with the papers upon which such order of reference was granted, or show that such papers have been filed with the clerk of the court.[49]

[44] N. Y. Supreme Court Rule 60. See *Citizens' Savings Bank* v. *Bauer,* 14 Civ. Proc. Rep. (N. Y.) 340.

[45] N. Y. Code Civ. Proc. § 769.

[46] N. Y. Code Civ. Proc. § 770.

[47] N. Y. Code Civ. Proc. § 769.

[48] *Citizens' Savings Bank* v. *Bauer,* 14 Civ. Proc. Rep. (N. Y.) 340, 343.

[49] N. Y. Supreme Court Rule 60.

In every case when the plaintiff moves for final judgment of foreclosure and sale, he must show, by affidavit, or by the certificate of the clerk of the county in which the mortgaged premises are situated, that a notice of the pendency of the action, in due form of law as required by the rules and practice of the court, has been filed at least twenty days before such application for judgment, and at or after the time of filing the complaint as required by law.[50] And where there are infant defendants, the application should show the time of the appointment of the guardian *ad litem,* because a judgment by default cannot be taken against an infant defendant, until the expiration of twenty days after the appointment of his guardian *ad litem;*[51] if such guardian has appeared or pleaded an answer, judgment may be taken without waiting twenty days.[52]

If service of the summons on any of the defendants was made by publication, the motion papers should show, in addition to the above matters, that service of the summons had been completed, and that all the requirements of the statute in regard to the publication of the summons have been fully complied with.[53]

The supreme court of Michigan hold that under the statute of that state[54] it is only where a personal decree is sought against sureties, or other persons besides the mortgagor, that such decree must be based on some written obligation, and there is no such condition as to the mortgagor himself.[55]

§ 525. Notice of application for judgment.—Where no answer has been pleaded denying the material facts and allegations of the complaint, the motion for judgment may be

[50] N. Y. Supreme Court Rule 60; N. Y. Code Civ. Proc. § 1631.

[51] N. Y. Code Civ. Proc. § 1218.

[52] *Newins* v. *Baird,* 19 Hun (N. Y.) 306.

[53] N. Y. Code Civ. Proc. § 1216. See *Kendall* v. *Washburn,* 14 How. (N. Y.) Pr. 380; *Hallett* v. *Righters,* 13 How. (N. Y.) Pr. 43.

[54] How. Mich. Stat. § 6704.

[55] *Sheldon* v. *Warner,* 59 Mich. 444, 26 N. W. 667.

made upon due notice to such of the defendants as have appeared in the action, without placing the cause upon the calendar.[56]

The court by ordering a reference to compute the amount due in a mortgage foreclosure, does not lose control of the main application; such reference may be immediately proceeded with and judgment rendered upon the report of the referee, without a new notice to a defendant who has appeared but has made default in pleading.[57]

In a mortgage foreclosure, judgment on default, where a reference has been directed and a report thereon has been made, follows as a matter of course.[58] On application, the court will render such judgment as is proper, according to the proof submitted. In determining what the judgment should be, the court will not be limited to the report of the referee as the only evidence before it, but it may also look to the pleadings and receive their allegations in its discretion; it may also consider any stipulations, offers or admissions of the parties presented to it.

In the case of Gregory v. Campbell,[59] the court held that, "nothing is referred to a referee under these orders of reference except the questions relating exclusively to the material situation of the mortgaged premises, and how the same can be most advantageously sold, having reference to its condition, the demand for such property, and its relative value and saleableness in the market in the locality where it is situated. The report of the referee is a part of the evidence before the court, and upon which it is called upon to decide whether it will or will not be most beneficial to the parties to decree a sale of the whole premises in one parcel in the first instance. The court will look to the pleadings and will receive other evidence

[56] N. Y. Supreme Court Rule 60.

[57] *Kelly* v. *Searing,* 4 Abb. (N. Y.) Pr. 354. See *Citizen's Savings Bank* v. *Bauer,* 14 Civ. Proc. Rep. (N. Y.) 340.

[58] See *Johnson* v. *Masters,* 49 S. C. 525, 27 S. E. 474.

[59] 16 How. (N. Y.) Pr. 417, 419.

in its discretion, and will consider any stipulations or admissions of the parties, or of other persons, presented to it on the hearing."

§ 526. Decree of foreclosure and sale—Variations from referee's report.—In an action to foreclose a mortgage upon real property, when the plaintiff becomes entitled to final judgment, such judgment must direct the sale of the property mortgaged, or, if a part thereof will be sufficient to satisfy the mortgage debt, the expenses of the sale, and the costs of the action, then that such part only be sold.[60] The judgment may also direct the sale of the mortgaged premises, either as an entirety or in separate parcels, as the referee may have reported it to be most advantageous; or that one part or parcel be sold first and that the remainder be left unsold, unless the sale of such remainder shall be necessary to pay the amount due, with the costs and expenses.[61] A judgment in a foreclosure, which includes also the foreclosure of mortgages prior in lien to the one upon which the action was brought, will be irregular and may be opened by the prior mortgagee, but the foreclosure of mortgages subsequent to the one sued upon will be valid and binding[62]

It is thought that in an action to foreclose a mortgage, a decree for plaintiff should not be delayed to await a settlement of issues raised between co-defendants.[63] And it is said that although in a decree of foreclosure the defendant's first name is incorrectly stated in the recital as to his making de-

[60] The supreme court of California, in the case of *Talman* v. *Smith* (85 Cal. 280, 24 Pac. 743), say that a foreclosure decree that a certain sum is due plaintiff, and that the property be sold and the proceeds applied to the payment thereof and of costs and expenses, there being no provision for docketing a judgment for any deficiency, is not a personal judgment.

[61] N. Y. Code Civ. Proc. §§ 1626, 1636, 1637.

[62] *McReynolds* v. *Munns,* 2 Keyes (N. Y.) 214. See *Adams* v. *McPartlin,* 11 Abb. (N. Y.) N. C. 369.

[63] *Heath* v. *Blake,* 28 S. C. 406, 5 S. E. 842; *Canaday* v. *Boliver,* 25 S. C. 547.

fault, as well as in the petition, yet where he accepted service in his proper name, and the decree contains a correct recital of that fact, the notice is sufficient.[64]

Where in a foreclosure suit one judge settles and adjusts all the rights of the parties therein, and orders a reference to compute the amount due, and after the report of the referee comes in, final judgment is rendered by a judge other than the one who first tried the case and settled the rights of the parties, such judgment will be as binding and valid as though rendered by the judge before whom the case was tried.[65]

It has been held that where, in an action brought to foreclose a mortgage, the referee's report states the amount due at the commencement of the action and also the amount due at the date of his report, before which latter date and after the commencement of the action a payment of the principal fell due under the provisions of the mortgage, and the judgment set forth the latter amount as due, the remedy of the defendant is by motion to correct the judgment and to conform the same to the report, and not by an appeal therefrom.[66]

§ 527. Extent of relief granted by decree of sale.—A judgment on default in a foreclosure suit can be entered for a larger amount than the complaint shows to be due,[67] but if an answer is pleaded, the court may permit the plaintiff to take any judgment consistent with the case made by the complaint and embraced within the issues.[68] A judgment on default, which grants to the plaintiff relief not demanded in the

[64] *Lindsay* v. *Delano,* 78 Iowa, 350, 43 N. W. 218.

[65] *Chamberlain* v. *Dempsey,* 36 N. Y. 144, 1 Trans. App. 257, reversing 9 Bosw. (N. Y.) 540, 15 Abb. (N. Y.) Pr. 1.

[66] *Walbridge* v. *James,* 4 Hun (N. Y.) 793, aff'd 66 N. Y. 639.

[67] *Savings & Loan Society* v. *Horton,* 63 Cal. 105; *Zwickey* v. *Haney,* 63 Wis. 464.

[68] N. Y. Code Civ. Proc. § 1207.

complaint, will be void as unauthorized;[69] it is not enough to state the facts entitling the plaintiff to the relief, but he must specifically demand it.[70] In a decree on default in a mortgage foreclosure a judgment for deficiency cannot be rendered, unless it has been specially demanded in the complaint.[71] It has been held that a plaintiff in a mortgage foreclosure is not entitled, under the Code of Civil Procedure,[72] to a contingent personal judgment against any of the defendants before final judgment of foreclosure, nor until the referee to sell has made his final report.[73]

In an action to foreclose a mortgage, where only a part of the sum secured is due and payable at the time of the commencement of the action, the court may make a decree of sale to recover not only the sum due at the time the complaint was filed, but also such other sum as may have become due at the time of making the decree.[74] Thus, where a mortgage secures two or more promissory notes, all of which are not due at the time of the commencement of the action, the court may include in the judgment and decree such as fall due after the commencement of the action and before the decree is rendered.[75]

On a bill to foreclose a mortgage on an undivided interest

[69] *Grant* v. *VanDercook,* 8 Abb. (N. Y.) Pr. N. S. 455, 57 Barb. (N. Y.) 165, 2 Alb. L. J. 52; *Simonson* v. *Blake,* 12 Abb. (N. Y.) Pr. 331; *Bullwinker* v. *Ryker,* 12 Abb. (N. Y.) Pr. 311; *Swart* v. *Boughton,* 35 Hun (N. Y.) 281. See *Garretson Investment Co.* v. *Arndt,* 144 Cal. 64, 77 Pac. 770; *Venner* v. *Denver Union Water Co.* 15 Colo. App. 495, 63 Pac. 1061.

[70] *Simonson* v. *Blake,* 12 Abb. (N. Y.) Pr. 331, 20 How. (N. Y.) Pr. 484; *Swart* v. *Boughton,* 35 Hun (N. Y.) 281. See *Bullard* v. *Sherwood,* 85 N. Y. 253, reversing, 22 Hun (N. Y.) 462; *Peck* v. *New York & N. J. R. Co.* 85 N. Y. 246.

[71] *Simonson* v. *Blake,* 12 Abb. (N. Y.) Pr. 331, 20 How. (N. Y.) Pr. 484; *Swart* v. *Boughton,* 35 Hun (N. Y.) 281.

[72] §§ 1204, 1205, 1206.

[73] *Cobb* v. *Thornton,* 8 How. (N. Y.) Pr. 66.

[74] *Asendorf* v. *Meyer,* 8 Daly (N. Y.) 278; *Johnson* v. *Van Velsor,* 43 Mich. 208. See *Walbridge* v. *James,* 66 N. Y. 639, aff'g 4 Hun (N. Y.) 793.

[75] *Bostwick* v. *McEvoy,* 62 Cal. 496; *Hanford* v. *Robertson,* 47 Mich. 100.

in land, the court will have no power in its decree to nullify, reverse or modify a decree of sale in an action for the partition of the same land, where no such purpose is indicated in the bill, and the parties to the partition are not brought before the court for that purpose.[76]

§ 528. Opening default—Power of court.—There is no question but that a court of equity has power, in a proper case, to open a judgment taken by default, and to allow an answer to be made if the defendant has a meritorious defence;[77] this may be done either before judgment is entered or afterwards.[78]

Although equity is ever ready to receive the excuses of a mortgagor, and to open a foreclosure where there is any good reason for the default,[79] yet it has long been the established practice in this state not to set aside a regular judgment entered upon default in a foreclosure suit, or in any other case, where the defendant has any interest or inducement to delay the proceedings, unless the application is made upon affidavits excusing failure to answer, accompanied by an affidavit of merits;[80] in such a case the defendant must either produce the sworn answer which he proposes to plead, so that the court may see that he has a meritorious defence *prima facie,* or he must, in his affidavit, state the nature of his defence and his belief in the truth of the matters stated therein, so far at least as to enable the court to see that injustice would probably be done, if the judgment entered upon de-

[76] *Thompson* v. *Frew,* 107 Ill. 478.

[77] *Foster* v. *Udell,* 2 N. Y. Code Rep. 30; *Allen* v. *Ackley,* 2 N. Y. Code Rep. 21; *Salutat* v. *Downes,* 1 N. Y. Code Rep. 120; *Lynde* v. *Verity,* 1 N. Y. Code Rep. 97; *Clark* v. *Lyon,* 2 Hilt. (N. Y.) 91; *Ramsey* v. *Gould,* 4 Lans. (N. Y.) 476..

[78] *McGuin* v. *Cace,* 2 Hilt. (N. Y.) 467, 9 Abb. (N. Y.) Pr. 160; *Bogardus* v. *Livingston,* 7 Abb. (N. Y.) Pr. 428, 2 Hill (N. Y.) 236; *Sharpe* v. *Mayor, etc.* 31 Barb. (N. Y.) 578, 19 How. (N. Y.) Pr. 193; *Ellsworth* v. *Campbell,* 31 Barb. (N. Y.) 134.

[79] *Golden* v. *Fowler,* 26 Ga. 451.

[80] *Powers* v. *Trenor,* 3 Hun (N. Y.) 3; *Hunt* v. *Wallis,* 6 Paige Ch. (N. Y.) 371, 377.

fault were permitted to stand;[81] and this early established rule of practice, not being inconsistent with any of the provisions of the Code of Civil Procedure, still continues in force.[82]

§ 529. Proceedings on trial after issue joined—General rules.—The trial of an action to foreclose a mortgage is conducted substantially the same as that of other actions tried by a court or a referee down to the entry of judgment.[83] Unless a reference is directed in a foreclosure suit, it can be

[81] *Goodhue* v. *Churchman,* 1 Barb. Ch. (N. Y.) 596; *Winship* v. *Jewet,* 1 Barb. Ch. (N. Y.) 173; *Powers* v. *Trenor,* 3 Hun (N. Y.) 3; *Hunt* v. *Wallis,* 6 Paige Ch. (N. Y.) 371, 377.

[82] N. Y. Supreme Ct. Rules 28, 85.

[83] Baylies' Tr. Pr. 341.

Thus ordinarily the burden of proof is on the plaintiff, *Daniel* v. *Hester* 24 S. C. 301, and a verified petition is not sufficient proof on which to found a decree, *Chancellor* v. *Traphagen,* 41 N. J. Eq. 369, 3 Atl. 263, 7 Atl. 505; but the plaintiff need not prove title in the mortgagor where that point is not controverted by the defendant, *Daniel* v. *Hester,* 24 S. C. 301, and if the defendant asserts title in such case, he must prove it. *Daniel* v. *Hester,* 24 S. C. 301. And in those cases where the plaintiff alleges that a defendant claims to have a lien upon the premises, but that the same is inferior to the mortgage, and the defendant answers, admitting the mortgage, and setting up his lien, and alleging that it is superior to the mortgage, the defendant has the burden of proof to establish the superiority of his lien. *Vaughn* v. *Eckler,* 69 Iowa, 332, 28 N. W. 624. Defendants in a mortgage foreclosure claiming under an attachment lien accruing after the mortgage was given, are entitled to prove the existence of their lien, and to show that, in consequence of certain acts of the plaintiff set forth in their answer, it is superior to the lien of the mortgage. *Scrivener* v. *Deitz,* 68 Cal. 1, 8 Pac. 609.

In those cases, however, where the note to secure which the mortgage was given is recited in the complaint, and the averment as to its contents and due execution is not denied by the answer, the plaintiff need not offer evidence to prove the indebtedness. *Cerf* v. *Ashley,* 68 Cal. 419, 9 Pac. 658. And in those cases where the execution of the notes and mortgage is denied the introduction of the notes and the duly acknowledged mortgage makes a *prima facia* case for the plaintiff upon the issues joined. *Mixer* v. *Bennett,* 70 Iowa, 329, 30 N. W. 587. But it has been held that when there are two attesting witnesses to a mortgage or other conveyance, its execution must be proved by one or both of them, unless the case is brought within some recognized exception to the general rule; and the admission of the

tried only at a special term of the court held in the county in which the mortgaged premises are situated.[84] The provisions of a Code,[85] authorizing the adjournment of a special term of the court to the chambers of any justice of the court residing in the district, and an adjournment from time to time as the justice holding the same shall order and direct, does not authorize the transfer of the trial of a local action to another county, but was intended simply to facilitate the trans-

mortgagor or grantor himself not made *in judicio,* does not dispense with the necessity for this proof. *Coleman* v. *State,* 79 Ala. 49.

It is thought that acts and declarations which transpired between plaintiff and defendant are admissible in evidence, although occurring in the presence of the person for whose debt the mortgage was given, who is since deceased, conversations with whom would be inadmissible by reason of his decease. *Jackson* v. *Payne,* 114 Pa. St. 67, 6 Atl. 340.

And it is held in Pennsylvania that in a *scire facias sur mortgage* executed as security for a debt of another than the mortgagor, evidence of the transaction creating the debt is admissible to determine the amount to be recovered, which cannot be more than the actual debt, whatever may be the nominal amount of the mortgage. *Jackson* v. *Payne,* 114 Pa. St. 67, 6 Atl. 340.

In an action by an administrator upon promissory notes and to foreclose a mortgage given to his decedent, where the defendant introduced evidence that, in conversation with the witnesses, the decedent had told them that he had agreed with the defendant to give him the notes and mortgage for furnishing the decedent a home during his life, it was held not to be competent, in rebuttal, to prove declarations of the decedent, made shortly before his death, and subsequent to the time of the agreement testified to, that he was holding the mortgage against the defendant, and had fears that the defendant would cheat him out of it; that the defendant's wife did not sign the mortgage; and that he feared a prior mortgage would render him unable to collect his debts out of the land mortgaged. *Brown* v. *Kenyon,* 108 Ind. 283, 9 N. E. 283. In those cases where it is sought to subject machinery or other property to the payment of the mortgage debt, evidence of a mortgagor that it was on the premises when the mortgage was made is competent to show that it was embraced in the mortgage. *Gill* v. *Weston* (No. 2), 110 Pa. St. 312, 1 Atl. 917.

[84] *Gould* v. *Bennett,* 59 N. Y. 124; *Birmingham Iron Foundry* v. *Hatfield,* 43 N. Y. 224, N. Y. Code Civ. Proc. § 892. See *Marsh* v. *Lowry,* 26 Barb. (N. Y.) 197; *Miller* v. *Hull,* 3 How. (N. Y.) Pr. 325.

[85] N. Y. Code Civ. Proc. § 239.

action of such business as might have been done in the county to which the term was adjourned.[86] Thus, where the trial of an action for the foreclosure of a mortgage upon real estate situated in the county of Westchester was adjourned by the judge holding the special term, to his chambers in Brooklyn, in the county of Kings, where he proceeded to try the action at the adjourned term in Brooklyn against the objection of the defendant, the appellate court held that this was error.[87]

In this case the counsel for the plaintiff insisted that the error in adjourning the trial to the judge's chambers, was obviated by the fact that the judge, after partly trying the case in Brooklyn, by taking a part of the testimony, adjourned the further proceedings in the trial to a special term, thereafter to be held in the county of Westchester, at which special term further testimony was taken and the judgment given. The court say: "This, so far from obviating the error, unless consented to, was an additional error. The court has no more authority to require parties, without their consent, to go with their witnesses from county to county, partially trying the case in each, in cases triable by the court without a jury, than it has, in cases triable by jury, to require the jurors to attend out of their county."

Where there is an issue, either of law or of fact, it must be disposed of before the plaintiff can proceed with the cause. If the defendant, having answered, fails to appear at the trial, an inquest must be taken by the court, or the whole issue must be referred.[88] But failure to appear at the trial cannot be treated as equivalent to a failure to answer, or the same as a case in which a general answer is interposed by the guardian *ad litem* of an infant defendant.[89]

Where an action to foreclose a mortgage is tried by a

[86] *Gould* v. *Bennett,* 59 N. Y. 124.

[87] *Gould* v. *Bennett,* 59 N. Y. 124.

[88] Baylies' Tr. Pr. 341. See *Gottschalk* v. *Noyes, as adm'r. etc.,* 225 Ill. 94, 80 N. E. 72. See also *Hennessey, as adm'r. etc.,* v. *Walsh, as adm'r. etc.* 142 Ill. App. 237.

[89] *Exchange Fire Ins. Co.* v. *Early,* 4 Abb. (N. Y.) N. C. 78.

court, and all the rights of the parties are adjudicated and settled, the court, instead of making the necessary computation to ascertain the amount due to the plaintiff, may order a reference for that purpose, and may also direct the referee to ascertain the amount due upon any mortgages set up in the answer and also to ascertain and report whether there are any prior liens by mortgage upon the premises, and if so, whether they are yet due.[90]

Where an issue has been joined as to all the defendants in an action to foreclose a mortgage, the action must be brought on for trial in the usual manner, and be heard and determined the same as other actions in equity.

§ 530. Proceedings after issue joined—Where part only of the defendants have answered.—Where only a part of the defendants have answered, the trial must be by the court without a jury, unless a reference is ordered or a trial by jury specially directed, because issues of fact in mortgage foreclosures are not triable by a jury as a matter of right.[91] But where a mortgagee brings an action against the grantees of a mortgagor to recover the deficiency arising on the foreclosure of a mortgage, which they had by their deed covenanted and agreed to pay as part of the purchase price of the land, the action is one at law and is triable by a jury.[92]

In such a case, when the plaintiff notices the cause for trial, he should also give notice to all defendants who have appeared but who have not pleaded an answer, that he will apply at the same time for the relief demanded against them. He may then proceed to a trial of the issues raised by the pleas of those defendants who have answered, and he may at the same time produce the proofs necessary to entitle him

[90] *Chamberlain* v. *Dempsey*, 36 N. Y. 144; Baylies' Tr. Pr. 342. But see *Marcole* v. *Hinnes*, 61 Atl. 975 (N. J. Eq.).

[91] Baylies' Tr. Pr. 341. See N. Y. Code Civ. Proc. §§ 968, 969.

[92] *Hand* v. *Kennedy*, 83 N. Y. 149 aff'g 45 N. Y. Supr. Ct. (13 J. & S.) 385.

to recover against the non-answering defendants. If, on such trial, the plaintiff proves the material facts stated in the complaint, and is examined upon oath as to the payments which have been made, the court may render final judgment without ordering a reference as against the non-answering defendants.

Where the answer of any defendant presents a defence to the plaintiff's claim, or any part of it, and no demurrer is interposed and no motion is made to strike it out as irrelevant, or for judgment upon it as frivolous, the proper practice is to have the case placed on the calendar for trial and upon the hearing to obtain a decision on the issues presented.[93] He should then apply to the court for an order referring the cause to some suitable person to compute the amount due to the plaintiff and to such of the defendants as are prior incumbrancers, and, if the whole amount of the debt secured by the mortgage has not yet become due, to exaimne and report whether the mortgaged premises can be sold in parcels.[94] The reference in such cases is made for the information and convenience of the court, and without regard to the question whether any party has made default, or whether any of the defendants are infants or absentees.[95]

Where a verdict is rendered in his favor on the trial of the issues by a jury, or on the coming in of the referee's report, where the trial of the cause has been referred, the plaintiff may move for the usual order of reference as to the defendants who have not appeared, or who have not answered.[96] The plaintiff may expedite matters by having this reference made to the referee having charge of the issues of fact, so that one report may embrace both matters. In such a case

[93] *Stuyvesant* v. *Browning,* 33 N. Y. Supr. Ct. (1 J. & S.) 203; Baylies' Tr. Pr. 342. The proceedings provided for by N. Y. Supreme Court Rule 60, do not apply to such an answer.

[94] Baylies' Tr. Pr. 341.

[95] Baylies' Tr. Pr. 342.

[96] *Hill* v. *McReynolds,* 30 Barb. (N. Y.) 488.

the referee will be clothed with the double power of deciding the issues of fact, in which his decision will stand as the decision of the court, and of reporting the amount due and the other facts required by the rule;[97] upon the confirmation of the report and the motion for judgment, the court will still have to pass upon the questions of fact and the conclusions of law, as well as upon the proofs upon which the conclusions are founded.[98] It will be irregular to combine in one reference both the trial of the issues and the inquiry as to the facts and circumstances of the issues stated in the complaint, and to enter a judgment as of course upon the report, without application to the court for judgment against the non-answering or absentee defendants.[99]

Upon the coming in and the confirmation of the report of the referee appointed for that purpose, the court may direct the entry of the usual judgment of foreclosure and sale.[1]

§ 531. Proceedings after default or issue joined—Where some of the defendants are infants or absentees.— Where no proof of the material allegations in the complaint is made, because the issues involved do not require it, and there are infant or absentees defendants, a reference will be necessary to take proof of the facts and circumstances stated in the complaint.[2] The decision in such a case is merely interlocutory, determining only the issues involved and directing a reference. The same facts must be shown on the reference in such cases, as where there is a default.[3]

If the defendant is an infant and has put in a general answer by his guardian, or if any of the defendants are absentees, the order of reference must also direct the referee

[97] N. Y. Supreme Court Rule 60.

[98] VanSant, Pr. 98; Baylies' Tr. Pr. 342.

[99] *Cram* v. *Bradford*, 4 Abb. (N. Y.) Pr. 193. See *Citizens' Savings Bank* v. *Bauer*, 14 Civ. Proc. Rep. (N. Y.) 340, 343.

[1] *Chamberlain* v. *Dempsey*, 36 N. Y. 144; Baylies' Tr. Pr. 342.

[2] New York Supreme Court Rule. 60.

[3] 1 Crary Pr. 301, 5 Wait Pr. 217. See *ante*, §§ 511, 513.

to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent on oath as to any payments which have been made, and to compute the amount due on the mortgage preparatory to application for judgment of foreclosure and sale. After the referee has filed his report, the plaintiff will be in a position to apply for final judgment of foreclosure and sale.[4]

§ 532. Proceedings where the bill is taken as confessed. —Where the bill is taken as confessed against all the defendants, or where no answer has been pleaded by any of them denying the material allegations of the complaint, the plaintiff may, when the cause is in readiness for a hearing as to all the defendants, apply for a final decree of foreclosure and sale on any regular motion day, either in vacation or during a regular term of the court, upon giving due notice to such of the defendants as have appeared in the suit. He need not have the case placed on the calendar.[5] This rule applies only to cases where the bill is taken as confessed, and does not authorize the complaint to apply for a decree on a motion day, where a plea or a demurrer to the bill has been filed in good faith.[6]

Where the defendant puts in a frivolous plea or demurrer, however, the complainant may, on a motion day, apply to have such plea or demurrer striken out as frivolous, and for a final decree in the cause as upon default. To entitle him to this relief the complainant must give special notice to the defendants, that he intends to move for an order to strike out the plea or demurrer as frivolous and to take the bill as confessed and for a final decree thereon.[7] Where a bill is taken

[4] *Cram* v. *Bradford*, 4 Abb. (N. Y.) Pr. 193; *Hill* v. *McReyolds*, 30 Barb. (N. Y.) 488, N. Y. Supreme Court Rule 60.

[5] N. Y. Supreme Court Rule, 60, 2 Barb. Ch. Pr. 182.

[6] *Bowman* v. *Marshall*, 9 Paige Ch. (N. Y.) 78.

[7] *Bowman* v. *Marshall*, 9 Paige Ch. (N. Y.) 78.

as confessed against any of the defendants, the complainant, at the hearing or when he moves for final decree, must show by affidavit or otherwise whether it is so taken against any of the defendants as absentees, and where it is, the complainant must produce the referee's report as to the proof of the facts and circumstances stated in the complaint, and as to the examination of the complainant or his agent on oath as to any payments which have been made.[8] But where the record in the case shows that personal service of process has been made upon each of the defendants, an affidavit showing that none of them are absentees will not be required.[9]

[8] 2 Barb. Ch. 183.

[9] *Manning* v. *McClurg,* 14 Wis. 350.

CHAPTER XXII.

SALE OF MORTGAGED PREMISES.

DECREE OF SALE—OFFICER MAKING SALE—NOTICE OF SALE—TIME OF SALE—PLACE OF SALE—TERMS OF SALE—STAY OF SALE.

§ 533. Decree of sale—Generally.
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§ 556. Terms and conditions of sale.
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§ 562. Whole property subject to sale.
§ 563. Certificate of sale—Form of.
§ 564. Order staying sale.
§ 565. Restraining sale.
§ 566. Application of proceeds of sale—Where there are two or more debts.

§ 533. **Decree of sale—Generally.**—The plaintiff having duly procured the judgment of foreclosure and sale, and entered the same, is entitled to proceed to have the mortgaged premises sold for the payment of his debt. A sale under such decree is, in contemplation of the law, the act of the court, although it may be made through the instrumentality of some officer designated by statute, or appointed by the court. When the sale is confirmed, it becomes the act of the court, or, in other words, is a judicial sale; but until such confirmation there is no judicial sale, and no title passes to the purchaser.[10] In New York, however, confirmation of the referee's report of sale is not necessary to pass title.[11]

The sale may be made by a master in chancery, a referee, trustee, commissioner or sheriff; and in the Federal courts it is usually made by a United States marshal, or by a referee specially appointed for that purpose.[12] Whatever name may be given to the officer who makes the sale, he acts as the agent of the court, and must report his proceedings in the execution of its decrees. And it has been said that the sheriff, or other officer to whom the decree of sale is committed, may conduct

[10] *Thorn* v. *Ingram,* 25 Ark. 52; *Southern Bank* v. *Humphreys,* 47 Ill. 227; *Bozza* v. *Rowe,* 30 Ill. 198, 83 Am. Dec. 184; *Penn* v. *Heisey,* 19 Ill. 297, 68 Am. Dec. 597; *Ayers* v. *Baumgarten,* 15 Ill. 444; *Young* v. *Keough,* 11 Ill. 642; *Foreman* v. *Hunt,* 3 Dana (Ky.) 614, 621; *Hurt* v. *Stull,* 4 Md. Ch. Dec. 391; *Harrison* v. *Harrison,* 1 Md. Ch. Dec. 331; *Sewall* v. *Costigan,* 1 Md. Ch. Dec. 208; *Andrews* v. *Scotton,* 2 Bland. Ch. (Md.) 629; *Mullikin* v. *Mullikin,* 1 Bland. Ch. (Md.) 538; *Iglehart* v. *Armiger,* 1 Bland Ch. (Md.) 527; *Wagner* v. *Cohen,* 6 Gill (Md.) 97, 46 Am. Dec. 660; *Mason* v. *Osgood,* 64 N. C. 467; *Vendaver* v. *Baker,* 13 Pa. St. 121, 126; *Moore* v. *Shultz,* 13 Pa. St. 102, 53 Am. Dec. 446; *Yerby* v. *Hill,* 16 Tex. 377, 381; *Griffith* v. *Fowler,* 18 Vt. 394; *Blossom* v. *Railroad Co.* 70 U. S. (3 Wall.) 207, 18 L. ed. 47; *Minnesota R. R. Co.* v. *St. Paul Co.* 69 U. S. (2 Wall.) 609, 17 L. ed. 886; *Williamson* v. *Berry,* 49 U. S. (8 How.) 547, 12 L. ed. 1170, 1192.

[11] See *post,* § 614.

[12] *Heyer* v. *Deaves,* 2 Johns. Ch. (N. Y.) 154; *Mayer* v. *Wick,* 15 Ohio St. 548; *Blossom* v. *Railroad Co.* 70 U. S. (3 Wall.) 196, 205, 18 L. ed. 43

the sale, though his term of office will expire before the sale can be completed.[13]

In this respect a sale under a mortgage foreclosure is different from an ordinary sheriff's sale on execution. The latter is a ministerial act in which the officer, and not the court, is regarded as the vendor; and when such a sale is made in conformity with law, it is valid and passes title to the purchaser.[14] But on a sale of mortgaged premises by a referee, all the proceedings, from the order appointing the referee up to the final confirmation of his report of sale, including the passing of title to the vendee, and the distribution of the proceeds of the sale to the persons entitled thereto, are under the direction and control of the court; and the court can stay the sale, or confirm or reject the referee's report, as law and justice may require.[15]

A decree of foreclosure is as comprehensive in its effect upon the title of the mortgagor as a decree in a suit to quiet title;[16] and after the time for redemption has expired, the mortgagee or holder of the mortgage, may proceed with all legal despatch, and is not required to give the defendant notice of the issuance of the order of sale.[17] It has been said that the assignee of the two decrees for the foreclosure of mortgages on the same land, rendered in favor of different persons, who sells the land under the junior lien without fraud or misrepresentation of any kind, is not estopped by such sale

[13] *Union Dime Savings Inst.* v. *Andariese,* 19 Hun (N. Y.) 310; *Cord* v. *Hirsch,* 17 Wis. 403; *Holmes* v. *Crooks,* 56 Neb. 466, 76 N. W. 1073; *National Black River Bank* v. *Wall,* 3 Neb. (Unof.) 316, 91 N. W. 525; *Ayers* v. *Casey,* 72 N. J. Law, 223, 61 Atl. 452.

[14] *Harrison* v. *Harrison,* 1 Md. Ch. Dec. 335; *Williamson* v. *Berry,* 49 U. S. (8 How.) 495, 546, 12 L. ed. 1170, 1191.

[15] *Sessions* v. *Peay,* 23 Ark. 39, 41. See *Penn's Adm'r* v. *Tolleson,* 20 Ark. 652; *Robertson* v. *Haun,* Freem. Ch. (Miss.) 270; *Tooley* v. *Kane,* 1 Smed. & M. Ch. (Miss.) 518, 522; *Deaderick* v. *Smith,* 6 Humph. (Tenn.) 146.

[16] *Gaylord* v. *La Fayette,* 115 Ind. 423, 17 N. E. 899.

[17] *Smith* v. *Foxworthy,* 39 Neb. 214, 57 N. W. 994.

and the receiving of the money thereunder to sell the land again to satisfy the prior lien.[18]

In Pennsylvania a judgment and decree of foreclosure obtained after two returns of *nihil* under a writ of *scire facias sur mortgage* is good although the mortgagor was dead when the first writ issued; and a sale in pursuance of such judgment will pass the title.[19]

It has been held that a decree for the sale on foreclosure of a railroad of which a receiver has been appointed properly directs that the purchaser take the property subject to the outstanding expenses and obligations incurred by the receiver, requiring the receiver to file a statement thereof so that the amount may be named at the sale with sufficient certainty to enable an intending purchaser to bid with confidence in those cases where the road must be kept going by the receiver until delivered to the purchaser,[20] or the court may limit the charges subject to which the sale is made to such as are undisputed or adjudged valid by the Federal courts in which the foreclosure proceedings are conducted, and the purchaser will hold the property free from any claims arising against the receivers, not embraced in the terms of the reservation made in the decree ordering the delivery of the property to such purchaser.[21]

[18] *Matless* v. *Sundin,* 94 Iowa, 111, 62 N. W. 662.

[19] *Lehman* v. *Tammany* (Pa. C. P.), Kulp 235.

[20] *Bound* v. *South Carolina R. Co.* 7 C. C. A. 322, 58 Fed. 473.

[21] *Central Trust Co.* v. *St. Louis A. & T. R. Co.* 59 Fed. 385.

The sale of a railroad free from all liens is thought to be properly ordered, in a second mortgage foreclosure, where the holders of the first liens are pressing for a sale and entitled to it unless paid, and no one offers to make such payment, although certain bondholders under a subsequent mortgage ask the privilege of redeeming without making such offer, and ask the court to direct a sale subject to the incumbrances prior to the mortgage in suit and direct payment of the prior liens out of the proceeds, without offering to bid an amount to pay them or the costs and expenses of the sale, especially where the decree provides for redemption at any time before sale by paying the amounts found due. *Bound* v. *South Carolina R. Co.* 58 Fed. 473, 7 C. C. A. 322.

§ 534. Form and contents of decree of sale.—Under the New York practice, in mortgage foreclosures, the decree for the sale of the mortgaged premises must contain a description of the property to be sold, with its particular boundaries, so far as the same can be ascertained from the mortgage; and unless otherwise specially ordered by the court, the judgment should direct that the mortgaged premises, or so much thereof as may be sufficient to discharge the mortgage debt, the expenses of the sale, and the costs of the action, as provided by the Code, be sold by and under the direction of the sheriff, or a referee appointed by the court;[22] that the plaintiff or any other party may become the purchaser at such sale; that the sheriff or referee appointed to make the sale, execute to the purchaser a deed of the premises sold; that out of the proceeds of the sale, unless otherwise directed, he pay all taxes, assessments and water rates, which are liens upon the property sold, and redeem the property sold from any sales for unpaid taxes, assessments or water rates which have not apparently become absolute as prescribed by the Code;[23] and that he also pay to the plaintiff or to his attorney the amount of his debt, interest and costs, or so much thereof as the purchase money will pay, and that the purchaser at such sale be let into possession of the premises on production of the referee's deed;[24] and also directions as to the disposition of surplus money.[25]

It has been said that a decree in a suit to foreclose an ordinary mortgage for the nonpayment of notes long past due by

[22] N. Y. Code Civ. Proc. §§ 1626, 1676. The sale must also be made under the directions of the sheriff of the county in which the premises are situated, or of a person selected by the court for that purpose, according to the judgment. It is not, however, necessary that the sheriff or other person selected by the court should cry the sale in person; it will be sufficient if made by an auctioneer or some person employed for that purpose by such sheriff, or referee, in his presence and under his direction. *Heyer* v. *Deaves*, 2 Johns. Ch. (N. Y.) 154. See *post*, § 537.

[23] N. Y. Code Civ. Proc. § 1676.

[24] N. Y. Supreme Court Rule 61.

[25] See Supreme Court Rule 61.

their express terms, and of money advanced for taxes and insurance in accordance with the provisions of the mortgage, sufficiently finds that the money is due and its nonpayment is a breach of the condition of the deed of trust, by setting out the amounts due on the several accounts, with their maturity and the rate of interest each shall bear.[26] But a judgment foreclosing a mortgage, declaring that the indebtedness secured shall be collectible without relief from valuation and appraisement laws, is erroneous in the asbence of any stipulation in the notes or mortgage securing them providing that the debt should be collectible without relief from such laws.[27]

To render a decree of foreclosure valid the court must have jurisdiction in the premises; yet where the proceedings in a foreclosure action are otherwise regular, an omission of the decree and the notice of sale to set forth the county and state in which the land is situated, is not fatal in a subsequent action for the recovery of the land.[28]

The supreme court of New York, in the case of Clapp v. McCabe,[29] say that a decree for the sale of the mortgaged premises described in the complaint in an action to foreclose a mortgage, which complaint alleges that part of the premises has been released, referring to the release by date and place of record, and correctly describing the part remaining subject, does not cover the part released, although the subsequent description excepts from the entire tract the unreleased part.

It has been held that in foreclosing a purchase-money mortgage on premises upon which the purchaser has erected buildings for which he has not paid, the decree may properly order a sale of the premises first for the payment of such purchase

[26] *Taylor* v. *Girard L. Ins. A. & T. Co.* 1 App. Cas. D. C. 209, 21 Wash. L. Rep. 632.

[27] *Duckwall* v. *Kisner,* 136 Ind. 99, 35 N. E. 697.

[28] *Bryan* v. *Scholl,* 109 Ind. 367, 10 N. E. 107.

[29] 84 Hun (N. Y.) 379, 32 N. Y. Supp. 425.

money, and thereafter for the satisfaction of the liens of the parties interested.[30]

It is said in the case of Sprague v. Blaner,[31] that a judgment foreclosing a mortgage held by a surviving husband against his wife's land is erroneous where the premises are directed to be sold subject to dower and homestead in him, while the homestead was released by the mortgage and his rights subject thereto, and his interests are exempted from contribution, as by his estate in homestead and as surviving husband he is bound in equity to keep down the interest out of the rents and profits. Also that a judgment in foreclosure against heirs and administrator, finding the plaintiff entitled to recover a certain sum, and decreeing that the defendants pay the same and costs, and in default thereof the premises be sold, is alternative, and not personally against the defendants.

It has been said that a decree of foreclosure is not erroneous because not rendered against a subsequent purchaser of part of the lands subject to half of the mortgage, which he agreed to pay as part of the purchase price, where the mortgagee never accepted his obligation and seeks no personal judgment against him, and such purchaser has paid nearly all the purchase money.[32] And it is thought the fact that a decree of sale under a mortgage ordered the sale of both personal and real property, while there was no authority to order the sale of personal property, does not make the decree void as to the real property, where that alone is sold and no effort made to sell the personal property.[33]

The Illinois court of appeals has held that a decree in a foreclosure suit, requiring the defendants to pay to the plaintiff a designated sum, and that in default of such payment the mortgaged land, or so much as may be necessary to satisfy

[30] *Blatchford* v. *Blatchard,* 57 Ill. App. 518.

[31] 45 Ill. App. 17.

[32] *Duckwall* v. *Kisner,* 136 Ind. 99, 35 N. E. 697.

[33] *Bernstein* v. *Hobelman,* 70 Md. 29, 16 Atl. 374, 19 Md. L. J. 899. But see *Taylor* v. *Ellenberger,* 128 Cal. 411, 60 Pac. 1034.

the decree, be sold and the amount paid out of the proceeds, is not a decree *in personam*.[34]

§ 535. Same—Description of property.—The general rule is that the decree of foreclosure must contain an accurate description of the property directed to be sold.[35] Thus it is said that an order for the delivery of possession of mortgaged property by the mortgagor to the mortgagee forming part of a judgment for foreclosure absolute ought to contain a description of the property as set forth in the mortgage deed, in order that the writ of possession may identify the property.[36] Such a decree describing mortgaged property substantially in the terms of the mortgage is sufficient.[37] And it is thought a description in a decree on foreclosure of a legal sub-division in a United States government survey as "south ten acres" is sufficient between private persons, although the term "quarter" is ordinarily used by the government in patents of land.[38] But it is said that in the absence of any allegation of mistake, or prayer for reformation, a decree for the sale of 100 acres off the east side of the southeast quarter of a certain section of land, mortgaged as "the east side of the southeast quarter" is erroneous notwithstanding an allegation in the bill that the mortgage was intended to

[34] *Phelan* v. *Iona Sav. Bank*, 48 Ill. App. 171. See also *Trumbo, as adm'r. etc.* v. *Flournoy*, 77 Mo. App. 324.

[35] As to what constitutes description sufficient for identification, see *Quigley* v. *Beam's Adm'r.*, 137 Ky. 325, 125 S. W. 727; *City of Lincoln* v. *Lincoln Street R. Co.* 75 Neb. 523, 121 Am. St. Rep. 816, 106 N. W. 317; *Northern Counties Investment Trust* v. *Wilson*, 1 Neb. (Unof.) 348, 95 N. W. 699. Sufficiency of description where reference is made to deed. *Sanger Bros.* v. *Roberts*, 92 Tex. 312, 48 S. W. 1. Clerical error in description may be corrected by court. *Bostwick* v. *Van Vleck*, 106 Wis. 387, 82 N. W. 302. Where land can be easily located the description is sufficient. *Godfrey, as adm'r.* v. *White*, 32 Ind. App. 265, 69 N. E. 688. Where description is uncertain, the sale will be set aside. *Lebus* v. *Slade*, 71 S. W. 510.

[36] *Thyne* v. *Sarl*, 2 Ch. 79. (1891)

[37] *Cook* v. *Shorthill*, 82 Iowa, 277, 48 N. Y. 84.

[38] *McCartney* v. *Dennison*, 101 Cal. 252, 35 Pac. 766.

include 100 acres off the east side, and other parts of the mortgaged property are described as the "east half" of certain quarters of certain sections.[39] The Supreme court of Colorado, in the case of Thompson v. Brocker,[40] say that an interlocutory decree in a suit to foreclose a mortgage, that "the mortgaged premises mentioned in the complainant's bill, viz.," followed by a description of the premises differing from that in the bill, sufficiently describes the property, where the bill contains an accurate description,—especially where it is evident that the difference in the description arises from the insertion of the preposition "of" in place of the conjunction "and," so as to make the description call for a portion only of one of the mortgaged parcels, instead of two separate parcels. And the supreme court of California declare that the description of land in the decree in a mortgage foreclosure is sufficient if it describes the same land as that described in the complaint, although it does not describe it in the same words.[41] And it is thought that a foreclosure sale is not invalidated by the fact that the land is misdescribed in the judgment in that the portion sold is designated as the "eastern," whereas it was in fact the "western" portion of a certain tract, where there is sufficient other description to identify the portion sold, and the purchaser already owned the eastern portion.[42] But a sale cannot be decreed as a whole of two tracts with defined boundaries mortgaged by different parties with separate interests without their consent, though the tracts lie within the boundaries of a larger tract.[43]

The Texas court of civil appeals, in the case of Birdseye v. Rogers,[44] say that a petition and judgment in proceedings to sell land under a mortgage are not void for uncertainty

[39] *Kemp* v. *Moir,* 45 Ill. App. 490.

[40] 18 Colo. 328, 32 Pac. 831.

[41] *McCartney* v. *Dennison,* 101 Cal. 252, 35 Pac. 766.

[42] *Vissman* v. *Bryant,* 21 S. W. 759, 14 Ky. L. Rep. 874.

[43] *Doty* v. *Berea College,* 15 S. W. 1063, 12 Ky. L. Rep. 964, rev'd in 16 S. W. 268, 12 Ky. L. Rep. 965.

[44] 26 S. W. 841.

because of a single misrecital in the description of the land in the petition, where there is a reference in the petition for a more particular description of the lands to a grant in which the lands are properly described.

In the supreme court of Kansas, in the case of Keys v. Lardner,[45] the description of the mortgaged premises in the decree of foreclosure was amended so as to include therein a tract not clearly included in the original description, this was declared to be erroneous as against a defendant whose motion to require the plaintiff to make his petition more definite and certain by giving a sufficient description of the land on which the mortgage lien was claimed, and the defendant's answer to the effect that he was the owner of the tract and that it was not included in the description of the mortgaged land, was treated by the court as a disclaimer. But it is thought that the mere correction of a clerical error in a decree of foreclosure, and the insertion of a clause permitting judgment creditors to redeem, does not affect the decree so as to interrupt the running of the time fixed thereby for payment, and does not postpone the time in which notice of sale may be given.[46]

§ 536. Time within which sale may be made.—In a recent case in the District of Columbia it was held that a decree foreclosing a mortgage expressly empowering the trustees to sell the property at public sale upon ten days' notice, is not erroneous in failing to fix a definite time in the future for the payment of the sums due, before which sales cannot be made, where the amount is long past due, and fifteen days' notice of the time and place of sale are required to be given, and the sale is required to be made for one-third cash and the remainder payable in two years.[47]

It has been held that the supreme court of Wisconsin, under

[45] 55 Kan. 331, 40 Pac. 664.

[46] *Vail* v. *Arkell,* 146 Ill. 363, 34 N. E. 937.

[47] *Taylor* v. *Girard L. Ins. A. & T. Co.* 1 App. Cas. D. C. 209, 21 Wash. L. Rep. 632.

a statute of that state, providing that no sale upon a judgment of foreclosure shall be made until the expiration of one year from the date of such judgment or order of sale, such year is to be computed from the time when the judgment is signed and filed and the costs are taxed, although it is not recorded or entered on the record until later, since the object of the statute is to secure to the party entitled to redeem an entire year in which so to do after the amount necessary to be paid has been ascertained and definitely declared by the judgment of the court.[48]

§ 537. By what officer sale to be made—Employing auctioneer or deputy.—The sale must be made by the sheriff [49] of the county in which the mortgaged premises are situated,[50] or by some person designated [51] by the court for that purpose; and if not so made, the sale will be irregular. It has been said that the death of the plaintiff, after a regular decree of sale has been entered in a mortgage foreclosure, will not affect

[48] *Meehan* v. *Blodgett,* 86 Wis. 511, 57 N. W. 291.

[49] *Blitz* v. *Moran,* 17 Colo. App. 253, 67 Pac. 1020.

Deputy sheriff may make the sale. *Union Trust Co. of New York* v. *Davis,* 64 Neb. 340, 89 N. W. 1052; *Bell* v. *Omaha Savings Bank,* 1 Neb. (Unof.) 88, 95 N. W. 486; *Young* v. *Wood,* 63 Neb. 291, 88 N. W. 528; *Richardson* v. *Hahn,* 63 Neb. 294, 88 N. W. 527; *Maginn* v. *Pickard,* 57 Neb. 642, 78 N. W. 295; *Johnson* v. *Colby,* 52 Neb. 327, 72 N. W. 313; *Hamer* v. *McKinley-Lanning Loan & Trust Co.* 52 Neb. 705, 72 N. W. 1041; *Scottish-American Mortgage Co.* v. *Nye,* 58 Neb. 661, 79 N. W. 553; *Post* v. *Smith,* 1 Neb. (Unof.) 94, 95 N. W. 500. See *Nebraska Loan & Building Ass'c.* v. *Marshall,* 51 Neb. 534; *Hodgdon* v. *Davis,* 6 Dak. 21, 50 N. W. 478; *Granger* v. *Sheriff,* 140 Cal. 190, 73 Pac. 816.

[50] *Vietzen* v. *Otis,* 46 Wash. 402, 90 Pac. 264.

[51] When no one is appointed, the clerk, by virtue of his general powers as the commissioner of the court, may make the sale (§ 538, Mansf. Dig.) *Griffin* v. *Smith,* 5 Ind. Terr. 89, 82 S. W. 684.

In Nebraska the officer designated to make the sale need not take an oath. *Northwestern Mutual Life Ins. Co.* v. *Mulvihill,* 53 Neb. 538, 74 N. W. 78; *Wright* v. *Stevens,* 55 Neb. 676, 76 N. W. 441; *Omaha Loan & Trust Co.* v. *Bertrand,* 51 Neb. 508, 70 N. W. 1120; *George, as adm'r. etc.* v. *Keniston,* 57 Neb. 313, 77 N. W. 772.

the power of the sheriff or referee to proceed with the sale of the premises, in pursuance of the decree of judgment, and to execute a deed to the purchaser; it will not be necessary to revive the action and to bring in the representatives of the deceased plaintiff as parties.[52]

Under the former chancery practice in New York, every sale of mortgaged premises under a decee of foreclosure was required to be made by a master in chancery, or by some one selected by him in his presence and under his immediate direction. The constitution of 1846 abolished the office of master in chancery, and the Judiciary Act[53] of the following year provided that any matter before referred to a clerk, master or referee, might be referred to a clerk, county judge or other suitable person or persons, with the same powers formerly possessed by masters in chancery.

Under these provisions it was customary, when any controversy arose or was likely to arise between the parties, as to the order in which different portions of the premises should be sold, to appoint a referee to make the sale, instead of the sheriff.[54] A sale and a conveyance of the real estate by such referee was governed by § 77 of the Judiciary Act until the year 1851, when, for the purpose of obviating any questions which might arise concerning the power of a referee to sell,[55] § 287 of the New York Code of Procedure[56] was adopted, providing that where real property was decreed to be sold, it must be sold in the county where it is situated by the sheriff

[52] *Lynde* v. *O'Donnell* 21 How. (N. Y.) Pr. 34, 12 Abb. (N. Y.) Pr. 286. See also *Center* v. *Billinghurst,* 1 Cow. (N. Y.) 33; *Cleve* v. *Veer,* Cro. Car. 450.

But if the order of sale is not issued before the death of the plaintiff, such order cannot be issued without a revivor. *Havens* v. *Pope,* 10 Kan. App. 305, 62 Pac. 540.

[53] § 77.

[54] *Knickerbacker* v. *Eggleston,* 3 How. (N. Y.) Pr. 130.

[55] It was held in an early case under the Code, that a foreclosure sale might be made by a referee as well as by a sheriff; *Jennings* v. *Jennings,* 2 Abb. (N. Y.) Pr. 7, 17; *Knickerbacker* v. *Eggleston,* 3 How. (N. Y.) Pr. 130.

[56] See New York Code Civ. Proc. § 1242.

of that county, or by a referee appointed by the court specially for the purpose of making the sale.

The sale on a mortgage foreclosure must be made by the officer designated by the court, or by some one selected by him to act under his supervision,[57] or it will be void.[58] Thus, where a sale was directed to be made by a master in chancery residing in New York city, and a sale was made by a master residing in Brooklyn, the sale was set aside, although the purchaser had taken his deed.[59] And a sale made by a person deputized by the officer authorized to make such sale will be irregular, if made in the absence of such officer.[60]

§ 538. Same—Authority.—It is said by the supreme court of Minnesota, in the case of Crambie v. Little,[61] that a copy of the judgment in foreclosure, with a direction indorsed thereon to the sheriff to execute it, is sufficient authority for

[57] *Heyer* v. *Deaves,* 2 Johns. Ch. (N. Y.) 154; *Gould* v. *Garrison,* 48 Ill. 258. See *Reynolds* v. *Wilson,* 15 Ill. 394, 60 Am. Dec. 753; *Blossom* v. *Milwaukee & C. R. R. Co.* 70 U. S. (3 Wall.) 196, 205, 19 L. ed. 43; *Williamson* v. *Berry,* 49 U. S. (8 How.) 495, 544, 12 L. ed. 1170.

It is said in *Blossom* v. *Milwaukee & C. R. R. Co., supra,* that such sales "must be made by the person designated in the decree, or under his immediate direction and supervision, but he may employ an auctioneer to conduct the sale, if it be made in his presence." See *ante,* § 534.

In Nebraska, the authority of the commissioner appointed to sell cannot be delegated. *Penn Mutual Life Ins. Co.* v. *Creighton Theatre Bldg. Co.* 54 Neb. 228, 74 N. W. 583.

[58] See N. Y. Supreme Court Rule 61.

But see *Taylor* v. *Ellenberger,* 65 Pac. 832. (Cal.)

It has been said that an order appointing a commissioner to sell mortgaged property is not invalid because the prayer of the complaint was that it be sold by the sheriff, also that an order appointing a commissioner to sell mortgaged property is not invalid because the decree on which it is founded ordered the property to be sold by the sheriff, as the decree may be amended by striking out the word "sheriff" and inserting "comissioner." *McDermot* v. *Barton,* 106 Cal. 194, 39 Pac. 538.

[59] *Yates* v. *Woodruff,* 4 Edw. Ch. (N. Y.) 700. See *Fuller* v. *Van-Geeson,* 4 Hill (N. Y.) 171, 176.

[60] *Heyer* v. *Deaves,* 2 Johns. Ch. (N. Y.) 154.

[61] 47 Minn. 581, 50 N. W. 823

the sheriff to make sale of the mortgaged property.[62] It has been held that the sale of a railway on foreclosure of a mortgage made pursuant to consent decrees of two courts in different states, in each of which part of the railway property was situated, is valid; and the receiver of the company who made and reported the sale, and not the register, who performed no service, is entitled to commissions for making it, notwithstanding[63] a statute providing that any sales ordered to be made by a chancery court for the satisfaction of a mortgage debt shall be made by the register of the court ordering it.[64]

§ 539. Duties of officer making sale.—The duties of a referee appointed to sell in a mortgage foreclosure,[65] are purely ministerial in their nature, and he cannot vary the judgment in prescribing the terms of sale, nor relieve himself thereby from the performance of his duties.[66] It is his duty to see that the advertisement is published in a newspaper that will give the proposed sale general publicity.[67] And it has been said that a referee appointed to conduct a foreclosure sale must personally determine the time when the sale shall take place, and cannot delegate such duty to any other party to the proceeding, and must re-advertise where the auctioneer postpones the sale in his absence by the direction of the plaintiff's attorney.[68] It is his duty to proceed to execute the decree of sale without delay, if he is requested to do so by any of the parties to the suit who will be injured by delay, regardless of

[62] The decree itself is the sheriff's authority to make the sale. *McKinny* v. *Glassburn*, 2 Neb. (Unof.) 615, 89 N. W. 598; *Salisbury* v. *Murphy*, 63 Neb. 415, 88 N. W. 764; *Mead* v. *Hoover*, 63 Neb. 419, 88 N. W. 655.

[63] As Ala. Code, 1886, § 3600.

[64] *Rome & D. R. Co.* v. *Sibert*, 97 Ala. 393, 12 So. 69.

[65] There is no doubt that the statute imposes a duty upon the referee; *O'Donnell* v. *Lindsay*, 39 N. Y. Supr. Ct. (7 J. & S.) 523, 529.

[66] *People* v. *Bergen*, 53 N. Y. 404, 15 Abb. (N. Y.) Pr. N. S. 97. *Woolf* v. *Leicester Realty Co.* 134 App. Div. 484, 119 N. Y. Supp. 288.

[67] *State ex rel. Elliott* v. *Holliday*, 35 Neb. 327, 53 N. W. 142.

[68] *Shepard* v. *Whaley*, 19 N. Y. Civ. Pro. 381, 13 N. Y. Supp. 532.

any directions he may receive from the plaintiff or his attorney. And should the officer, under whose direction the premises are ordered to be sold, neglect to proceed at once to sell the same, the court will direct such officer to proceed forthwith upon the application of any person who is interested in the sale.[69]

It is the duty of the officer conducting a sale under a decree of foreclosure, to attend at the time and place of the sale, and (1) to announce the terms of sale, if they are not contained in the published notice; (2) to offer the premises to the highest bidder, and to receive bids as long as they are offered, waiting a reasonable time after each bid is made for others, and if no others are made, to strike off the premises to the highest bidder; (3) after marking down the premises to the highest bidder, to require him to sign a memorandum of the sale, agreeing to complete the same; (4) if at the time appointed for the sale, there are no bidders, or if from the few persons in attendance, or other sufficient cause, the officer is satisfied that a fair price cannot be obtained, to postpone the sale and not sacrifice the property unnecessarily.[70]

Where the property has been struck off to a bidder who does not comply with the terms of the sale, the officer making the sale may again offer the property for sale upon sufficient notice, so that no one will be misled or injured.[71] And where the highest bidder has withdrawn his bid, it is the duty of the officer making the sale, to mark the premises down to the next highest bidder; and if such person leaves the sale before the property is marked down to him, it is the duty of the officer making the sale to suspend the proceedings until such bidder can be notified.[72]

It has been held, that where the party purchasing offers to pay in bank notes, and specie payment is demanded, it is the

[69] *Kelley* v. *Israel,* 11 Paige Ch. (N. Y.) 147.

[70] *Bicknell* v. *Byrnes,* 23 How. (N. Y.) Pr. 486, 487.

[71] *Lentz* v. *Craig,* 2 Abb. (N. Y.) Pr. 294, 13 How. (N. Y.) Pr. 72.

[72] *May* v. *May,* 11 Paige Ch. (N. Y.) 201.

duty of the officer making the sale to wait a reasonable time, in order to allow the bidder to comply with the terms.[73] It has been the general practice of sheriffs, masters in chancery and referees, in making mortgage foreclosure sales, to receive current bank bills in payment.[74]

Where an execution is issued upon a decree of foreclosure to sell mortgaged property, it is not necessary for the sheriff to make a levy upon the premises before proceeding to sell the same.[75]

§ 540. Same—Appraisement.—In most of the states one of the first duties of the officer appointed to make a sale under a decree of foreclosure is to cause the property to be appraised[76] in accordance with the provisions of the statute regulating such sale. Those statutes generally require that the appraisement shall be made by disinterested freeholders[77]

[73] See *Baring* v. *Moore,* 5 Paige Ch. (N. Y.) 48.

[74] *Hall* v. *Fisher,* 9 Barb. (N. Y.) 17. See *Mumford* v. *Armstrong,* 4 Cow. (N. Y.) 553; *Baring* v. *Moore,* 5 Paige Ch. (N. Y.) 48, 52.

[75] *Bank of British Columbia* v. *Page,* 7 Oreg. 454.

[76] *In Louisiana* a sale under a mortgage is not illegal for want of an appraisement, where appraisement is dispensed with by the mortgage. *Stockmeyer* v. *Tobin,* 139 U. S. 176, 35 L. ed. 123, 11 Sup. Ct. Rep. 504. But a contrary doctrine seems to prevail in *Washington. Dennis* v. *Moses,* 18 Wash. 537, 40 L.R.A. 302, 52 Pac. 333.

In Indian Territory a sale without an appraisement has been held invalid. *Webb* v. *Hunt,* 2 Ind. Terr. 612, 53 S. W. 437.

Notice of appraisal is unnecessary. *Doughty* v. *Hubbell,* 1 Neb. (Unof.) 709, 96 N. W. 632; *Mills* v. *Hamer,* 55 Neb. 445, 75 N. W. 1105; *Eastern Banking Co.* v. *Seeley,* 59 Neb. 676, 81 N. W. 852; *Tillson* v. *Benschoter,* 55 Neb. 443, 75 N. W. 1101; *Hoover* v. *Hale,* 56 Neb. 67, 76 N. W. 457.

[77] The court, in the case of the *Nebraska Loan and Trust Company* v. *Hamer* (40 Neb. 281, 58 N. W. 695), held that one whose only land was originally conveyed as security for debt by deed absolute in form, and who subsequently pays further moneys to the grantor under an agreement that the deed shall thenceforth be treated as absolute, is a freeholder capable of being an appraiser in a foreclosure sale.

Deputy sheriff may make appraisement. *Carstens* v. *Eller,* 60 Neb. 460, 83 N. W. 743; *Nebraska Loan & Building Ass'c.* v. *Marshall,* 51 Neb. 534, 71 N. W. 63; *Union Trust Co.* v. *King,* 3 Neb. (Unof.) 155, 91 N. W. 190; *Wells* v. *Frazier,*

upon actual view,[78] yet in some states it is not necessary that the appraisers upon the sale of land under mortgage foreclosure go upon the property to appraise it, where they have a knowledge of the property.[79] The purpose of the appraisement is to fix an upset price, below two-thirds of which no bids will be received.[80] Two lots may be appraised together where they are contiguous and used as a single track;[81] or where one is insufficient and both are covered by one mortgage.[82]

It is thought that a sale of mortgaged premises under foreclosure will not be set aside on the ground that the property was appraised too low, unless the actual value so greatly exceeds the appraised value as to raise a presumption of fraud in making the appraisement.[83] Neither will a foreclosure sale be vacated because one of the appraisers misconceived the

64 Neb. 370, 89 N. W. 1033; *Doughty* v. *Hubbell*, 1 Neb. (Unof.) 709, 96 N. W. 632.

Constable or justice of the peace may make appraisement. *Durland* v. *McKibbin*, 5 Neb. (Unof.) 47, 97 N. W. 228.

[78] See *Ellenbogen* v. *Griffey*, 55 Ark. 268, 18 S. W. 126; *Alfred* v. *Bank of Hazelton*, 48 Kan. 124. 29 Pac. 471; *Stockmeyer* v. *Tobin*, 139 U. S. 176, 35 L. ed. 123, 11 Sup. Ct. Rep. 504.

As to sufficiency of filing of copy of appraisal, see *Northwestern College* v. *Shreck*, 2 Neb. (Unof.) 484, 89 N. W. 289; *Emory* v. *Boyer*, 2 Neb. (Unof.) 1, 95 N. W. 1061.

[79] *Zable* v. *Masonic Sav. Bank* (Ky.) 16 S. W. 588; *Iowa Loan & Trust Co.* v. *Devall's Estate*, 63 Neb. 826, 89 N. W. 381; *Reynolds* v. *Fagan*, 2 Neb. (Unof.) 415, 89 N. W. 170.

[80] *Pearson* v. *Badger Lumber Co.* 2 Neb. (Unof.) 251, 96 N. W. 493; *Hart* v. *Beardsley*, 67 Neb. 145, 93 N. W. 423.

[81] *Smith Bros. Loan & Trust Co.* v. *Weiss*, 56 Neb. 210, 76 N. W. 564.

[82] *Tichy* v. *Simecek*, 5 Neb. (Unof.) 81, 97 N. W. 323.

[83] *Smith* v. *Foxworthy*, 39 Neb. 214, 57 N. W. 994; *Green* v. *Doerwald*, 69 Neb. 698, 96 N. W. 634; *Pearson* v. *Badger Lumber Co.* 96 N. W. 493; *Brown* v. *Fitzpatrick*, 56 Neb. 61, 76 N. W. 456; *Mills* v. *Hamer*, 55 Neb. 445, 75 N. W. 1105; *Jones* v. *Cleary*, 2 Neb. (Unof.) 541, 89 N. W. 386; *Stafford* v. *Harmon*, 2 Neb. (Unof.) 528, 89 N. W. 380. See *Wolcott* v. *Henninger*, 1 Neb. (Unof.) 552, 96 N. W. 612.

The appraisement cannot be successfully assailed merely because the appraisers were mistaken, or because they differed in their valuation from that of other witnesses. *Pearson* v. *Badger Lumber Co.* 2 Neb. (Unof.) 251, 96 N. W. 493; *Nelson* v. *Alling*, 58 Neb. 606, 79 N. W. 162; *Ecklund* v. *Willis*, 44 Neb. 129, 62 N. W. 493; *Brown* v. *Fitzpatrick*, 56 Neb. 61, 76 N. W. 456; *Ballou* v. *Sherwood*, 58 Neb.

manner of estimating the value of the property where it does not appear that such misconception resulted in an unfair appraisement.[84] And the owner of the equity of redemption in mortgaged premises cannot be heard to object to the confirmation of a sale on foreclosure because prior liens and incumbrances were not deducted in making the appraisement,[85] as required by the provisions of the statute under which the sale is made, as such provisions are intended for the sole benefit of the mortgagee.[86] Where, however, an appraisement is set aside by the court, a sale thereunder is void.[87] It has been said that the making of a second appraisement higher than the first, where mortgaged land is sold under an order of sale, which sale is vacated for irregularities and an alias order of sale issued, is not a valid objection on the part of the mortgagor to the confirmation of the sale.[88]

20, 78 N. W. 383; *Lockwood* v. *Cook,* 58 Neb. 302, 78 N. W. 624; *Michigan Mutual Life Ins. Co.* v. *Richter,* 58 Neb. 463, 78 N. W. 932; *Green* v. *Doerwald,* 69 Neb. 698, 96 N. W. 634; *Taylor* v. *Reis,* 2 Neb. (Unof.) 533, 89 N. W. 374.

The presumption is that the appraisers did their duty. *De Groat* v. *Wilson,* 63 Neb. 423, 88 N. W. 657; *Union Trust Co.* v. *King,* 3 Neb. (Unof.) 155, 91 N. W. 190.

[84] *Nebraska Loan & T. Co.* v. *Hamer,* 40 Neb. 281, 58 N. W. 695. See *Levy* v. *Hinz,* 3 Neb. (Unof.) 11, 90 N. W. 640.

[85] Taxes included in decree should not be deducted from gross appraisement. *Beck* v. *McKibben,* 63 Neb. 413, 88 N. W. 765.

[86] *Smith* v. *Foxworthy,* 39 Neb. 214, 57 N. W. 994; *Hamer* v. *McKinley-Lanning Loan & Trust Co.* 52 Neb. 705, 72 N. W. 1041; *Wright* v. *Patrick,* 2 Neb. (Unof.) 695, 89 N. W. 746.

[87] *Carstens* v. *Eller,* 60 Neb. 460, 83 N. W. 743.

[88] *Nebraska Loan & T. Co.* v. *Hamer,* 40 Neb. 281, 58 N. W. 695.

New appraisement—Ohio statute. —In the case of *Brown* v. *Connecticut Mutual Life Insurance Company,* 6 Ohio C. C. 62, it is said that the ordering of a new appraisement of property to be sold in foreclosure proceedings, where a sale has not been effected under a former appraisement, is governed by Ohio Revised Statutes, § 5417; and an order making an appraisement and directing a sale on foreclosure under § 5416, which relates solely to property taken on execution, is a nullity and may be set aside on motion, and a new appraisement made under § 5417.

In Nebraska a new appraisement is not necessary until the property has been twice offered for sale. *Lombard* v. *Pasusta,* 2 Neb. (Unof.) 496, 89 N. W. 255; *Burkett* v. *Clark,*

The supreme court of Nebraska, in the case of Schultz v. Loomis,[89] say that a foreclosure sale is void where the plaintiffs, having a joint interest in the mortgage, declare it wholly due and collectible because of non-payment according to stipulations therein contained, and ask for the ascertainment of the whole amount secured by the mortgage, and a decree for much less than is really due is entered, and the appraisers deduct from the value of the property the balance omitted from the decree as being a lien on the property.

§ 541. Same—Same—Objections to.—It has been said that a fixed value upon real estate by appraisers in proceedings for a sale under foreclosure can be assailed only for fraud;[90] and inadequacy of the appraised value alone is insufficient cause for setting aside a sale.[91] Any objections to the value fixed by appraisers in proceedings for a sale of real estate under foreclosure must be made promptly, and are held to be too late where not made until after the sale has occurred.[92] They should be made and filed in the case, with a motion to vacate the appraisement, prior to the sale.[93] And objections to the confirmation of the sale of real estate on foreclosure,

46 Neb. 466, 64 N. W. 1113; *Thompson* v. *Purcell,* 63 Neb. 445, 88 N. W. 778; *Carstens* v. *Eller,* 60 Neb. 460, 83 N. W. 743; *Beardsley* v. *Higman,* 58 Neb. 257, 78 N. W. 510. The number of new appraisements is unlimited, under Nebraska Code Civ. Proc. § 495. *Logan* v. *Wittum,* 67 Neb. 143, 93 N. W. 146.

[89] 40 Neb. 152, 58 N. W. 693.

[90] *Pearson* v. *Badger Lumber Co.* 2 Neb. (Unof.) 251, 96 N. W. 493.

[91] *Ecklund* v. *Willis,* 44 Neb. 129, 62 N. W. 493; *Williams* v. *Taylor,* 63 Neb. 717, 89 N. W. 261; *Brown* v. *Fitzpatrick,* 56 Neb. 61, 76 N. W. 456; *Pearson* v. *Badger Lumber Co.* 2 Neb. (Unof.) 251, 96 N. W. 493; *Home Ins. Co. of New York* v. *Clark,* 1 Neb. Unof.) 844, 95 N. W. 1056; *David Adler & Sons Clothing Co.* v. *Hellman,* 4 Neb. Unof.) 557, 95 N. W. 467. See *Wolcott* v. *Henninger,* 1 Neb. (Unof.) 552, 96 N. W. 612; *Woolworth* v. *Parker,* 60 Neb. 142, 82 N. W. 317.

[92] *Wells* v. *Frazier,* 64 Neb. 370, 89 N. W. 1033; *Hamer* v. *McFeggan,* 51 Neb. 227, 70 N. W. 937. See *Emory* v. *Boyer,* 2 Neb. (Unof.) 1, 95 N. W. 1061; *Sanford* v. *Anderson,* 2 Neb. (Unof.) 315, 96 N. W. 486.

[93] *Ecklund* v. *Willis,* 44 Neb. 129, 62 N. W. 493. See *Siwooganock Guaranty Saving Bank* v. *Feltz,* 84 Neb. 706, 121 N. W. 967.

on the ground that the appraisement is irregular and not in accordance with the provisions of the law governing sheriff's sales, are not sufficient to be available, as the objections relied upon must be specifically assigned.[94]

§ 542. Discretion of the officer—Selling in parcels.—The Code requires where real property offered for sale, by virtue of a decree of the court or on execution, consists of two or more known lots, tracts or parcels, that such lots, tracts or parcels must be separately exposed for sale, and that no more of the property shall be exposed for sale, than appears to be necessary in order to satisfy the plaintiff's claim.[95]

The present provisions of the Code [96] are a re-enactment of a former statute,[97] and are only directory to the sheriff or officer making the sale. A sale to a *bona fide* purchaser will be held to be valid, although the requirements of the statute may not have been complied with; but where the purchase is not made in good faith, the sale will be set aside upon the application of the proper parties.[98]

The provisions of the statute and the rules of practice give to the referee, or other officer making the sale on a mortgage foreclosure, a discretion regarding the amount of property to be sold, similar to that in the case of other sales of real estate. Under some circumstances the officer will be obliged to exercise a discretion, which is judicial in its nature,[99] in deciding what is the best course to pursue upon the sale,[1] in which case

[94] *Ecklund* v. *Willis*, 44 Neb. 129, 62 N. W. 493; *Bird* v. *McCreary*, 4 Neb. (Unof.) 183, 93 N. W. 684; *Union Savings Bank* v. *Lincoln Normal University*, 4 Neb. (Unof.) 70, 93 N. W. 408.

[95] N. Y. Code Civ. Proc. § 1437; N. Y. Supreme Court Rule 61; *Groff* v. *Jones*, 6 Wend. (N. Y.) 522, 22 Am. Dec. 545.

[96] N. Y. Code Civ. Proc. § 1437.

[97] 2 Rev. St. 369, § 38.

[98] *Wallace* v. *Feely*, 1 N. Y. Civ. Proc. Rep. 126. See *Groff* v. *Jones*, 6 Wend. (N. Y.) 522, 22 Am. Dec. 545. See *post*, § 637.

[99] See *post*, § 576.

[1] *Kane* v. *Jonasen*, 55 Neb. 757, 76 N. W. 441.

an honest exercise of that discretion will be as final as the decision of any judicial tribunal.

Where the question of determining whether the property shall be sold in parcels or as one tract rests in the sound discretion of the referee, if he honestly and fairly exercises that discretion, in the absence of any special circumstances tending to show a clear mistake of judgment, such discretion will control and the sale will be valid.[2]

Although the statute and the rules of the court require that no more of the real estate shall be sold than will be sufficient to satisfy the judgment,[3] yet the provisions of the statute and the rules of the court are only directory, and failure to follow them will be merely an irregularity and will not necessarily vitiate the sale, although it may be a ground for setting it aside on motion of any party aggrieved who may have claimed, at the time of the sale, the right to have the property sold in parcels, and who has not waived his right by delay in objecting to the sale on that account.[4]

The statute presupposes that the officer making a sale in a mortgage foreclosure will ascertain the situation of the property, before he sells in obedience to the decree.[5] Where the mortgaged premises directed to be sold consist of several different lots or parcels of land, which can be disposed of separately without diminishing their value, it is the duty of the

[2] *Whitbeck* v. *Roe,* 25 How. (N. Y.) Pr. 403.

And a sale under a power in a trust deed is not invalidated by the fact that the land was sold in parcels, instead of *in solido,* and that the purchaser had made a map thereof, from which he read the description of the several pieces to the trustee, and which he used in making his bids without exhibiting it to the persons assembled at the sale, where no one requested to see it, and such purchaser would have permitted it to be seen by any one desiring to bid. *Smith* v. *Deeson* (Miss.) 14 So. 40.

[3] *Groff* v. *Jones,* 6 Wend. (N. Y.) 522, 22 Am. Dec. 545.

[4] *Cunningham* v. *Cassidy,* 17 N. Y. 276, 7 Abb. (N. Y.) Pr. 183; *Wallace* v. *Feely,* 1 N. Y. Civ. Proc. Rep. 126; *McIntyre* v. *Sanford,* 9 Daly (N. Y.) 21; *Ames* v. *Lockwood,* 13 How. (N. Y.) Pr. 555; *Woods* v. *Monell,* 1 Johns. Ch. (N. Y.) 502.

[5] *O'Donnell* v. *Lindsay,* 39 N. Y. Supr. Ct. (7 J. & S.) 523, 529.

officer making the sale to sell the same in separate lots or parcels, unless otherwise specially directed by the court.

Thus, where a deed of trust was given on the west one hundred acres of a quarter section of land, and the land was afterwards subdivided into lots and blocks, a decree of foreclosure ordering a sale of the premises was held not to require the sale of the property *en masse,* but that it would be the duty of the offcer to sell the same by lots, if such mode of sale would be more advantageous.[6] But where the officer making the sale is satisfied that the property will produce a greater price if sold together than if sold in parcels, he may sell it together, unless otherwise directed by the court.

§ 543. Notice of sale.[7]—In most, if not all of the states, the notice required to be given of a foreclosure sale is regulated by statute; and where so regulated, the sale will be illegal, if it is made without the prescribed notice, and may be set aside.[8] Thus, where thirty days' notice is required to be given to the defendant of a sale of real estate by a sheriff under a decree of foreclosure, the sale will be set aside if such

[6] *Chicago & Gt. Western R. L. Co.* v. *Peck,* 112 Ill. 408.

[7] For Notice under Foreclosure by Advertisement, see *post,* chap. 34.

[8] See *Shier* v. *Prentis,* 55 Mich. 175; *Miller* v. *Lefever,* 10 Neb. 77.

The provisions of the New York Code as to notice on foreclosure of mortgages do not supersede the special statutes applicable to mortgages securing loans by the loan commissioners. *Barley* v. *Roosa,* 59 Hun (N. Y.) 617, mem. 35 N. Y. S. R. 898, 13 N. Y. Supp. 209, 20 Civ. Pro. Rep. 113.

A sale under a power given by a mortgage, which provides for notice by publication, will be valid although there was an arrangement to prevent the mortgagor from having notice of such sale, where the notice required by the mortgage was given and the purchaser was not a party or privy to such arrangement. *Ritchie* v. *Judd,* 137 Ill. 453, 27 N. E. 682.

The Arkansas supreme court, *Johnson* v. *Meyer,* 54 Ark. 437, 16 S. W. 121, have said that the trial court may direct a sale upon twenty days' notice, under a mortgage containing a power of sale, to be exercised on a notice of thirty days. On the other hand the supreme court of Virginia has held that the trial court in supervising a sale under a trust deed prohibiting a shorter notice than ten days at the least, should prescribe a reasonable notice of at least thirty days, where

notice is not given.[9] The right of a defendant in a foreclosure to all the time the decree allows him for making a payment, cannot be presumed to be waived in order to sustain a sale prematurely made without notice to him.[10]

When not regulated by statute, the notice of sale may be prescribed by the decree of foreclosure, or left to the discretion of the officer entrusted with the execution of the decree. Whether prescribed by the court or determined by the officer, the notice should not only fix the time of sale, but also the hour of the day on which it will be made, in order to prevent the setting aside of the sale in case a reasonable price is not obtained for the property.[11]

The New York Code of Civil Procedure [12] provides that the sale shall be made in the county where the real estate is situated, and that due notice of the time and place of holding the sale shall be publicly advertised for six successive weeks immediately preceding the sale, as follows: "A written or printed notice thereof must be conspicuously fastened up at least forty-two days before the sale, in three public places, in the town or city where the sale is to take place, and also in three public places in the town or city where the property is situated, if the sale is to take place in another town or city. A copy of the notice must be published at least once in each of the six weeks immediately preceding the sale, in a newspaper published in the county, or published in an incorporated village, a part of which is within the county, if there is a newspaper published in such county or village; or, if there

the property is valuable and abundant security for the debt, and direct its publication, not only in a newspaper as directed in the deed, but by hand-bills so posted as to bring the best prices obtainable for the property, where the debtor especially requests that such expense be then incurred. *Morriss* v. *Virginia State Ins. Co.* 90 Va. 370, 18 S. E. 843.

[9] *Miller* v. *Lefever,* 10 Neb. 77.

[10] *Shier* v. *Prentis,* 55 Mich. 175.

[11] *Trustees of Schools* v. *Snell,* 19 Ill. 156, 68 Am. Dec. 586. See *Miller* v. *Lefever,* 10 Neb. 77.

[12] N. Y. Code Civ. Pro. §§ 1434, 1678.

is none, in the newspaper printed at Albany, in which legal notices are required to be published." [13]

But where the property is situated wholly or partly in a city in which a daily, semi-weekly or tri-weekly paper is published, notice of the sale may be given by the publication in such daily, semi-weekly or tri-weekly, paper of notice thereof at least twice in each week for three successive weeks, or in a weekly paper published in a city, once in each of the six weeks, immediately preceding the sale; or, if in the counties of New York and Kings, in two such daily papers.[14]

Under a provision of the statute,[15] the judges of the various courts in the city of New York have designated *The Law Journal* as the official paper in which all legal notices are to be published.

The notice of sale is usually drawn and posted by the plaintiff's attorney,[16] who should also prepare a statement of the terms of sale, which are usually read with the notice

[13] N. Y. Code Civ. Proc. § 1434.

[14] N. Y. Code Civ. Proc. § 1678. As to sufficiency of publication within the meaning of this section, see *Chamberlain* v. *Dempsey*, 13 Abb. (N. Y.) Pr. 421, 22 How. (N. Y.) Pr. 356.

[15] Laws of 1874, chap. 656.

[16] In the sale of mortgaged property the attorney for the plaintiff is considered as the agent of all the parties to the action, and the proceedings on the sale are usually supervised by him. *Dalby* v. *Pullen*, 1 Russ. & Myl. 296.

The general rule is that the names of the trustees in a trust deed may be signed to the notice of sale by others than themselves, with their authority. *Crutchfield* v. *Hewett*, 2 App. Cas. D. C. 373, 22 Wash. L. Rep. 127.

Under the Missouri statute, 1889, § 7093, requiring the notice of sale to state the date of recording the trust deed, a sale of lands is not void, especially on collateral attack, where the notice gave the date of the instrument itself and the book and page where it was recorded. *Morgan* v. *Joy*, 121 Mo. 677, 26 S. W. 670.

The performance of the mere ministerial acts of posting the notices and making the sale, by agents selected by the trustee under a trust deed authorizing the trustee to take possession on nonpayment does not affect the validity of the sale. *Tyler* v. *Herring*, 67 Miss. 169, 19 Am. St. Rep. 263, 6 So. 840. And it has been said that the preparation of the notices of sale under a mortgage, under the supervision of an intending purchaser, will not affect the validity of the sale. *Ritchie* v. *Judd*, 137 Ill. 453, 27 N. E. 682.

on the day of sale. This statement should specify the terms and conditions of the sale, the time of payment of the purchase money, what amount is to be paid on the day of sale, when and where the referee's deed is to be executed and delivered, what amount, if any, is to be deducted for taxes, assessments, water rents and other incumbrances; but it need not describe the nature and situation of the property, that being fully done by the notice of sale.

§ 544. **Same—Defects in.**—It is thought that defects in a notice of sale, where not sufficient to deceive anyone, will not defeat the title acquired at the sale.[17] Thus it has been said the fact that a notice of mortgage foreclosure describes the land as in the wrong civil township is immaterial, where the land is otherwise sufficiently identified.[18] And it has been held that a sale under a foreclosure is not invalid through omission to state in the advertisement the town in which the property is situated, where the description was so complete otherwise as to identify the property; nor invalid because made by one as assignee of the mortgagee, while the bond filed described him as attorney.[19] On the same principal it has been held that a sale of mortgaged real property under a power is not invalid because the notice of sale does not sufficiently describe certain personal property also covered by the mortgage, especially where such description is as full as that in the mortgage.[20]

[17] *Bacon* v. *Northwestern Mut. L. Ins. Co.* 131 U. S. 258, 33 L. ed. 128, 9 Sup. Ct. Rep. 787; *Slater* v. *Taylor*, 109 Minn. 492, 134 Am. St. Rep. 793, 124 N. W. 3 (omission of letters "a. m." after hour of sale.)

[18] *Lindsey* v. *Delano*, 78 Iowa, 350, 43 N. W. 218. See also *Cross* v. *Leidich*, 63 Neb. 420, 88 N. W. 667; *Phoenix Mutual Life Ins. Co.* v. *Sparks*, 2 Neb. (Unof.) 215, 96 N. W. 214; *Salisbury* v. *Murphy*, 63 Neb. 415, 88 N. W. 764; *Hamer* v. *McKinley-Lanning Loan & Trust Co.* 52 Neb. 705, 72 N. W. 1041.

[19] *Dickerson* v. *Small*, 64 Md. 395, 1 Atl. 870.

[20] *First Nat. Bank* v. *Bell Silver & Copper Min. Co.* 8 Mont. 32, 19 Pac. 403.

§ 545. Contents of notice of sale.—While it is not absolutely necessary, yet it is the proper practice, to insert the title of the cause in the notice of sale. This is usually done by stating the names of the first plaintiff, and of the first defendant at length, and by adding the words *"et al.,"* or "and others," where there are several plaintiffs or several defendants.[21] Where land is to be sold by a referee, it should be described with reasonable certainty by setting forth the number of the township or tract, and the number of the lot,[22] if the lot has a number; and if it has none, by some other appropriate description.[23] It is usually best to follow the description given in the decree or order of sale.[24] The referee is not at liberty to insert any further particulars in such notice, whereby the value of the property will be enhanced or depreciated, or the purchaser will be in any way misled.[25] In other respects there is no rule of law prescribing the form of the notice of sale.[26]

Where the mortgaged premises consist of several tracts which can be sold separately, without prejudice to the parties,

[21] *Ray* v. *Oliver,* 6 Paige Ch. (N. Y.) 489.

[22] The supreme court of Missouri have held that a description of a lot in a notice of sale under a mortgage, as a certain lot in a certain block in a certain person's addition to a town, is not insufficient, although the person has made three additions numbered respectively 1, 2, 3, and the lot to be sold is in the second, where there is reference to the plat, examination of which would show that such number in such plat could be only in the second addition. *Noland* v. *White,* 129 Mo. 57, 31 S. W. 341.

[23] *Cooper* v. *Ryan,* 73 Ark. 37, 83 S. W. 328.

[24] See *Levy* v. *Hinz,* 3 Neb. (Unof.) 11, 90 N. W. 640; *German Saving & Loan Society* v. *Kern,* 38 Or. 232, 62 Pac. 788; *Miller* v. *Lanham,* 35 Neb. 886, 53 N. W. 1010.

[25] *Marsh* v. *Ridgeway,* 18 Abb. (N. Y.) Pr. 262; *Laight* v. *Pell,* 1 Edw. Ch. (N. Y.) 577; *Veeder* v. *Fonda,* 3 Paige Ch. (N. Y.) 94.

[26] See *Ramser* v. *Johnson,* 2 Neb. (Unof.) 526, 89 N. W. 381; *Pearson* v. *Badger Lumber Co.* 60 Neb. 167, 82 N. W. 374.

The notice is defective if it does not disclose that there is an outstanding lease on the property and describe the same. *Carter* v. *Builders' Construction Co.* 129 App. Div. 318, 113 N. Y. Supp. 816.

Insufficient description.—It is held that notice of a mortgage sale, stating that for breach of conditions there will be sold at a certain time

it is not necessary to state in the notice of sale that the premises will be sold in separate parcels.[27]

A statement of the amount of the decree, although proper, is not essential to the validity of the notice.[28] Hence it has been said that a trustee's sale will not be affected by an inaccurate statement of the amount of the debt, contained in the notice of the sale, unless made for fraudulent purposes.[29]

It is thought that the amount due is sufficiently stated in a notice of sale under a trust deed setting out the terms of a note secured thereby, and reciting a default and election to declare the same due and payable, with all interest thereon,—at least as against a bona fide purchaser at the sale after years of peaceful possession.[30]

§ 546. Same—Describing improvements.—It is thought that it is not necessary, for an officer, on making sale of lands under an order of court, to describe the improvements on the

"on the premises, which are bounded and described as follows, viz., a certain parcel of land," describing it by metes and bounds, is not insufficient as not stating what was to be sold. *Streeter* v. *Ilsley,* 151 Mass. 291, 23 N. E. 837.

[27] *Hoffman* v. *Burke,* 21 Hun (N. Y.) 580; *Carstens* v. *Eller,* 60 Neb. 460, 83 N. W. 743; *Eldridge* v. *Wesierski,* 4 Neb. (Unof.) 517, 94 N. W. 961; *Fraser* v. *Seeley,* 71 Kan. 169, 79 Pac. 1081. But see *Hutchison* v. *Yahn,* 9 Kan. App. 837, 61 Pac. 458.

[28] *Stratton* v. *Reisdorph,* 35 Neb. 314, 53 N. W. 136. See *Manwaring* v. *Jenison,* 61 Mich. 117, 27 N. W. 899.

In Michigan a notice of sale under a mortgage executed prior to the 1879 Amendment (How. Mich. Stat. § 6980), providing for like notice as for constable sales, is sufficient if it describes and locates the property, without giving the date or amount of the mortgage or names of parties, where there is but one mortgage on the property and it is duly filed. *Manwaring* v. *Jenison,* 61 Mich. 117, 27 N. W. 899; *Amoskeag Savings Bank* v. *Robbins,* 53 Neb. 776, 74 N. W. 261; *Iowa Loan & Trust Co.* v. *Whistler,* 62 Neb. 698, 87 N. W. 538; *Iowa Loan & Trust Co.* v *Estate of Devall,* 63 Neb. 826, 89 N. W. 381; *Bourke* v. *Sommers,* 3 Neb. (Unof.) 761, 92 N. W. 990; *Gallentine* v. *Cummings,* 4 Neb. (Unof.) 690, 96 N. W. 178; *Springer* v. *Law,* 185 Ill. 542, 76 Am. St. Rep. 57, 57 N. E. 435.

[29] *Bowman* v. *Ash,* 36 Ill. App. 115.

[30] *Reedy* v. *Millizen,* 155 Ill. 634, 40 N. E. 1028.

premises, otherwise than as described in the writ.[31] Hence a sale of mortgaged premises, made under a power contained in the mortgage, will not be set aside because of the failure of the mortgagee to state in his advertisement of the sale the facts that improvements had been made on the premises, of which he did not know until the day of the sale, where they were obvious to those attending the sale.[32]

§ 547. Publication of notice of sale.—The number of weeks and the number of times each week which a notice of sale under a decree of foreclosure is required to be published, is regulated by the statutes of the various states.[33] Thus, in Maine the notice is not required to be published three weeks successively so as to continue for the space of twenty-one days,[34] but it must appear in three consecutive weekly issues of the paper; while under the Wisconsin stat-

[31] *Guarantee Trust & S. D. Co.* v. *Jenkins,* 40 N. J. Eq. 451, 2 Atl. 13; *Louser* v. *Light,* 202 Pa. 582, 52 Atl. 84. See *Thompson* v. *King,* 2 Marv. (Del.) 358, 43 Atl. 168; *Kebabian* v. *Shinkle,* 26 R. I. 505, 59 Atl. 743.

[32] *Austin* v. *Hatch,* 159 Mass. 198, 34 N. E. 95.

[33] Unless the parties have in the mortgage or deed of trust made a special provision or contract as to the publication of notice; in that case the provision or contract controls and must be strictly complied with. Thus it is said that an advertisement inserted on Sunday the fourth, of sale under a trust deed to take place on the fifteenth, is suf ficient where the deed provides that the advertisement is to be "ten days at the least." *Morriss* v. *Virginia State Ins. Co.* 90 Va. 370, 18 S. E. 843. And the civil court of appeals of Texas, in the case of *Lerch* v. *Hill,* 2 Tex. Civ. App. 421, 21 S. W. 183, say that a sale under a power in a deed of trust requiring the land to be sold after advertisement of ten days is void where the first publication is made on the eighth and the sale takes place on the eighteenth of the same month. In Illinois, however, it is held that the statute requiring notice of sale under a power in a mortgage to be published once a week for four successive weeks controls, although the mortgage provides for a different notice. See *Cornell* v. *Newkirk,* 144 Ill. 241, 33 N. E. 37, aff'g 44 Ill. App. 487. But a failure to comply with the provisions of the statute does not render the sale void, but only voidable. Id.

[34] *Wilson* v. *Page,* 76 Me. 279. This statute has been construed to mean three consecutive weekly issues of a newspaper; not that there must be a period of twenty-one days

ute,[35] a notice of sale under a decree of foreclosure is required to be published for six full weeks after the expiration of one year from the date of the judgment.[36]

Where the published notice of sale is dated prior to the expiration of the year, there will be an apparent irregularity at least in the proceedings tending to the defendant's injury; but whether, upon clear proof of the regular publication of the notice at and for the time prescribed by statute, such apparent irregularity will be fatal to the sale is not determined.[37]

Whether publication of a notice is required to be made for three weeks, twice in each week, or for six weeks, once in each week, it is not necessary that in the first instance twenty-one days should elapse between the time of the first publication and the time of sale, nor in the second case, that forty-two days should elapse between the first publication, and the day of sale, in order to render the publication of the notice sufficient and the sale made thereunder valid.[38] It has been held that the notice of sale need not be inserted in every edition of the paper issued on the day on which the notice

between the time of the first publication, and the date of the last insertion.

[35] Wis. Rev. Stat. §§ 2993, 3162, 3168.

[36] *Kopmeier* v. *O'Neil,* 47 Wis. 593.

[37] *Kopmeier* v. *O'Neil,* 47 Wis. 593.

[38] *Market Nat. Bank* v. *Pacific Nat. Bank,* 89 N. Y. 397, 399, 11 Abb. (N. Y.) N. C. 104; *Olcott* v. *Robinson,* 21 N. Y. 150, 78 Am. Dec. 126; *Sheldon* v. *Wright,* 5 N. Y. 497; *Steinle* v. *Bell,* 12 Abb. (N. Y.) Pr. N. S. 171, 177; *Merritt* v. *Village of Rochester,* 8 Hun (N. Y.) 40, 45; *Wood* v. *Terry,* 4 Lans. (N. Y.) 80, 85; *Hackley* v. *Draper,* 4 T. & C. (N. Y.) 614, 622. In the case of *Valentine* v. *McCue,* 26 Hun (N. Y.) 456, the court say: "The period of a week, therefore, is seven full days, and when the publication is directed to be made twice a week for three weeks, it means that there shall be a period of twenty-one days before the sale, calculated by weeks, during each of which, two publications shall be made, and this shall occur without regard to the day of the week when the publication was commenced." But in this case, the notice of sale of real property in the city of New York, under decree of foreclosure, to take place on the 20th day of May, was published in two papers on April the 27th (Wednesday) and 30th (Saturday), May 4th (Wed-

was published.[39] And it seems that the court may amend the judgment during the publication of the notice of sale, without affecting the validity of such notice, or the validity of the title to the property sold thereunder.[40] An incorrect publication will not invalidate the sale where sufficient other correct publications are made.[41]

A notice of sale of property was directed to be published in a designated paper, which, after the decree and before the publication of the notice, was merged in another paper and its name changed; on application to the judge at chambers, he directed the sale to be advertised in the same paper under its new name. The publication of the notice in such paper under its new name was held to be in accordance with the decree and to be valid and sufficient.[42]

Under a judgment of foreclosure and sale, a notice of the sale to take place on the twenty-eighth day of December was published on the ninth, twelfth, sixteenth, nineteenth, twenty-third and twenty-sixth of that month, and the court held this to be a publication twice in each week for three weeks immediately preceding the sale within the meaning of the Code.[43] In the case of Wood v. Morehouse,[44] an execution was issued to the sheriff on the twenty-sixth day of September, and he caused a notice of the sale thereunder to be published on the following first day of November, in a newspaper printed [45] in the proper county, and to be continued once

nesday), 7th (Saturday), 11th (Wednesday) and 14th (Saturday), and in one of them on May 20th; and this publication of notice was held to be sufficient. *Cotton* v. *Horton*, 132 N. W. 225 (N. D.)

[39] *Everson* v. *Johnson*, 22 Hun (N. Y.) 115.

[40] *Valentine* v. *McCue*, 26 Hun (N. Y.) 456.

[41] *State Realty & Mortgage Co.* v. *Villaume*, 121 App. Div. 793, 106 N. Y. Supp. 698; *May* v. *Hatcher*, 130 Cal. 627, 63 Pac. 33. See also *Pierce* v. *Reed*, 3 Neb. (Unof.) 874, 93 N. W. 154.

[42] *Sage* v. *Cent. R. R. Co.* 13 West. Jurist, 218.

[43] *Chamberlain* v. *Dempsey*, 13 Abb. Pr. 421, 22 How. (N. Y.) Pr. 356.

[44] 1 Lans. (N. Y.) 405, aff'd 45 N. Y. 368.

[45] The words "published" and "printed" as applied to the insertion of notices in a paper printed (or

a week for six successive weeks, and afterwards sold the property on an adjourned day, and such publication of the notice was held valid.[46]

In the case of Stowe v. Merrill[47] it is said that notice of foreclosure published in three successive issues of a weekly newspaper, and recorded the next day after the last publication, is sufficient, under the statutes of Maine.[48] It is said in First National Bank v. Bell Silver and Copper Mining Company[49] that the provisions of the Montana statute for "thirty days' notice" of a sale under a power in a mortgage, by publishing once a week for three weeks successively, does not require that all three publications shall be thirty days before the sale, but only that the first one shall be. In Alexander v. Messervey[50] it is held that an advertisement of a foreclosure sale in a newspaper once a week for three weeks, though full twenty-one days do not elapse between the first publication and the sale, complies with the South Carolina statute,[51] providing that notices of sale "shall be advertised for twenty-one days prior to the sale,—that is to say, once a week for at least three weeks prior thereto." The supreme court of Texas, in the case of Howard v. Fulton,[52] say that under a trust deed authorizing the trustee to sell the land after advertising notice of sale in some newspaper for at least thirty days prior to the day of sale, such publication to be made four times in suc-

published) in the county, are synonymous. *Ætna Life Ins. Co.* v. *Wartaszewski,* 63 Neb. 636, 88 N. W. 855; *Nebraska Land, Stock-Growing & Investment Co.* v. *McKinley-Lanning Loan & Trust Co.* 52 Neb. 410, 72 N. W. 357.

[46] See also the following cases where the publication was held sufficient: *Wilson* v. *Petzold,* 116 Ky. 873, 76 S. W. 1093; *Potter, as rec'r, etc.* v. *Lynch,* 2 Neb. (Unof.) 798, 90 N. W. 217; *Trenery* v. *American Mortgage Co.* 11 S. D. 506, 78 N. W. 991; *Cortland Savings Bank* v. *Lighthall,* 53 Misc. 423, 104 N. Y. Supp. 1022. For insufficient or defective publication, see *Wilson* v. *Northwestern Mutual Life Ins. Co.* 65 Fed. 38, 12 C. C. A. 505; *Polhemus* v. *Princilla,* 61 Atl. 263 (N. J. Eq.)

[47] 77 Me. 550, 1 Atl. 684.

[48] Me Rev. Stat. c. 90, § 5.

[49] 8 Mont. 32, 19 Pac. 403.

[50] 35 S. C. 409, 14 S. E. 854.

[51] S. C. Gen. Stat. § 2424.

[52] 79 Tex. 231, 14 S. W. 1061.

cession, does not require that the last publication shall be thirty days before the day of sale. It has been said that a mortgage sale of lands and a commissioner's deed obtained in a United States circuit court proceeding on a publication of the warning order for only ten consecutive days, instead of not less than once a week for six consecutive weeks, as required by the United States statutes,[53] is absolutely void as to persons having an interest, equitable or otherwise in the land sold and who were not before the court.[54]

While it is the duty of the officer making the sale [55] to see that the advertisement is published in a newspaper that will give it general publicity, yet the supreme court of California, in the case of Northern Counties Investment Trust v. Cadman,[56] say that a plaintiff in a mortgage foreclosure suit cannot control the sheriff as to the particular newspaper in which the notice of foreclosure sale shall be published, and the sheriff may lawfully publish it the requisite number of times and in a weekly paper, although he has been directed by the plaintiff to publish it in a certain daily paper in which the plaintiff has contracted to have it published. The supreme court of Nebraska, in the case of Smith v. Foxworthy,[57] say that the statute of that state requiring the notice of sale under foreclosure of a mortgage to be published in "some newspaper printed in the county, in general circulation therein," does not require that the newspaper in which such notice is published shall have a general circulation in any particular city or portion of the county in which the land is situated.

§ 548. Same—Notice of adjourned sale.—In those cases where, for any reason, the sale is not made on the day advertised, and the sale is adjourned to another day, due notice

[53] 1 Supp. U. S. Rev. Stat. p. 176.

[54] *Mercantile Trust Co.* v. *South Park Residence Co.* 94 Ky. 270, 22 S. W. 314.

[55] As to duty of officer making sale under mortgage foreclosure. See *ante*, § 539.

[56] 101 Cal. 200, 35 Pac. 557.

[57] 39 Neb. 214, 57 N. W. 994.

should be given by publication of such adjournment and the day and hour the sale is adjourned to. In this, as in the original publication, the statute should be strictly complied with. Thus in a case where the notice of sale was regularly published for six successive weeks, and the sale was adjourned, and nothing but the notice of adjournment published, which did not contain the requisite elements of a notice of sale, the publication was held not to be sufficient to authorize the sale of the mortgaged premises.[58] But exception for want of due publication of the adjournment sale should be promptly taken, and the question of the want of such publication cannot be raised collaterally. The supreme court of New York, in the case of Bechstein v. Schultz,[59] say that the omission to publish a notice of an adjournment of a foreclosure sale from August nineteenth to September second, until September fourth of the same year, that being the day on which the sale actually took place, as required by the New York Code,[60] was not a valid objection by the defendant to accepting title from the plaintiff, who derived his title through a judgment in the foreclosure suit, it appearing that more than two years had elapsed from the date of confirmation of the sale without objection by any of the parties.

§ 549. Same—Place of publication—Sufficiency of newspaper.—Under a statute requiring that notices of sale be published for a certain length of time, a weekly paper, containing principally religious news, of interest to a particular denomination, but containing a column devoted to the general news of the day, embracing every sort of news of interest to the general reader, is a "newspaper," within the meaning of the statute in which the notice of a sale on mortgage foreclosure may be published.[61] Likewise a paper which contained

[58] *Sanborn* v. *Petter,* 35 Minn. 449, 29 N. W. 64.

[59] 45 Hun (N. Y.) 191, 9 N. Y. S. R. 815.

[60] N. Y. Code Civ. Proc. § 1678.

[61] *Hull* v. *King,* 38 Minn. 349, 37 N. W. 792. See also *Williams* v. *Colwell, as adm'r etc.* 14 App. Div. 26, 43 N. Y. Supp. 1167.

legal advertisements only has been held sufficient.[62] And the fact that a newspaper is a socialistic publication is immaterial, where it is otherwise sufficient.[63]

§ 550. Same—Posting statutory notice.—In some statutes it is provided, and also in some trust deeds and mortgages, that notice of a sale of the mortgaged premises shall be given by posting notices thereof in a specified manner.[64] It is said that posting a notice of sale in the corridor of the court house, on boards provided by the county for the posting of public notices, is a sufficient compliance with a provision in a trust deed that a sale thereunder shall be at the court house door, and the notice be posted at the place of sale.[65] But in all cases where notice is given by posting, strict proof of the posting of the statutory notices of sale must appear of record in the mortgage foreclosure; the statement in regard thereto by the officer in his report of sale will not cure a defect in the affidavit upon which such report rests as proof.[66]

§ 551. Same—Service of notice.—In some states the statute requires the notice to be served upon the person actually in possession of the mortgaged premises.[67] Under such a statute the supposition that a person to whom a copy of a foreclosure notice is delivered was in actual possession of the mortgaged premises does not affect the validity of the service, if such person was one whom the statute author-

[62] *Hoock* v. *Sloman,* 155 Mich. 1, 118 N. W. 489.

[63] *Michigan Mutual Life Ins. Co.* v. *Klatt,* 5 Neb. (Unof.) 305, 98 N. W. 436.

[64] See *McClendon* v. *Equitable Mortgage Co.* 122 Ala. 384, 25 So. 30. See also *Elgutter* v. *Northwestern Mutual Life Ins. Co.* 86 Fed. 500.

[65] *Howard* v. *Fulton,* 79 Tex. 231, 14 S. W. 1061.

[66] *New York Baptist University for Ministerial Education* v. *Atwell,* 95 Mich. 239, 54 N. W. 760.

[67] In Illinois, personal notice is not required. *Springer* v. *Law,* 185 Ill. 542, 76 Am. St. Rep. 57, 57 N. N. E. 435.

A party to foreclosure need not be personally served in New Jersey. *Ring* v. *New Auditorium Pier Co.* 77 N. J. Eq. 422, 77 Atl. 1054.

ized service upon as one of suitable age and discretion.[68] In Pennsylvania it is held that the sheriff's return upon a *levari facias sur mortgage* should show the service upon the defendant of the notice of the sale and advertisement required by the statute,[69] or should show that the defendant could not be found.[70]

§ 552. Same—Proof of publication.—Proof of the due publication of the notice may be made by the affidavit of any person having knowledge of the fact.[71] And the proof is sufficient if it states only the dates of the first and last publications.[72] In the absence of proof to the contrary, it will be presumed that publication of a notice of sale made in a daily newspaper was first made on the day of the date of such notice, especially if such presumption does not conflict with either the sheriff's certificate or the printer's affidavit.[73]

The supreme court of Missouri have held that an omission in the printer's affidavit to recite the proper and sufficient publications of notice of a sale under a deed of trust does not vitiate the sale, where the trustee's deed is correct and strictly formal and states that the proper notice has been given, and the publication was in fact properly made.[74] A

[68] *Groff* v. *National Bank of Commerce,* 50 Minn. 348, 52 N. W. 934.

[69] Pa. Act 1705, § 4.

[70] *Gibbons* v. *Williams,* 10 Pa. Co. Ct. 299, 6 Kulp, 277.

[71] *Miller* v. *Lefever,* 10 Neb. 77; *Johnson* v. *Colby,* 52 Neb. 327, 72 N. W 313; *Home Ins. Co. of New York* v. *Clark,* 1 Neb. (Unof.) 844, 95 N. W. 1056.

For sufficient affidavits by printer, see *Bourke* v. *Sommers,* 3 Neb. (Unof.) 761, 92 N. W. 990; *Northwestern College* v. *Shreck,* 2 Neb. (Unof.) 484, 89 N. W. 289; *Foster* v. *McKinley-Lanning Loan & Trust Co.* 3 Neb. (Unof.) 65, 90 N. W. 765.

For sufficient sheriff's return as to publication in legal paper, see *Nye* v. *Rogers,* 55 Neb. 353, 75 N. W. 854.

[72] *Clarke* v. *Chamberlin,* 70 Ill. App. 262. See *German Savings & Loan Society* v. *Kern,* 38 Or. 232, 62 Pac. 788, for sufficient affidavit as to dates and places of posting notices.

[73] *Kopmeier* v. *O'Neil,* 47 Wis. 593.

[74] *Gray* v. *Worst,* 129 Mo. 122, 31 S. W. 585.

defect in the sheriff's certificate is not cured by the printer's affidavit showing sufficient publication.[75]

§ 553. When sale may be made—Hour of day.—It is provided in many of the states that mortgaged premises shall not be sold under a judgment of foreclosure, until after the lapse of a specified time from the commencement of the action, or the recovery of the judgment.[76] Where there is such a regulation, any proceedings taken for a sale before the exepiration of the prescribed period, such as publishing the notice thereof, will be irregular, but not void.[77] And under such a statute, where a party is brought in as a defendant by an amended complaint, and is charged with a personal liability, the statutory period after which a sale may be made will run only from the date of filing the amended complaint.[78]

The time of day at which a sale of mortgaged premises shall be made under a decree of foreclosure is usually a matter resting entirely in the discretion of the referee or other officer making the sale,[79] except that in New York the sale is required by the Code of Civil Procedure [80] to be made at public auction between the hour of nine o'clock in the morning and sunset.[81] Should the sale be made before sunrise in the

[75] *Evans* v. *Bushnell,* 59 Kan. 160, 52 Pac. 419.

For immaterial variance between sheriff's return and publisher's affidavit as to name of paper in which notice was published, see *Michigan Mutual Life Ins. Co.* v. *Klatt,* 5 Neb. (Unof.) 305, 98 N. W. 436.

[76] *Burt* v. *Thomas,* 49 Mich. 462; *Culver* v. *McKeown,* 43 Mich. 322. See *Andrews* v. *Welch,* 47 Wis. 132; *Northwestern Mut. L. Ins. Co.* v. *Neeves,* 46 Wis. 147; Wis. Rev. Stat. § 3162. See also *Delgardno* v. *Barthrop,* 40 Wash. 191, 82 Pac. 285; *Lone Jack Mining Co.* v. *Megginson,* 82 Fed. 89.

Confirmation of sale made on nineteen days notice instead of twenty as required, cures such irregularity. *Farnsworth* v. *Hoover,* 66 Ark. 367, 50 S. W. 865.

[77] See *Northwestern Mut. L. Ins. Co.* v. *Neeves,* 46 Wis. 147.

[78] *Canfield* v. *Shear,* 49 Mich. 313.

[79] *Sessions* v. *Peay,* 23 Ark. 39.

[80] N. Y. Code Civ. Proc. § 1384.

[81] See *Carnrick* v. *Myers,* 14 Barb. (N. Y.) 9.

morning or after sunset in the evening, it will be absolutely void.[82]

Where the lands to be sold are situated wholly or partly within the counties of New York and Kings, the sale shall be made at public auction between eleven o'clock in the forenoon and three o'clock in the afternoon, unless otherwise specially directed.[83] The notice of sale should state the place where the sale is to be made and the hour when it is to take place, but need not indicate whether the hour appointed is standard or true time, and where sale is made according to standard time it will be sufficient.[84] It has been said that a notice of foreclosure by advertisement, stating that the sale will be held at the court-house in a designated village and county, sufficiently describes the place of sale.[85] And the fact that notice of a trustee's sale under a trust deed does not specify between what hours the sale is to occur, will not invalidate the sale in those cases where neither the statute nor the deed require such designation.[86] The notice should not fix the day of sale upon a holiday,[87] but a sale in mortgage foreclosure may properly be made during Chistmas week.[88] Neither should a sale be at an unusual hour of the day. Where the hour is unusual or unsuitable, this will be sufficient to warrant the court in setting aside the sale, particularly when to that fact is added great inadequacy of price.[89] It is said by

[82] *Carnrick* v. *Myers,* 14 Barb. (N. Y.) 9. See *Wood* v. *Morehouse,* 45 N. Y. 369, aff'g 1 Lans. (N. Y.) 405, 413; *Hackley* v. *Draper,* 4 T. & C. (N. Y.) 614, 622; *Frederick* v. *Wheelock,* 3 T. & C. (N. Y.) 210, 212.

[83] N. Y. Supreme Court Rule 62.

[84] *Iowa Loan & Trust Co.* v. *Estate of Devall,* 63 Neb. 826, 89 N. W. 381.

[85] *McCammon* v. *Detroit L. & N. R. Co.* 103 Mich. 104, 61 N. W. 273.

[86] *Meier* v. *Meier,* 105 Mo. 411, 16 S. W. 223.

[87] *In Missouri* a sale under a power in a mortgage upon a public holiday is not void, under Missouri Revised Statutes 1879, §§ 551, 1054, 4039, providing that on the holidays named therein certain specified business, not including mortgage sales, shall not be transacted. *Stewart* v. *Brown,* 112 Mo. 171, 16 S. W. 389, 20 *Id.* 451.

[88] *Anderson* v. *White,* 2 App. Cas. D. C. 408, 22 Wash. L. Rep. 159.

[89] *Holdsworth* v. *Shannon,* 113 Mo. 508, 35 Am. St. Rep. 719, 21

the supreme court of Mississippi, in the case of Goodman v. Durant Building and Loan Association,[90] that authority in a mortgage to the donee of the power to designate the time, place, and terms of sale, is not taken away by the Mississippi statute,[91] providing that if a mortgage with power of sale is silent as to the place of sale, the sale may be made at such place as is required for sheriff's sales.

§ 554. Sale to be made at time advertised—Place of sale.—The sale of mortgaged premises in an action for foreclosure must be made at the time fixed for selling the same, pursuant to the notice;[92] and if such time has passed,[93] and a valid sale has not been made, or if the party in interest elects to disregard it, the officer conducting the sale cannot sell again without an order of the court, unless he advertises the sale *de novo*.[94]

It was said in Bicknell v. Byrnes,[95] that where the "mortgagor, or other person interested in the premises, attends at the time fixed for the sale, and a sale upon satisfactory terms is made and he leaves, and if thereafter, without notice, the party foreclosing can abandon the sale and make a new one, he may create just such an amount of deficiency, or he may purchase the premises at just such a price as he deems proper. Such a practice cannot be tolerated."

S. W. 85, 89; *Fowler* v. *Taylor,* 19 D. C. 456, 19 Wash. L. Rep. 131. See *post,* § 627 *et seq.*

[90] 71 Miss. 310, 14 So. 146.

[91] Miss. Code, 1892, § 2484.

[92] *Brown* v. *Belles,* 17 Colo. App. 529, 69 Pac. 275.

A sale will be void where made before the time specified in the notice of sale, except when occasioned by the ordinary variance in timepieces; and a difference of fifteen minutes cannot be attributed to that cause. But it is said that the record of a certificate of a sale on foreclosure, stating that the sale was had at the time stated in the notice of sale, and also at another time, is no basis to estop proof of the actual time of sale. *Richards* v. *Finnegan,* 45 Minn. 208, 47 N. W. 788.

[93] Mortgage foreclosure sales do not have to be held open for any specified length of time. *Cross* v. *Leidich,* 63 Neb. 420, 88 N. W. 667.

[94] *Bicknell* v. *Byrnes,* 23 How. (N. Y.) Pr. 486.

[95] 23 How. (N. Y.) Pr. 489.

If the officer making the sale re-advertises the property before selling, an order of the court will not be necessary, and such a sale, if otherwise conducted in conformity to the rules regulating sales of real estate, will be valid.

As a general rule, the sale of real property under a decree of the court must be made on the premises, or at the court house in the county in which the lands are situated, unless for good cause shown the court directs otherwise.[96] In New York the Code provides that all sales of real property on mortgage foreclosure under final judgment, shall be made by the sheriff or referee executing the decree of sale in the county and borough in which the property is situated. Where the property is situated partly in one county or borough and partly in another and it appears that a sale of the whole will be most beneficial to the parties, the court rendering judgment may direct in which county and borough the whole of the property shall be sold.[97]

If the mortgaged premises are situated in the county of New York, unless otherwise specially directed by the court, they are required to be sold at public vendue at the Exchange Sales Rooms, Nos. 14 and 16 Vezey street, between the hours of eleven o'clock in the forenoon and three o'clock in the afternoon. Authority is given to the Appellate Division of the First Department to change the place of sale and to make rules and regulations governing the same. The court may also designate the auctioneers or persons who shall make the sale.[98]

[96] *Sessions* v. *Peay,* 23 Ark. 39; *Stockmeyer* v. *Tobin,* 139 U. S. 176, 35 L. ed. 123, 11 Sup. Ct. Rep. 504. See *Morriss* v. *Virginia State Ins. Co.* 90 Va. 370, 18 S. E. 843. See *Aukam* v. *Zantzinger,* 98 Md. 380, 56 Atl. 820.

Where all the people at the place of sale adjourn to other quarters where the sale is completed, and there is no showing of prejudice by the adjournment, the sale is not invalidated by reason thereof. *Morrissey* v. *Dean,* 97 Wis. 302, 72 N. W. 873.

A sale made in a county other than that in which the premises are situated is void, notwithstanding subsequent confirmation or previous authorization by the court. *Vietzen* v. *Otis,* 46 Wash. 402, 90 Pac. 264.

[97] N. Y. Code Civ. Proc. § 1242.

[98] N. Y. Supreme Court Rule 62.

In Buffalo the sale must take place at the Real Estate Exchange Rooms between 9 and 11 a. m., and 2 and 3 p. m., unless the court ordering the sale otherwise directs. The sale must be made subject to such regulations as the justices of the Supreme Court of the Eighth Judicial District shall establish.[99]

§ 555. Same—At door of court house.—Where a sale of mortgaged lands is made at the seat of justice of the county, or district in which they are situated, it usually takes place at the door of the court house. And it has been held that a sale made by a trustee under a deed of trust requiring it to be held "at the door of the court house in a county wherein the premises are situated" is properly held at the court house in the county seat of such county, although there is a second court house at another place in the county.[1] It is thought that where by the terms of a mortgage or deed of trust the sale thereunder is required to be made at the court house door, it may be made at the door of a temporary court house selected and occupied by the proper authorities, where the court house proper has been destroyed or abandoned.[2] But the supreme

[99] N. Y. Supreme Court Rule 62.

[1] *Gray* v. *Worst,* 129 Mo. 122, 31 S. W. 585.

[2] *Johnson* v. *Cocks,* 37 Minn. 530, 35 N. W. 436; *Riggs* v. *Owen,* 120 Mo. 176, 25 S. W. 356; *Davis* v. *Hess,* 103 Mo. 31, 15 S. W. 324. See *Boone* v. *Miller,* 86 Tex. 74, 23 S. W. 574.

Where a county court house had been partly destroyed by fire, and rooms had been rented in another place by the county commissioners for several months for the temporary use of some of the county officers and for all the court rooms in Minnesota, there is no irregularity in advertising or in holding the sheriff's sale at the front door of such building. *Johnson* v. *Cocks,* 37 Minn. 530, 35 N. W. 436.

In *Missouri,* however, a different rule has been laid down. See *Stewart* v. *Brown,* 112 Mo. 171, 20 S. W. 451.

Sale at door of new and unfinished structure.—A sale under a deed of trust providing for sale at tne court house door is properly made at the door of a new and unfinished court house proper, the old one having been removed and the terms of court held in other buildings leased for the purpose, where the sale was well attended and there is no evidence that anyone was misled as to the place of sale. *Davis* v. *Hess,* 103 Mo. 31, 15 S. W. 324.

court of Texas, in the case of Boone v. Miller,[3] say that a sale of land under a power in a deed of trust providing for a sale at the court house door is invalid under the Texas statute,[4] providing that where there is no court house in a county the door of the house where the district court was last held shall be deemed to be the court house door,[5] if made at another place than that appointed for holding the district court; although it was at the door of a house used and occupied by the commissioners' court and county court of the county. The supreme court of Missouri hold, however, that a sale under a deed of trust will not be set aside upon the ground that it was not made at the court house door, that it was not an open public sale as provided by the deed of trust, and that the property was not struck off to the highest bidder, where it appears that it was made in the vestibule in front of the court house door, at the usual hour and in the usual manner of public sales at that place, and that the property was not then struck off to the highest bidder on account of the interruption of the plaintiff seeking to have the sale set aside, in order that he might make his bid good.[6] In those cases where a trust deed provides for a sale of the property at the front door of the court house, the sale will not be set aside on the ground that it should have been made from the front of the door leading to the court room, where there are three front doors, and it was made in front of one, in full view of all the other doors;[7] but when a particular door of a building is named in the trust deed or mortgage at which the sale shall be made, a sale made anywhere else will be invalid. Thus it has been held that a sale under a power in a deed of trust to

[3] 86 Tex. 74, 23 S. W. 574.

[4] Tex. Rev. Stat. Art. 2310.

[5] See also *Smith Bros. Loan & Trust Co.* v. *Weiss,* 56 Neb. 210, 76 N. W. 564; *Reynolds* v. *Fagan,* 2 Neb. (Unof.) 415, 89 N. W. 170.

[6] *Maloney* v. *Webb.* 112 Mo. 575, 20 S. W. 683.

[7] *Martin* v. *Barth,* 4 Colo. App. 346, 36 Pac. 72. See also *Peck* v. *Starks,* 64 Neb. 341, 89 N. W. 1040; *Iowa Loan & Trust Co.* v. *Nehler,* 3 Neb. (Unof.) 680, 92 N. W. 729.

sell "at the east court house door," will be set aside when held at the north door of another building at a distance, in a different neighborhood, to which the circuit court removed upon the partial destruction by fire of the court house existing at the date of the deed, the county and probate courts being removed to a third building at a distance from the others, and the property bringing but half its value because of doubts of the bidders as to the validity of the sale.[8] And it has also been said that a sale under a power in a mortgage which provides that sale thereunder shall be held at the east door of the court house in a city named must be made at the east door of the court house in existence when the mortgage was made, although at the time of the sale it had been partially destroyed by fire and the courts are at the time held in other buildings in a different part of the city.[9]

§ 556. Terms and conditions of sale.—The New York Code of Civil Procedure requires that the terms of sale on a mortgage foreclosure shall be made known at the time of the sale; if the property or any part thereof is to be sold subject to any lien or charge, or to a right of dower, that fact must also be made known at the time of the sale.[10] It is the usual practice for the officer conducting such sale to read the notice of sale for the purpose of informing bidders of the location and general description of the property to be sold; it is also his duty to announce the terms of sale, if they are not contained in the published notice.[11] After announcing the terms of sale, the officer in charge should offer the premises, or separate parcels thereof, to the highest bidder.[12] But the officer making the sale is not obliged to accept the highest

[8] *Stewart* v. *Brown,* 112 Mo. 171, 20 S. W. 451.

[9] *Stewart* v. *Brown,* 112 Mo. 171, 16 S. W. 389. *Compare Johnson* v. *Cocks,* 37 Minn. 530, 35 N. W. 436; *Riggs* v. *Owens,* 120 Mo. 176, 25 S. W. 536; *Davis* v. *Hess,* 103 Mo. 31, 15 S. W. 324; *Boone* v. *Miller,* 86 Tex. 74, 23 S. W. 574.

[10] N. Y. Code Civ. Proc. § 1678.

[11] *Bicknell* v. *Byrnes,* 23 How. (N. Y.) Pr. 486.

[12] N. Y. Code Civ. Proc. § 1678.

bid, if he has reasons for believing that the bid is not made in good faith, or that the bidder is unable to comply with the terms of sale.[13] The bidder may withdraw his bid at any time before the hammer falls.[14] He may also transfer his bid to another.[15]

As a reasonable precaution in order to insure the completion of the sale, or to cover the costs and expenses of a resale, in case the purchaser should fail to fulfill his contract, a deposit, or the payment of some portion of the bid, at the time of the sale, is usually required.[16] The amount to be paid or deposited should be a sum reasonably sufficient to insure the completion of the purchase or to cover the expenses of a resale.[17] To require the immediate payment of the whole purchase money in cash at the time of the sale, would tend to deter bidders, and in this manner be oppressive and unjust to the mortgagor; a sale made upon such terms, unless specially ordered, may be set aside by a court of equity.[18]

[13] *Gray* v. *Veirs,* 33 Md. 18. *State Bank* v. *Brown,* 128 Iowa, 665, 105 N. W. 49. See *Slack* v. *Cooper,* 219 Ill. 138, 76 N. E. 84. But see *Spalding* v. *Murphy,* 63 Neb. 401, 88 N. W. 489.

[14] *Hibernia Savings & Loan Society* v. *Behnke,* 121 Cal. 339, 53 Pac. 812. See also *Jones* v. *Williams,* 155 N. C. 179, 36 L.R.A. (N.S.) 426, 71 S. E. 222

[15] *Austin* v. *Ballard,* 84 Kan. 619, 114 Pac. 1084.

[16] *Cummings* v. *Hart,* 4 Neb. (Unof.) 20, 93 N. W. 150; *Michigan Mutual Life Ins. Co.* v. *Klatt,* 5 Neb. (Unof.) 305, 98 N. W. 436.

[17] *Maryland Permanent Land and Building Society of Baltimore* v. *Smith,* 41 Md. 516. And in those cases where the trust deed provides that a sale under the power shall be for cash, a requirement by the trustee that ten per cent. of any bid made shall be deposited when the sale is adjudged, is a reasonable precaution to avoid the necessity of a resale, and will not avoid the sale, particularly where no solvent and apparently honest bidder has been deprived of an opportunity to buy at the sale, or applied for a further reasonable delay that he might have an opportunity to make good his bid. *Smith* v. *Deeson* (Miss.) 14 So. 40.

[18] *Goldsmith* v. *Osborne,* 1 Edw. Ch. (N. Y.) 560, 562.

It has been said that where a trust deed provides for a sale for cash, and the creditor instructs the trustee to accept in payment only gold and silver or legal tender currency, the announcement of that fact at the sale, without any fraudulent purpose, will not vitiate the sale. *Lallance* v. *Fisher,* 29 W. Va. 512, 2 S. E. 775.

While it is true that the parties to a mortgage or trust deed may, by consent, authorize a sale of mortgaged premises upon such terms as they see fit,[19] yet it is a well settled principle that on a foreclosure the sale must be made in accordance with the decree of the court, and its terms cannot be changed by agreement of parties or counsel, which are not incorporated in the record.[20] Thus where the decree is that the property be sold for cash, a sale on time will be improper,[21] though not void as to the mortgagor,[22] or his privies, where such mortgagor has obtained the credit and benefit of the amount bid.[23]

Where by the terms of the sale the price bid was to be paid in cash, it has been held in a contest between bidders, where the sale took place on Saturday and the money was paid on the following Monday, that this was a substantial compliance with the terms of the sale.[24]

Where the terms of the sale are cash and the mortgagee

[19] An agreement between a mortgagee and a foreclosure purchaser, that he should bid off the property and hold it in trust to pay a certain creditor of the mortgagor, renders such sale inoperative as a foreclosure of the creditor's claim. *Whitney* v. *Leominster Sav. Bank,* 141 Mass. 85, 6 N. E. 551.

[20] *Nebraska Loan & T. Co.* v. *Hamer,* 40 Neb. 281, 58 N. W. 695.

Under South Carolina supreme Court rule 35, a decree of resale of mortgaged lands is not invalid, because it required one third of the bid to be deposited, thus tending to chill bidding. *Tyer* v. *Charleston Rice Milling Co.* 32 S. C. 598, mem. 10 S. E. 1067.

[21] A decree in foreclosure for a sale upon credit, barring redemption, is improper when the deed of trust provides for a cash sale with right of redemption in the mortgagor. *Clark* v. *Jones,* 93 Tenn. 639, 27 S. W. 1009, 42 Am. St. Rep. 931.

[22] *Durden* v. *Whetstone,* 92 Ala. 480, 9 So. 176.

A mortgagee cannot object that a prior mortgagee allowed the property on foreclosure to be bid in by heirs of the debtor without payment, where no fraud is shown. *Sanger* v. *Nightingale,* 122 U. S. 176, 30 L. ed. 1105, 7 Sup. Ct. Rep. 1109.

[23] Thus the supreme court of Alabama say in the case of *Jones* v. *Hagler,* 95 Ala. 529, 10 So. 345, that where the grantor in a trust deed has obtained the credit and benefit of the amount bid at the trustee's sale, neither he nor any other person who was not a benficiary can complain because the payment was not made in cash.

[24] *Jacobs* v. *Turpin,* 83 Ill. 424.

It is thought that an allowance by the attorney of the mortgagee,

becomes the purchaser at the sale, he cannot be required to pay at once in cash the whole or a part of his bid as earnest money.[25] It seems that the holder of the mortgage may comply with the terms of the sale where it is to be for cash, by simply indorsing the amount of his bid on the notes which he holds, and that the formality of paying the money to the officer making the sale, and of receiving it back from him, is unnecessary.[26]

But if any person other than the mortgagee becomes the purchaser, where the sale is to be for cash, he must comply strictly with the terms of sale, and pay the price bid in cash;[27] a note of the party entitled to the proceeds of the sale is not cash, and the tender of such note will not be a compliance with the terms of sale.[28] The officer may also refuse to receive checks.[29] And it has been held that where the mortgagor purchases at a sale under the mortgage, the fact that he is entitled to any surplus does not make his receipt receivable as a cash payment, although the amount of his bid exceeds the debt and costs by more than the amount of such payment.[30]

of a "short time" to the purchaser of land under a power in a mortgage providing for a cash sale, is to be regarded as a mere temporary arrangement to allow him to obtain the balance of the purchase price, and not as an agreement to treat the sale as completed on the basis of a part payment in cash and a credit for the balance, where there is no agreement to make a deed upon the part payment, or to postpone the payment of the balance for a definite period. *Atkins* v. *Tutwiler,* 98 Ala. 129, 11 So. 640.

[25] *Sage* v. *Central R. R. Co.* (Iowa) 13 West. Jurist, 218. *Lockwood* v. *Cook,* 58 Neb. 302, 78 N. W. 624. See *McLagan & Pierce* v. *Witte,* 1 Neb. (Unof.) 438, 96 N. W. 490.

[26] *Jacobs* v. *Turpin,* 83 Ill. 424. See also *Slack* v. *Cooper,* 219 Ill. 138, 76 N. E. 84.

[27] See *Holland Trust Co.* v. *Thomson-Houston Electric Co.* 9 App. Div. 473, 41 N. Y. Supp. 457. See also *Wheeler* v. *Dake,* 129 Mo. App. 547, 107 S. W. 1105; *Slack* v. *Cooper,* 219 Ill. 138, 76 N. E. 84.

[28] *Pursley* v. *Forth,* 82 Ill. 327; *Sage* v. *Central R. R. Co.* (Iowa) 13 West. Jurist, 218.

[29] *Bartlett Estate Co.* v. *Fairhaven Land Co.* 56 Wash. 437, 105 Pac. 848.

[30] *Fishburne* v. *Smith,* 34 S. C. 330, 13 S. E. 525.

§ 557. Same.—Where only part of debt due.—Where the whole of the mortgage debt is due the mortgagee is entitled to have it sold for cash; but where a portion only is due, it is thought the property should be sold for cash to meet the matured note or bond, and on terms or credit to correspond to the unmatured notes or bonds.[31] But it is said that the mortgaged property may be sold for cash to pay installments falling due after the commencement of a suit to foreclose it, in which the petition asks a sale for cash to pay a matured installment, and that credit be given for the balance of the price to meet the other installments.[32]

§ 558. Same.—Deductions from purchase price.—The supreme court of New York, in the case of Schell v. Elkins,[33] say that a purchaser of lands at foreclosure sale, the terms of which provide that accrued taxes shall be deducted from the purchase price, is entitled to a deduction of the taxes as they were at the date of the sale, although between the sale and the confirmation thereof a law was passed reducing the amount of accrued and delinquent taxes on lands. But a purchaser at a foreclosure sale made pursuant to a decree holding certain debts to be of a preferential character cannot be heard to complain of the allowance of one of such debts against the property, in those cases where the property was sold subject thereto.[34]

The general rule is that a sale under a trust deed should not be ordered before taking an account of liens on the land.[35] But in those cases where there is no cloud on the title, uncertainty as the debts secured or the amounts thereof, or a dispute as to priorities, it is not the duty of the trustee, in every

[31] *Penouilh* v. *Abraham*, 44 La. An. 188, 10 So. 676; *Ware, as trustee, etc.* v. *Hewett*, 63 W. Va. 47, 59 S. E. 756.

[32] *Penouilh* v. *Abraham*, 44 La. An. 188, 10 So. 676.

[33] 10 N. Y. Supp. 167, 31 N. Y. S. R. 197.

[34] *St. Louis S. W. R. Co.* v. *Stark*, 55 Fed. 758.

[35] *Alexander* v. *Howe*, 85 Va. 198, 7 S. E. 248; *Adkins* v. *Edwards*, 83 Va. 300, 2 S. E. 435.

case where there are liens on the trust subject, to invoke the aid of equity before making the sale *in pais*.[36] But where a deed of trust is executed, and there are a number of prior judgment liens on the land for the enforcement of which resort to equity is necessary, the court will fix the terms of sale according to the rules of equity, without regard to the terms fixed in the trust deed.[37]

§ 559. Same—Failure to complete purchase.—Where, by the terms of sale, the purchase money is to accompany the bid, or a deposit is to be made, and the bidder refuses to make such deposit or to pay the price bid when demanded, the referee may at once resume the sale.[38] It is said that under special circumstances the sale may be adjourned to another day and then resumed, if the deposit is not made or the price bid is not paid.[39] Should the day of sale be permitted to pass without an adjournment or the completion of the sale by the purchaser, the referee may re-advertise and resell the premises, as if no notice of sale had been published.[40]

A purchaser at a foreclosure sale for cash is not excused from completing his bid by the pendency, at the date of sale, of a suit by the mortgagor merely contesting certain items of indebtedness claimed to be secured by the mortgage, without denying the right to sell under the power therein, or that the sale was regular.[41] In those cases where the purchaser neglects to pay the balance of the purchase price until the mortgagee has elected to treat the contract of purchase as abandoned, and has transferred all his interests to another, the purchaser

[36] *Muller* v. *Stone*, 84 Va. 834, 10 Am. St. Rep. 889, 6 S. E. 223.

[37] *Barbour* v. *Tompkins*, 31 W. Va. 410, 7 S. E. 1.

[38] See *Lents* v. *Craig*, 13 How. (N. Y.) Pr. 72, 2 Abb. (N. Y.) Pr. 294; *Sherwood* v. *Reade*, 8 Paige Ch. (N. Y.) 633; *Wilson* v. *Thorn* 11 Ky. L. Rep. 945, 13 S. W. 365.

[39] Hoffman on Referees, 236.

[40] *Robinson* v. *Brennan*, 90 N. Y. 208; *Bicknell* v. *Byrnes*, 23 How. (N. Y.) Pr. 486.

[41] *Atkins* v. *Tutwiler*, 98 Ala. 129, 11 So. 640.

cannot, as against that other, redeem the premises from the mortgage and enforce his purchase.[42] And a purchaser who takes possession under a mortgage foreclosure sale of land without complying with his bid by paying the balance of the purchase price at the time agreed upon, is accountable for rents and profits, his possession being the same as that of a mortgagee before foreclosure.[43]

§ 560. Conditions of sale sometimes published.—It is sometimes the practice to annex to the notice of sale a statement of the conditions or terms of sale. This statement should specify fully the terms and conditions of the sale, the time of payment of the purchase money, what amount in cash is to accompany the bid, and when and where the deed is to be delivered. It should also state whether the sale is to be subject to taxes, assessments and water rents, for it is the well settled practice of the courts to have all taxes, assessments and water rents, which are liens on the premises sold, paid out of the purchase money by the officer making the sale, unless otherwise provided. The decree for the sale of the property, in some instances, directs that these liens be paid, but they are more frequently provided for by the terms of the sale.[44]

It has been held, that, since the purchaser of lease-hold

[42] *Atkins* v. *Tutwiler*, 98 Ala. 129, 11 So. 640.

[43] *Atkins* v. *Tutwiler*, 98 Ala. 129, 11 So. 640.

[44] See *Catlin* v. *Grissler*, 57 N. Y. 363; *Robinson* v. *Ryan*, 25 N. Y. 320; *Stillman* v. *Van Beuren*, 49 N. Y. Supr. Ct. (17 J. & S.) 86; N. Y. Code Civ. Proc. § 1676. It was said in the case of *Stuyvesant* v. *Browning*, 33 N. Y. Supr. Ct. Rep. (1 J. & S.) 203, 210, however, that "it is not usual to insert in the judgment a direction to pay taxes or assessments which may at the time of the sale be a lien upon the mortgaged premises. That is usually done by the referee, or officer who makes the sale. Yet, in an ordinary case of mortgage upon real property, it would not be deemed an essential error. But in this case, which is a mortgage upon lease-hold property, taxes and assessments should not be paid out of the purchase money. If the lessees have agreed to pay such liens, it is at most a mere personal covenant, and not included in their mortgage."

property at public sale takes it subject to being dispossessed for rents in arrears, it is necessary that the judgment of foreclosure on a mortgage of lease-hold property, or the terms of sale thereof, should provide for the payment of such rents, in order to obtain the full value of the property, and that the purchaser may acquire the title discharged of such liens.[45]

§ 561. Sale on credit.—Although a sale upon credit[46] might produce a greater price than a sale for cash, yet judicial sales, it seems, are not made on credit unless the consent of the parties interested, for if the court should direct that the sale be made on credit, and the mortgaged land should produce more than the amount of the mortgage debt, two new mortgages would follow, one to the complainant for whose benefit the land is being sold, and the other to the defendant, or to some one entitled to the surplus. Such a practice would, in effect, convert one mortgage into another or into several mortgages, and it might be injurious rather than beneficial to the defendant.[47]

It seems, however, that the plaintiff may direct the referee, or other officer making the sale, to sell the premises on credit. If no one objects, and the referee, thus authorized, sells the property on time, and such sale is confirmed by the court, the

[45] *Stillman* v. *VanBeuren*, 49 N. Y. Supr. Ct. (17 J. & S.) 86. See *Catlin* v. *Grissler*, 57 N. Y. 363; *Robinson* v. *Ryan*, 25 N. Y. 320.

[46] A purchaser at such a sale is not prejudiced by being required to execute a bond for the purchase price, although there were prior unsatisfied liens on the land, where the purchase money unpaid is sufficient to satisfy them, as he has the right to apply enough of the purchase money to satisfy the lien and obtain credit therefor. *Cornwall* v. *Falls City Bank*, 18 S. W. 452, 13 Ky. L. Rep. 606. On such a sale where the purchaser gives ample security to pay any balance that might be found due from him, a delivery of the deed upon the receipt of the amount of cash required by the judgment, and the balance of the purchase price in securities, as authorized by the judgment, is valid. *Farmers Loan & T. Co.* v. *Bankers & M. Teleg. Co.* 119 N. Y. 15, 28 N. Y. S. R. 613, 23 N. E. 173.

[47] *Sedgwick* v. *Fish, Hopk.* Ch. (N. Y.) 594.

purchaser will have a right to insist upon the terms on which the sale was made, and cannot be compelled to pay cash.[48] Should the defendant object to having the sale made on credit, the plaintiff, or the court on his application, may allow the sale to be made on credit to the extent of the amount due to him for principal and interest;[49] but beyond this amount, credit cannot be allowed to the purchaser.

It is said in Chaffraix v. Packard,[50] that "the principle upon which the right of a mortgage creditor to sell for cash rests, is that every part of the property is mortgaged for the whole of the principal debt, and in the distribution of the proceeds of the pledge the holders of the different installments of the same mortgage are entitled to participate." It has been held that where the mortgage provides for the sale of the property for cash, and the mortgagee makes an arrangement with the purchaser of the property to allow him time on the sum due on his mortgage, the mortgagor cannot complain of such an arrangement, whether made before or after the sale, inasmuch as he cannot, by any possibility, be injured by such arrangement; it therefore constitutes no ground for setting the sale aside. The tendency of such an arrangement would be to increase the number of bidders, and to enhance the price rather than to decrease it.[51] Yet, it seems that the property can be sold for cash to pay the notes which are due, and on credit to meet unmatured notes, according to the contract of the mortgage.[52]

It has been said that the court may order the premises to be sold on credit without violating the obligation of the mortgage contract.[53] And it was held by the supreme court of

[48] *Rhodes* v. *Dutcher,* 6 Hun 453, 455.

[49] *Sedgwick* v. *Fish,* Hopk. Ch. 594.

[50] 26 La. An. 173, 175.

[51] *Mahone* v. *Williams,* 39 Ala. 202, 215.

[52] *Pepper* v. *Dunlap,* 16 La. 163, 170, 171. See *Chaffraix* v. *Packard,* 26 La. An. 172, 174.

[53] *Stoney* v. *Shultz,* 1 Hill (S. C.) Eq. 465, 500, 27 Am. Dec. 429; *Lowndes* v. *Chisholm,* 2 McC. (S. C.) Eq. 455, 16 Am. Dec. 667. But

Tennessee, in the case of Mitchell v. McKinney,[54] where a trust deed provided that a trustee should sell the proprty for cash, that, on a bill to foreclose, the court might order a sale on time. But it was held by the supreme court of Virginia, in the case of Crenshaw v. Seigfried,[55] that where the mortgage provides that the property shall be sold for cash, the court must act according to the provisions of the mortgage, and cannot sell on time.

§ 562. **Whole property subject to sale.**—Mortgages are no longer regarded as conveyances of the land, but merely as securities for the payment of money, or the performance of contracts; they are our highest class of securities, and in some respects are more than a lien; they are formal pledges of the land. For this reason no part of the mortgaged land is exempt from sale in satisfaction of the mortgage by virtue of a statute exempting property to a certain value "from levy and sale on execution issued upon any judgment obtained upon contract." [56] And a statute exempting from forced sale a portion of the property of the decedent, for the benefit of his widow and children, has no force against a mortgage.[57]

In the case of Watson v. Blymer Manufacturing Company,[58] the lower court, in giving judgment against two mortgagors, the estate of one of whom was then in probate, ordered all property named in the mortgage to be sold. On appeal it was held that unless it appeared that the mortgage was a partnership transaction and covered partnership property, only the interest of the mortgagor living should have been ordered sold, and the judgment should have been certified to the county court for observance.

see *Wytheville Crystal Ice & Dairy Co.* v. *Frick Co.* 96 Va. 141, 30 S. E. 491.

[54] 6 Heisk. (Tenn.) 83.

[55] 24 Gratt. (Va.) 272.

[56] *Bryar's Appeal,* 111 Pa. St. 81, 2 Atl. 344; *Gangwere's Appeal,* 36 Pa. St. 466.

[57] *Bryar's Appeal,* 111 Pa. St. 81, 2 Atl. 344; *Nerpel's Appeal,* 91 Pa. St. 334.

[58] 66 Tex. 558, 2 S. W. 353.

§ 563. Certificate of sale—Form of.—In many of the states there are statutes requiring that the officer making the sale shall give to the purchaser at such sale a "certificate of sale." Such certificate, to be valid, must conform to the letter of the statute authorizing and directing it.[59] The certificate of sale conveys no title or right of possession to the purchaser, but becomes a lien on the premises.[60]

§ 564. Order staying sale.—In an action to foreclose a mortgage the court will do its utmost to secure a fair and advantageous sale of the mortgaged premises.[61] The unfortunate debtor is not beneath the protection of the court, and it will not permit the slightest advantage to be taken of him, even by pursuing the strict forms of the law.[62] Thus, in case of any calamity, such as hostile invasion, or an epidemic prevailing at the time and place of sale, the court will interfere and postpone the sale.[63] But the sale of mortgaged premises under a decree of foreclosure will not be postponed merely on account of a general depression in the business of the country,[64] nor on account of the existence of war, because the existence of war is a general calamity and is not sufficient to justify the interruption of the regular administration of justice by the courts in the collection of debts.[65]

[59] See *Nelson* v. *Central Land Co.* 35 Minn. 408, 29 N. W. 121. As to amendment of certificate, see *Bristol* v. *Hershey,* 7 Cal. App. 738, 95 Pac. 1040.

[60] *Vandevender* v. *Moore,* 146 Ind. 44, 44 N. E. 3; *Van Camp* v. *Weber,* 27 S. D. 276, 130 N. W. 591; *Rochester Loan & Banking Co.* v. *Morse,* 181 Ill. 64, 54 N. E. 628. See also *Bradley* v. *Lightcap,* 202 Ill. 154, 67 N. E. 45, reversed in 195 U. S. 24, 49 L. ed. 75, 24 Sup. Ct. Rep. 753.

[61] *Lansing* v. *Goelet,* 9 Cow. (N. Y.) 346, 402.

[62] *King* v. *Platt,* 37 N. Y. 155, 160, 35 How. (N. Y.) Pr. 23. See 1 Story Eq. Jur. 239.

[63] *Lansing* v. *Goelet,* 9 Cow. (N. Y.) 346, 402.

[64] *McGown* v. *Sanford,* 9 Paige Ch. (N. Y.) 290.

[65] *Astor* v. *Romayne,* 1 Johns. Ch. (N. Y.) 310. It would be otherwise, however, if an invasion of the immediate neighborhood where the property is situated was imminent. See *McGown* v. *Sanford,* 9 Paige Ch. (N. Y.) 290.

A judicial sale made in the day of the charter election of a city is not necessarily void; but if the plaintiff has been unnecessarily oppressive in his proceedings, the sale may be set aside.[66] Thus, where the sale is made against the defendant's remonstrance on a day of general election, or on a day most unfavorable to a large gathering of bidders, and under circumstances which give rise to the belief that free competition was obstructed, the sale ought not to stand. The court held in King v. Platt,[67] that "occupying the position of advantage, it behooved the plaintiffs to pursue their remedy with scrupulous care, lest they should inflict an injury on one who was comparatively powerless. A court of equity justly scrutinizes the conduct of a party, placed by the law in a position where he possesses the power to sacrifice the interests of another, in a manner which may defy detection, and stands ready to afford relief on very slight evidence of unfair dealing, whether it is made necessary by moral turpitude, or only by a mistaken estimate of others' rights."

Chancellor Walworth held in the early case of McGown v. Sandford,[68] that "it is the duty of the officer intrusted with the sale of property, under a judgment or decree for the payment of a debt, to put it up for sale at such a time and under such circumstances as to make it bring the best price, without injuring the party entitled to the proceeds of the sale by delaying the payment of his debt. And where a master, or other officer appointed to make the sale, in violation of his duty, is proceeding to sell property under a decree in chancery at an improper time, when such sale must necessarily sacrifice the property, as during the raging of a pestilence, or while there is a threatened invasion, which will destroy all chance of fair competition by deterring bidders from attending the sale, it will unquestionably be the duty as well as the

[66] *King* v. *Platt,* 37 N. Y. 155, 35 How. (N. Y.) Pr. 23. See *Kellogg* v. *Howell,* 62 Barb. (N. Y.) 280.

[67] 37 N. Y. 155, 160, 35 How. (N. Y.) Pr. 23.

[68] 9 Paige Ch. (N. Y.) 290, 291.

right of this court to interfere. But the court of chancery has no legal right to interfere for the relief of an individual by arbitrarily suspending the ordinary operation of the laws for the collection of debts to meet his particular case."

After a decree of sale has been entered a mortgage foreclosure may properly be stayed until further order, and the plaintiff be directed to convey the mortgaged lands and the suit to persons paying into court the sum due, at the instance of a lessee who was not made a party to the foreclosure.[69] But the defendant in foreclosure proceedings is not entitled to a stay of the execution unless request therefor is made within the time required by statute from the rendition of the decree.[70] It has been held that sixty days is not an unreasonably short time within which to require payments of the amount due as a condition of an injunction against sale under a trust deed.[71]

In an action to foreclose a mortgage, no order to stay the sale shall be granted or made by a judge out of court, except upon a notice of at least two days to the plaintiff's attorney.[72] Consequently, it has been held that an order to show cause, made by a judge out of court, and returnable in less than two days, is irregular, if it contains a stay of proceedings of sale under a judgment for foreclosure and sale.[73] It has been said that if a subsequent purchaser desires the prior mortgagee to act with reference to the order of alienation of the mortgaged premises, he should give notice of the facts to such mortgagee in proper time, and request him to sell accordingly. If he is not a party to the proceedings for foreclosure, and

[69] *Collins* v. *Cunningham,* 21 Can. 139.

[70] Under Nebraska Code Civil Procedure, § 477b, providing that the order of sale shall be stayed whenever the defendant shall, within twenty days after the rendition of the decree, file a written request for the same, provided that if he makes no such request within said twenty days the order of sale may issue immediately. *State ex rel. Harris* v. *Laflin,* 40 Neb. 441, 58 N. W. 936.

[71] *Joiner* v. *Enos,* 23 Ill. App. 224.

[72] N. Y. Supreme Court Rule 67.

[73] *Asinari* v. *Volkening,* 2 Abb. (N. Y.) N. C. 454.

is given no opportunity therein to present his equities, he may file a bill against the mortgagee, and the other subsequent purchasers, where there are any, staying the sale until their respective equities can be adjusted. But he cannot remain passive until the sale has been made and confirmed, and then assert his rights against the mortgagee upon an allegation of facts of which the latter had no knowledge.[74]

§ 565. Restraining sale.—On a proper showing a court of equity may restrain a sale under a mortgage foreclosure proceedings.[75] Thus it is said by the supreme court of Virginia, in the case of Morriss v. Virginia State Insurance Company,[76] that an injunction to restrain a sale under a trust deed for $12,000 of property worth $25,000, at a place without the county where the land is situated, should not be dissolved where the debtor claims that the appearance and situation of the property will increase the prospects of a good sale if it is in view of the bidders; and the debt is safely secured and it may not be necessary to sell the whole of the property. But in such cases the court should retain the cause and direct the sale to be made under its supervision, ordering a division into portions, and selling only so much as may be necessary to satisfy the debt.

The supreme court of Illinois, in the case of Hollingsworth v. Koon,[77] held by a divided court that upon a bill to restrain the sale of land embraced in two mortgages, until an account can be taken, the court, after ascertaining the total amount due, should apportion the amount so that lands embraced in the separate mortgages should bear their just proportion of the indebtedness, and direct a sale of the same, with the usual

[74] *Lausman* v. *Drahos*, 8 Neb. 457.

[75] See *Brunswick Savings & Trust Co.* v. *National Bank of Brunswick*, 102 Ga. 776, 29 S. E. 688; *Bradford* v. *Downs*, 24 App. Div. 97, 48 N. Y. Supp. 1051.

[76] 90 Va. 370, 18 S. E. 843.

[77] 117 Ill. 511, 6 N. E. 148; 8 Id. 193.

statutory redemption, and out of the proceeds order payment of the sums found due on each one.

§ 566. Application of proceeds of sale—Where there are two or more debts.—In those cases where suit is brought to foreclose both a mortgage upon certain real estate and a judgment lien, obtained under statute,[78] upon certain other real estate for the debt secured by the mortgage, no right exists to have the property held by the judgment lien chargd only with the excess of the debt over the appraised value of the mortgaged property.[79] But it said by the supreme court of Arkansas, in Greer v. Turner,[80] that where a debtor owes to the same creditor two distinct debts, one of which is secured by a mortgage of real estate, and the other by a mortgage upon a growing crop, the proceeds of the mortgaged crop that come to the creditor's hands must be applied to that debt which the crop mortgage was made to secure. No specific appropriation is required at the time such proceeds are received, in order to fix the rights of the parties. By the terms of the mortgage they have agreed in advance how the proceeds shall be disposed of; and neither party can, without the consent of the other, change the appropriation. It has been held that a mortgagor may purchase at a sale under his own mortgage; but that if he has given a subsequent mortgage upon the same property, his purchase will not defeat this, but will operate for the benefit of it, in the same way as a discharge or transfer of the same mortgage to himself would have done.[81]

[78] As Conn. Acts 1878, c. 58.

[79] *Gushee* v. *Union Knife Co.* 54 Conn. 101, 6 Atl. 192.

[80] 47 Ark. 17, 14 So. 383.

[81] *Plum* v. *Studebaker Bros. Mfg. Co.* 89 Mo. 162, 1 S. W. 217; *Holliger* v. *Bates*, 43 Ohio St. 437, 2 N. E. 841. See *Thompson* v. *Heywood*, 129 Mass. 401; *Otter* v. *Vaux*, 6 De G. M. & G. 638.

CHAPTER XXIII.

SALE OF MORTGAGED PREMISES IN PARCELS.

DISCRETION OF COURT—WHEN TO BE MADE—PART ONLY DUE—SALE FOR AN INSTALLMENT—STAYED ON PAYMENT—FUTURE DEFAULTS.

§ 567. Sale in parcels—Discretion of court.
§ 568. Same—Where different tracts are included.
§ 569. Same—Where property partly in another state.
§ 570. Sale in parcels under the New York Code.
§ 571. Determining how much of premises to be sold.
§ 572. Sale to be made so as to protect subsequent liens and equities.
§ 573. Sale in parcels—When matter of right.
§ 574. Selling in parcels when premises described in one piece.
§ 575. Mortgagee or mortgagor dictating order of sale.
§ 576. Discretion of officer as to selling in parcels.
§ 577. Sale of premises subdivided into lots after execution of mortgage.
§ 578. Sale of moiety—Land held by tenants in common.
§ 579. Sale in parcels when only part of mortgage due.
§ 580. Sale of portion of premises for part of debt due—Failure to pay subsequent installments.
§ 581. Petition for order of second sale—Reference thereon to compute amount due.
§ 582. Order for second sale.
§ 583. Where proceedings stayed by payment—Subsequent default.

§ 567. Sale in parcels—Discretion of court.—On the foreclosure of a mortgage the court is not bound to ascertain, whether it will be to the advantage of the defendants to have the mortgaged premises sold in separate lots.[82] But the premises may be sold in one piece or in parcels, as the court may think most likely to bring the highest price;[83] and on proof

[82] *Jones* v. *Gardner,* 57 Cal. 641.

[83] *Macomb* v. *Prentis,* 57 Mich. 225; *Kane* v. *Jonasen,* 55 Neb. 757, 76 N. W. 441; *Thomas* v. *Thomas,* 44 Mont. 102, 119 Pac. 283. See *Geuda Springs Town & Water Co.* v. *Lombard,* 57 Kan. 625, 47 Pac. 532.

Thus, in an action to foreclose a mortgage covering several adjoin-

that a sale in parcels will probably be injurious to the interests of the defendants, the court may decree the sale of the whole of the mortgaged premises in one parcel, though composed of separate and distinct tracts or lots.[84] In a case where the whole amount of the mortgage debt was not due, and the premises were ample security for the amount due, with costs, but the land could not be sold advantageously in parcels, and the whole mortgage debt would become due before there could be a sale under the judgment, the court held that the case should be treated as though the whole debt were due.[85]

Where the mortgaged property is in separate parcels, and the amount due upon the mortgage can be realized by a sale of one or more of the parcels, if it is necessary that the property shall all be sold together, in order to protect the rights of subsequent incumbrancers, the sale will be made in that

ing tracts of land, the court may provide in the judgment and decree of sale for a sale of the premises in one parcel. *Hopkins* v. *Wiard,* 72 Cal. 259, 13 Pac. 687. And where lots of land are so situated as naturally to constitute one farm, one of which is partly fenced and cultivated, while the other is not, they may be sold together in one parcel on foreclosure sale in those cases where it is not shown that they were not in fact used as one farm. *Harris* v. *Creveling,* 80 Mich. 249, 45 N. W. 85. In all cases where, in the sale of adjoining lots, it appears that the premises have been held as an entire property and under one ownership, and that to sever them would be destructive of the value of both, the court should order the lots sold together. *Pepper* v. *Shepherd,* 4 Mack. (D. C.) 269. And the United States circuit court for the northern district of Illinois, in the case of the *Central Trust Company* v. *United States Rolling Stock Company,* 56 Fed. 5, say that a decree foreclosing a mortgage properly provides for the sale of the real estate upon which the plant of a manufacturing company is located as an entirety, where to cut it up into parcels would probably produce a less price than if it is sold as a whole.

The supreme court of California, in the case of *Bank of Sonoma County* v. *Charles,* 86 Cal. 322, 24 Pac. 1019, say that a foreclosure decree following the provision of the mortgage, that the lands embraced therein be sold in one large parcel and in several other smaller parcels is not erroneous.

[84] *Firestone* v. *Klick,* 67 Ind. 309; *Elgutter* v. *Northwestern Mutual Life Ins. Co.* 86 Fed. 500, 30 C. C. A. 218.

[85] *Schreiber* v. *Carey,* 48 Wis. 208. See *post,* §§ 579, 580.

manner;[86] and where a sale of a part of the premises is made in accordance with the directions of the court, and it is afterwards made to appear that the interests of the parties require the sale of the whole property, the court may make a supplementary order for the sale of the remainder of the mortgaged premises.[87] And where the decree of sale directs that the whole of the premises be disposed of for the payment of installments due, it is within the discretion of the court afterwards, in regulating the execution of its decree, if the premises can be divided into parcels, to direct a sale of a part only.[88] It is not necessary to render separate decrees for each parcel, one decree of sale being sufficient.[89]

It has been held that a foreclosure sale of land by first offering for sale the rents and profits of each parcel, and, on receiving no bid, offering the fee simple of the separate parcels in their respective order, and, finally, by offering and selling the fee simple of the whole tract, is valid although the rents and profits of all the tracts together were not offered before the fee was offered.[90]

If the order to sell the premises as a whole, or in parcels, be erroneous, the party aggrieved may ask to have the order amended. This should be done by motion, as the defect cannot be taken advantage of by appeal.[91]

Where, in a decree for the sale of mortgaged premises, the court directs that the land shall be sold together, or in parcels, it is the duty of the sheriff or person making the sale to comply strictly with such order;[92] and the parties interested

[86] *Gregory* v. *Campbell,* 16 How. Pr. N. Y. 417.

[87] *Livingston* v. *Mildrum,* 19 N. Y. 440; *DeForest* v. *Farley,* 4 Hun (N. Y.) 640.

[88] *American Life & Fire Ins. & Trust Co.* v. *Ryerson,* 6 N. J. Eq. (2 Halst.) 9.

[89] *Nix* v. *Thackaberry,* 240 Ill. 352, 88 N. E. 811.

[90] *Carpenter* v. *Russell,* 129 Ind. 571, 29 N. E. 36. See *Nix* v. *Williams,* 110 Ind. 234, 11 N. E. 36.

[91] *Horner* v. *Corning,* 28 N. J. Eq. (1 Stew.) 254. See *County Bank of San Lois Obispo* v. *Goldtree,* 129 Cal. 160, 61 Pac. 785.

[92] In all cases where the order of the court is that the mortgaged property be sold in certain specified parcels, a sale by the sheriff as an entirety is invalid. *Meriwether* v.

cannot, by stipulation, provide for a different order, although one of the defendants might be greatly benefited by such change. It is to be presumed, in such a case, that the court made its order with a view to the rights of all parties,[93] and parties holding subsequent interests will have a right to insist upon a compliance with the order of sale as made by the court.[94]

§ 568. Same—Where different tracts are included.—It is held that in those cases where a mortgage embracing two tracts of land, the owner of only one of which is the real debtor, will, in the first instance, be foreclosed only as against the land belonging to the real debtor, and not against the surety, unless the real debtor's land proves insufficient to pay the debt and costs.[95] And where a surviving partner who, for a debt incurred for the benefit of the firm business, has given a mortgage, valid and superior to the claims of the estate, upon the firm property, and has also mortgaged his own property to secure the same debt, he is entitled, as against the estate, to have the mortgage debt satisfied from the mortgaged firm property before his individual property mortgaged at the same time.[96]

It is thought that in all those instances where an instrument constitutes in effect several separate and distinct mortgages upon several lots, given to secure several separate and distinct sums of money, but for convenience all are consoli-

Craig, 118 Ind. 301, 20 N. E. 769, and is ground for setting aside the sale on proper application. Sale of mortgaged premises *en masse* does not render the sale void; at most, it is but ground for setting it aside upon proper application. *Bozartle* v. *Largent,* 128 Ill. 95, 21 N. E. 218.

[93] *Babcock* v. *Perry,* 8 Wis. 277. See also *Omaha Loan & Trust Co.* v. *Lynch,* 2 Neb. (Unof.) 798, 90 N. W. 217.

[94] *Farmers' & Millers' Bank of Milwaukee* v. *Luther,* 14 Wis. 96.

[95] *Speakman* v. *Oaks,* 97 Ala. 503. 11 So. 836; *Bechtol* v. *Wier,* 152 Cal. 443, 15 L.R.A.(N.S.) 549, 93 Pac. 75. See *Blackwell* v. *British American Mortgage Co.* 65 S. C. 105, 43 S. E. 395. See *post,* § 601.

[96] *Bell* v. *Hopworth,* 134 N. Y. 442, 31 N. E. 918, 47 N. Y. S. R. 807.

dated in one writing, a sale in foreclosure by advertisement of all the lots together as one tract, for a gross sum, is unauthorized and void.[97]

The supreme court of the United States have said that a plantation, and the personal property belonging thereto, may be sold in a lump under a mortgage including both;[98] and the sale may be at the seat of justice, unless the debtor seasonably requires the sale to be on the plantation.[99]

§ 569. Same—Where property partly in another State.—The supreme court of New York, in the case of the Farmers Loan and Trust Company v. Bankers and Merchants Telegraph Company,[1] hold that where in the decree foreclosing a mortgage upon property situated both within and without the State, it is found that the property should in no case be sold or disposed of except as an entirety, the court should not direct a separate sale of the property situated within the State, it not appearing that it was impossible for the mortgagee to enforce his rights by a method not entailing such great disaster as would result from such sale in separate parcels.

§ 570. Sale in parcels under the New York Code.—The New York Code of civil Procedure[2] provides that "where a mortgage debt is not all due, and the mortgaged property is so circumstanced that it can be sold in parcels without injury to the interests of the parties, the final judgment must direct that no more of the property be sold, in the first place, than is

[97] *Hull* v. *King*, 38 Minn. 349, 37 N. W. 792. See also *Strode* v. *Miller*, 7 Idaho, 16, 59 Pac. 893.

[98] See also *McKenzie* v. *Bismark Water Co.* 6 N. D. 361, 71 N. W. 608.

[99] *Stockmeyer* v. *Tobin*, 139 U. S. 176, 35 L. ed. 123, 11 Sup. Ct. Rep. 504.

As to sale of mortgaged premises at seat of justice, or the door of the court house, see *ante*, § 555.

[1] 44 Hun (N. Y.) 406.

[2] N. Y. Code Civ. Proc. §§ 1636, 1637.

sufficient to satisfy the sum then due, with the costs of the action and the expenses of the sale; and that upon a subsequent default in the payment of principal or interest, the plaintiff may apply for an order directing the sale of the residue, or of so much thereof as is necessary to satisfy the amount then due, with the costs of the application and the expenses of the sale. The plaintiff may apply for and obtain such an order as often as a default happens."

But where "it appears that the mortgaged property is so circumstanced, that a sale of the whole thereof will be most beneficial to the parties, the final judgment must direct that the whole property be sold; that the proceeds of the sale, after deducting the costs of the action and the expenses of the sale, be either applied to the satisfaction of the whole sum secured by the mortgage, with such a rebate of interest as justice requires, or be first applied to the payment of the sum due, and the balance, or so much thereof as is necessary, be invested at interest for the benefit of the plaintiff, to be paid to him from time to time, as any part of the principal or interest becomes due." Section 1678 of the New York Code of Civil Procedure, regulating sales upon foreclosure, prescribes only a rule of proceeding to render the judgment of foreclosure available; and therefrom the amendment of 1881,[3] allowing two or more buildings situated on the same city lot to be sold together, is effectual pursuant to its provisions to render valid sales previously made, which would be lawful according to its terms.[4]

These provisions of the Code of Civil Procedure simply declare the rules and formulate the principles by which courts of equity, without statutory provisions, are necessarily governed in foreclosure suits;[5] the statute merely establishes by

[3] Laws of 1881, chap. 682.

[4] *Wallace* v. *Feely*, 10 Daly (N. Y.) 331.

[5] *Cunningham* v. *Cassidy*, 17 N. Y.) 276, 7 Abb. (N. Y.) Pr. 183. See *Livingston* v. *Mildrum*, 19 N. Y. 440, 443; *Campbell* v. *Macomb*, 4 Johns. Ch. (N. Y.) 534; *Magruder* v. *Eggleston*, 41 Miss. 284; *American Life & Fire Ins. & Trust*

legislative enactment the rules which already prevailed in such cases.[6]

It has been held, however, that the provisions of the statute regarding sales in parcels are merely directory,[7] and that a sale made in disregard of such provisions is not void, but only voidable, if an application is made for relief within a reasonable time by the party aggrieved. But such party may waive the irregularity of the sale by express ratification, or by neglecting to take exceptions to it within a reasonable time.[8]

It was held by the court in Wallace v. Feely,[9] that "The question is whether this provision is directory merely, as the provision in the former statute regulating judicial sales was held to be.[10] That statute enacted that if the premises consist of distinct buildings, they shall be sold separately. The reason of the codifiers for substituting 'must' for 'shall' is not apparent; they give no explanation in their note of the section. The substituted word is more imperative than that which it replaces. As verbal alterations occur frequently in the new Code without apparent reason, the change in question loses much of its significance. The reasons for holding the former enactment to be directory merely are applicable in

Co. v. *Ryerson,* 6 N. J. Eq. (2 Halst.) 9; *Wilmer* v. *Atlanta & R. A. L. R. Co.* 2 Wood C. C. 447.

[6] *Cunningham* v. *Cassidy,* 17 N. Y. 276. See *Campbell* v. *Macomb,* 4 Johns. Ch. (N. Y.) 534; *Lyman* v. *Sale,* 2 Johns. Ch. (N. Y.) 487; *Brinckerhoff* v. *Thallhimer,* 2 Johns. Ch. (N. Y.) 486. See *post,* § 574.

[7] *Thomas* v. *Thomas,* 44 Mont. 102, 119 Pac. 283. See *Bartlett Estate Co.* v. *Fairhaven Land Co.* 56 Wash. 437, 105 Pac. 848.

[8] *Cunningham* v. *Cassidy,* 17 N. Y. 276. See *Sherman* v. *Willett,* 42 N. Y. 146; *Ellsworth* v. *Lockwood,* 42 N. Y. 89; *Husted* v. *Dakin* 17 Abb. (N. Y.) Pr. 137; *Griswold* v. *Fowler,* 4 Abb. (N. Y.)Pr. 238; *Merchants' Ins. Co.* v. *Hinman,* 3 Abb. (N. Y.) Pr. 455; *Wells* v. *Wells,* 47 Barb. N. Y. 416; *Lamerson* v. *Marvin,* 8 Barb. (N. Y.) 9, *Wolcott* v. *Schenck,* 23 How. (N. Y.) Pr. 385; *Ames* v. *Lockwood,* 13 How. (N. Y.) Pr. 555; *Woods* v. *Monell,* 1 Johns. Ch. (N. Y.) 503; *American Ins. Co.* v. *Oakley,* 9 Paige Ch. (N. Y.) 259, 38 Am. Dec. 561.

[9] 1 N. Y. Civ. Proc. Rep. 126.

[10] *Cunningham* v. *Cassidy,* 17 N. Y. 276.

every respect to the new. No different construction could be adopted without doing, in certain cases, a great injury."

§ 571. Determining how much of premises to be sold.—On an order of reference in a mortgage foreclosure, the first duty of the referee, aside from computing the amount due on the mortgage, is to ascertain whether the mortgaged premises are so circumstanced that they can be sold in parcels without injury to the interests of the parties. Sales may be directed in such manner and quantity as in the discretion of the court will secure the highest price.[11] A sale of the whole premises in one parcel can be most beneficial to the parties only when the mortgagee will receive, and the mortgagor will be able to pay, from the proceeds thereof, the largest amount of the mortgage debt, or when the sale will leave the largest surplus after the payment of the whole debt.[12] The

[11] *Macomb* v. *Prentis,* 57 Mich. 225, 23 N. W. 788.

But it is well settled that a decree on foreclosure of a mortgage cannot deprive the mortgagee of the right to the sale of the whole premises. *Baker* v. *Marsh,* 1 N. D. 20, 44 N. W. 662.

[12] A sale of the entire property is proper in the case of deeds of trust, where all the incumbrances are due, and where the plaintiff has a first lien on some of the property sought to be sold and a second lien on the other property, and where all the incumbrancers are parties to the suit. *Shepherd* v. *Pepper,* 133 U. S. 626, 33 L. ed. 706, 10 Sup. Ct. Rep. 438. And on the application of a junior incumbrancer a court of equity will provide for the sale of the entire incumbered property, if the circumstances of the case show that the interests of the mortgagor and of the incumbrancers require the sale. *Shepherd* v. *Pepper,* 133 U. S. 626, 33 L. ed. 706, 10 Sup. Ct. Rep. 438.

A statutory prohibition (as N. Y. Code Civ. Proc. § 2393), against selling more lots than are necessary, is absolute in a proceeding to foreclose a mortgage by advertisement. *Hemmer* v. *Hustice,* 51 Hun (N. Y.) 457, 21 N. Y. S. R. 231.

It has been held that on the foreclosure of a mortgage, subject to which is a right of way over a ten-foot strip of the land, title to which was acquired on the foreclosure of a second mortgage, the title to the rest of the lot, subject to the mortgage, having been acquired by another person on the foreclosure of a still later mortgage, which did not cover the ten-foot strip, it is proper to order the part of the land other than the ten-foot strip to be first sold. *Case* v. *Mannis,* 33 N. Y. S. R. 44, 11 N. Y. Supp, 243, 19 Civ.

benefits intended by the statute should be common to both parties.

But the report of the referee, in regard to the manner of sale, is only a part of the evidence before the court, upon which it should decide whether it will or will not be most beneficial to the parties to decree a sale of the whole premises in one parcel in the first instance. The court may look to the pleadings [13] and receive other evidence in its discretion; [14] it may also consider the stipulations, offers or admissions of any of the parties on the hearing.[15] In determining whether the premises shall be sold together or in parcels, the court should take into consideration the interests of the parties having equities subject to the mortgage, and direct the sale to be made in such a manner that the rights of no party interested will be prejudiced by the order of the sale.[16]

§ 572. Sale to be made so as to protect subsequent liens and equities.—A mortgage foreclosure sale is not for the benefit of the complainant alone, but for the benefit of all the parties who are before the court; and where the complainant in such a suit makes a junior mortgagee of the premises a party, the court may make a decree directing the sale of so much of the mortgaged premises as will be sufficient to satisfy the amount due on such junior mortgage and on intermediate

Proc. Rep. 296, aff'd in 123 N. Y. 661, mem.

Where the answer in a foreclosure suit puts in issue the validity of the mortgage as exectued by the husband alone, and sets up the defense that the property is exempt as a homestead, a decree will not be granted for the sale of so much of the property as exceeds in value the amount exempted by statute, unless the value thereof is alleged by plaintiff, or put in issue by proper pleadings. *Whitlock* v. *Gosson,* 35 Neb. 829, 53 N. W. 980.

[13] *Burge* v. *Chestnut,* 121 S. W. 989 (Ky.)

[14] *Jones* v. *Louisville Savings, Loan & Building Co.* 58 S. W. 534.

[15] *Gregory* v. *Campbell,* 16 How. (N. Y.) Pr. 417.

[16] *Livingston* v. *Mildrum,* 19 N. Y. 440. See *DeForest* v. *Farley,* 62 N. Y. 628; *Malcolm* v. *Allen,* 49 N. Y. 448; *Beekman* v. *Gibbs,* 8 Paige Ch. (N. Y.) 511; *Blazey* v. *Delius,* 74 Ill. 299.

incumbrances, in addition to the amount due on the complainant's mortgage, besides the costs of the action. But it is said that before such junior mortgage can be paid, the report of the referee, or other officer making the sale, must be filed and the surplus moneys brought into court, so that interested persons, who have not been made parties to the suit, may have an opportunity to file their claims to such surplus money.[17]

It is the duty of the court in decreeing a foreclosure of the mortgaged premises, to provide that only so much thereof shall be sold, and in such a manner, as that the parties having equities subject to the primary lien will not be prejudiced thereby. This power may be exercised as long as the subject matter and the parties remain under the jurisdiction of the court.[18] But where the court has failed in a decree of foreclosure to protect the equitable rights of the parties before it, it may supply the defect independently of the statute by a supplementary order;[19] and this may be done even after a portion of the premises sufficient to satisfy the primary lien has been sold.[20] A judgment creditor, pending his appeal from an order setting aside the judgment, cannot, however, maintain a suit, in equity to compel the mortgagee to sell that portion of the mortgaged property to which he cannot resort, before proceeding to sell the remainder.[21]

§ 573. Sale in parcels—When matter of right.—In a mortgage foreclosure the plaintiff is entitled to the sale of a sufficient amount of land to pay his claim and the costs of the suit, and no more;[22] and the sale should be made by

[17] *Beekman* v. *Gibbs*, 8 Paige Ch. (N. Y.) 511.

[18] *Livingston* v. *Mildrum*, 19 N. Y. 440. See *DeForest* v. *Farley*, 62 N. Y. 628; *Malcolm* v. *Allen*, 49 N. Y. 448.

[19] *Malcolm* v. *Allen*, 49 N. Y. 448; *Livingston* v. *Mildrum*, 19 N. Y. 440.

[20] *Livingston* v. *Mildrum*, 19 N. Y. 440.

[21] *Burgess* v. *Hitt*, 21 Mo. App. 313.

[22] *Ellsworth* v. *Lockwood*, 42 N. Y. 89; *Hewson* v. *Deygert*, 8 Johns. (N. Y.) 333; *Tiernan* v. *Wilson*, 6 Johns. Ch. (N. Y.) 411; *Jenks* v. *Alexander*, 11 Paige Ch. (N. Y.)

the officer conducting it in such a manner as to pay the just demands of the plaintiff without inflicting unnecessary loss upon the debtor, or interfering with the rights and interests of subsequent incumbrancers.[23]

It is a well settled principle of law, irrespective of any statute, that where a tract of mortgaged land has been laid out in parcels for separate and distinct enjoyment, it should be sold in parcels on a decree of foreclosure.[24] This general rule is said to rest upon the reasonable presumption, sanctioned alike by observation and experience, that such property will realize more when sold in parcels than in one piece, because of the fact that such sale will better correspond to the probable wants of the purchasers.[25]

Aside from statutory regulations [26] touching the matter, it is the primary duty of the officer making the sale to adopt such a mode of sale as will probably realize the largest amount, and to exercise his best judgment in determining how that end can be best accomplished; a sale in a different manner

619; *Mohawk Bank* v. *Atwater,* 2 Paige Ch. (N. Y.) 61; *O'Donnell* v. *Lindsay,* 39 N. Y. Supr. Ct. (7 J. & S.) 523, 530; *Thomas* v. *Fewster,* 95 Md. 446, 52 Atl. 750; *Buckley's Assignee* v. *Stevenson,* 30 Ky. Law Rep. 952, 99 S. W. 961; *Quigley* v. *Beam's Administrator,* 137 Ky. 325, 125 S. W. 727.

[23] *Woodhull* v. *Osborne,* 2 Edw. Ch. (N. Y.) 614. See *Miller* v. *Trudgeon,* 16 Okl. 337, 86 Pac. 523.

[24] *Wolcott* v. *Schenck,* 23 How. (N. Y.) Pr. 385; *Hewson* v. *Deygert,* 8 Johns. (N. Y.) 333; *Wood* v. *Monell,* 1 Johns. Ch. (N. Y.) 502; *Mahone* v. *Williams,* 39 Ala. 202; *Rowley* v. *Brown,* 1 Binn. (Pa.) 61; *Stead's Exrs.* v. *Course,* 8 U. S. (4 Cr.) 403, 2 L. ed. 660. See *McIntyre* v. *Wyckoff,* 119 Mich. 557, 78 N. W. 654.

[25] It has been held that if there is no division of the tract into parcels, adapted for separate and distinct enjoyment, it is generally reasonable that the defendant should show to the referee, or other officer selling, by a map or diagram, or in some other intelligible manner, the distinct parcels into which the land might be profitably divided for sale. See *Woodhull* v. *Osborne,* 2 Edw. Ch. (N. Y.) 614; *Wood* v. *Monell,* 1 Johns. Ch. (N. Y.) 502.

[26] *Under Califronia Code of Civil Procedure,* § *684,* the defendants in a mortgage foreclosure may require separate lots or parcels to be sold separately, and specify the order of sale. *Ontario Land & Imp. Co.* v. *Bedford,* 90 Cal. 181, 27 Pac. 39.

Illinois Revised Statutes, c. 77, § *12,* requiring that when real or

may be a sufficient reason for avoiding the sale, if the price received is disproportionate to the actual value of the premises.[27]

personal property susceptible of division is taken in execution it shall be sold in separate tracts, lots, or articles, does not apply to mortgage foreclosures. *Dates* v. *Winstanley,* 53 Ill. App. 623.

Under Howell's Michigan Statutes, § 5803, where the mortgagee has, by releasing a part of the mortgaged premises, severed the remainder into separate and distinct parcels, the parcels must be sold separately. *Keyes* v. *Sherwood,* 71 Mich. 516, 39 N. W. 740.

Under Washington Code of Procedure, §§ 501 and 630, which provide for enforcing the decree by execution, and, as to sales under execution, that a portion claimed by a third person may be sold separately, a sale in parcels may be demanded on foreclosure, by a defendant who has purchased a portion of the premises subject to the mortgage. *Solicitors' Loan & T. Co.* v. *Washington & I. R. Co.* 11 Wash. 684, 40 Pac. 344.

Under West Virginia Code, 1873, c. 113, § 6, providing that when default shall have been made in payment of the debt or any part thereof, the trustee shall sell the property conveyed by the deed, or so much thereof as may be necessary, a tract of land worth $25,000, subject to a trust deed for $12,000, should be subdivided and sold in parcels, so that no more may be sold than is necessary to pay the debt, where it is capable of subdivision, although the deed simply directs the trustee to sell the property conveyed. *Morriss* v. *Virginia* State Ins. 90 Va. 370, 7 S. E. 843.

The franchise and property of a water supply company will be sold with the plant, where the sale of the latter becomes necessary under a mortgage on the ground that public necessity requires the two to be sold together, notwithstanding an agreement that the machinery shall not be a fixture. *McNeal, Pipe & F. Co.* v. *Woltman,* 114 N. C. 178, 19 S. E. 109.

[27] *Mahone* v. *Williams,* 39 Ala. 202; *Gray* v. *Shaw,* 14 Mo. 341; *Stull* v. *Macalester,* 9 Ohio, 19, 24; *Ord* v. *Noel,* 5 Madd. 438.

But, "a mere error of judgment in the selection of a mode of sale, whereby some injury may probably have resulted, ought not to be any ground for the avoidance of a sale. If it were, all certainty and stability would be stripped from such sales, and their validity would depend upon mere vague speculation. The rule which we have deduced from Chancellor Kent's opinion [see *Wood* v. *Monell,* 1 Johns. Ch. (N. Y.) 502; *Woodhull* v. *Osborne,* 2 Edw. Ch. (N. Y.) 614], is a general one, adopted because it will lead, usually, to a correct solution of the question whether a sale should be by parcels, and is designed to aid in determining whether a sale should be avoided, because it was not made in that manner." *Mahone* v. *Williams,* 39 Ala. 202, 218. On discretion of officer making sale, see *ante,* § 542.

A sale of several lots or tracts in one parcel, where the decree does not direct that they be so sold, will be set aside where it is shown that the lots would have produced more had they been sold separately.[28] The general rule, however, is that such sales are not void, but merely voidable.[29] Yet it is said in the case of Skaggs v. Kincaid [30] that a decree of foreclosure of a mortgage on several tracts of land, the equities of redemption of which are owned by different persons, is materially defective where it requires the premises to be sold *en masse,* notwithstanding a clause in the trust deed authorizing the trustee in his discretion to sell in such manner, where the owners of the equity of redemption of some of the tracts have died so that the sale cannot be made under the Illinois statute [31] by virtue of the power of sale in such trust deed. The supreme court of Illinois, in the case of Brown v. McKay,[32] say that an indebtedness secured by a trust deed will not be so apportioned upon foreclosure thereof that an equitable part of it will fall upon an undivided one fifth of

[28] See *Larkin* v. *Brouty,* 15 N. Y. Supp. 599, 39 N. Y. S. R. 879.

Under Minnesota Statute a sale under a power contained in a mortgage of twenty-five lots, each for a separate sum, of five of such lots, upon a notice stating the amount due on the debt and for taxes paid in gross, instead of the separate sum due on each lot, though each lot is sold separately for the exact sum due upon it,—is unauthorized and invalid, but is cured by Minnesota General Laws, 1883, c. 112, § 1, relieving from such defects. *Bitzer* v. *Campbell,* 47 Minn. 221, 49 N. W. 691.

Under Hill's Washington Code, Vol. II, p. 501, providing that lots may be sold separately or together as is likely to bring the highest price, a sale of lands consisting of a number of city lots, under a judgment of foreclosure, will not be set aside because the lots were not sold separately, in the absence of a showing that a larger sum would have been realized if the lots had been so sold. *Feek* v. *Brewer,* 11 Wash. 264, 39 Pac. 655; *O'Connor* v. *Keenan,* 132 Mich. 646, 94 N. W. 186. See *Thomas* v. *Fewster,* 95 Md. 446, 52 Atl. 750.

[29] *Highland Land & Building Co.* v. *Audas,* 33 Ky. Law. Rep. 214, 110 S. W. 325. See *Ryder* v. *Hulett,* 44 Minn. 353, 46 N. W. 559; *Guarantee Trust & S. D. Co.* v. *Jenkins,* 40 N. J. Eq. 451, 2 Atl. 13.

[30] 48 Ill. App. 608.

[31] Ill. Rev. Stat. c. 95, § 13.

[32] 151 Ill. 315, 37 N. E. 1037, aff'g 51 Ill. App. 295.

the land subsequently alienated, the purchaser taking subject to the trust deed and agreeing to pay a *pro rata* share of the incumbrance, where it does not appear that the undivided four-fifths, if sold separately, would bring sufficient to satisfy the four-fifths of the indebtedness and costs remaining after the payment of one-fifth by the purchaser thereof, or that it would bring as much proportionately when thus sold as it would if the parcels were sold together.

It has been held that a second mortgagee, who has released the timber on the land from the lien of the mortgage, and subsequently taken an assignment of a judgment on the first mortgage, will not be permitted to sell the land and the timber under such judgment; but a sale of the timber will be ordered only in case the proceeds of the land are insufficient to satisfy the first mortgage.[33] And a person having a lien on one of several parcels of mortgaged land conveyed by the mortgagor cannot require that a parcel prior in order of alienation be first sold under the mortgage, upon offering to pay the whole amount of the mortgage debt for that parcel alone.[34]

An inchoate right of dower entitles the wife to have the land sold under a mortgage in separate parcels, instead of by the entirety, where that is necessary to protect her interests; and such right is not affected, although rendered less valuable, by the fact that she is an old woman.[35] And it has been held that a woman who has received from her husband a conveyance of a part of his land, which is all subject to a mortgage, is not prevented from insisting on the right to have the other part sold on the mortgage by the fact that she has subsequently united with her husband in another mortgage of that part.[36]

[33] *Pratt* v. *Waterhouse*, 158 Pa. St. 45, 27 Atl. 855; 24 Pitts. L. J. N. S. 169.

[34] *Crosby* v. *Farmers Bank*, 107 Mo. 436, 17 S. W. 1004.

[35] *Crosby* v. *Farmers' Bank*, 107 Mo. 436, 17 S. W. 1004.

[36] *Case Threshing Machine Co.* v. *Mitchell*, 74 Mich. 689, 42 N. W. 151. See also *Smith* v. *Sparks*, 162 Ind. 270, 70 N. E. 253.

§ 574. Selling in parcels when premises described in one piece.—And the rule as to selling in parcels is the same, whether the land is described in the mortgage in parcels or as one piece.[37] It seems, however, that if the premises are described in the mortgage as one tract, the referee, or officer making the sale, is not bound to sell them in parcels;[38] but where the premises are so situated, that he can sell in parcels without injury to the interests of any of the parties, he may properly do so.[39] And it has been held, where mortgaged premises consist of two or more parcels of land which have previously been held, used and conveyed together, that a sale of the whole in one parcel will be valid.[40]

The provisions of the New York Code regulating this matter are simply declaratory of the law on the subject,

[37] *Ellsworth* v. *Lockwood,* 42 N. Y. 89. See *Hewson* v. *Deygert,* 8 Johns. (N. Y.) 333; *Tiernan* v. *Wilson,* 6 Johns. Ch. (N. Y.) 411; *Jencks* v. *Alexander,* 11 Paige Ch. (N. Y.) 619; *Mohawk Bank* v. *Atwater,* 2 Paige Ch. (N. Y.) 54, 61.

[38] *Sherman* v. *Willett,* 42 N. Y. 146, 150; *Griswold* v. *Fowler,* 24 Barb. (N. Y.) 135, 4 Abb. (N. Y.) Pr. 238; *Lamerson* v. *Marvin,* 8 Barb. (N. Y.) 9.

[39] *Sherman* v. *Willett,* 42 N. Y. 146, 150.

[40] *Anderson* v. *Austin,* 34 Barb. (N. Y.) 319. See *Greenwell* v. *Moffett,* 77 Kan. 41, 93 Pac. 609; *Butters* v. *Butters,* 153 Mich. 153, 117 N. W. 203; *Thompson* v. *Browne,* 10 S. D. 344, 73 N. W. 194.

Where mortgaged property consists of one block of land with a building adapted to one purpose it is, properly sold as a whole under the foreclosure of the mortgage, although at a prior time the property had been split up in separate parcels, having upon it separate buildings. *Coudert* v. *De Logerot,* 62 N. Y. S. R. 26, 30 N. Y. Supp. 114.

In the case of *Abbott* v. *Peck,* 35 Minn. 499, 29 N. W. 194, after a mortgage of land by government description, the mortgagor platted it into lots and blocks, the mortgagee joining in the plat; and afterwards the mortgagee foreclosed and sold the land in separate blocks. The court held he was not required to sell in lots or half-lots. It is said by the supreme court of Michigan, in *Gage* v. *Sanborn,* 106 Mich 269, 64 N. W. 32, that a sale of land in one parcel under a mortgage foreclosure by advertisement is not invalid on the ground that different parcels were sold together, where the mortgage describes the premises as "lots 3 and 10 and the north half of lots 2 and 11," as it does not appear therefrom that all the land was not used as one parcel.

as the same was enforced by the courts of chancery before the enactment of the statute.[41] The object of the statute, as well as of the chancery rule, is to insure from the sale of the property the largest possible sum of money; and a sale in parcels is generally best for the interests of all parties concerned, because it tends to accommodate the wants of the bidders and to promote competition.[42]

The practice of selling several distinct parcels of land as one piece and of offering an entire tract at one time, when a portion of it would be sufficient to satisfy the judgment without detriment to the interests of any of the parties to the suit, has been uniformly condemned by the courts as tending to the sacrifice of the property and to the oppression of the debtor.[43]

§ 575. Mortgagee or mortgagor dictating order of sale.—In determining the order of sale the question always is, what method of sale will produce the best result. In deciding this much necessarily depends upon the circumstances of each particular case. The plaintiff has a right to have his lien protected in the fullest manner possible; and if the property is of doubtful value, and he acts in good faith and no party in interest is willing to furnish him additional security, he may properly be allowed to designate the manner in which the sale shall be made.[44] But where the land is ample security, the desires and preferences of the owner of the equity of redemption will be entitled to the fullest consideration from the referee or officer making the sale.[45]

[41] *Campbell* v. *Macomb,* 4 Johns. Ch. (N. Y.) 534; *Lyman* v. *Sale,* 2 Johns. Ch. (N. Y.) 487; *Brinckerhoff* v. *Thallhimer,* 2 Johns. Ch. (N. Y.) 486. See *ante,* § 570.

[42] See *Wood* v. *Monell,* 1 Johns. Ch. (N. Y.) 502.

[43] *Griffith* v. *Hadley,* 10 Bosw. (N. Y.) 587. See *Cunningham* v. *Cassidy,* 17 N. Y. 276, 7 Abb. (N. Y.) Pr. 183; *Jackson* v. *Newton,* 18 Johns. (N. Y.) 355, 362; *Tierman* v. *Wilson,* 6 Johns. Ch. (N. Y.) 411, 414; *Wood* v. *Monell,* 1 Johns. Ch. (N. Y.) 502.

[44] *Griswold* v. *Fowler,* 24 Barb. (N. Y.) 135; *Brown* v. *Frost,* Hoff. Ch. (N. Y.) 41, 43.

[45] *Walworth* v. *Farmers' Loan & Trust Co.* 4 Sandf. Ch. (N. Y.) 51.

In King v. Platt,[46] the decree of foreclosure directed the sale of certain lots in New York city; the defendant mortgagor presented a written request to the referee to have the corner lot, which was the most valuable, sold first; the referee disregarded this request and directed the sale to proceed in a different manner. It appearing that the request was made in good faith and in the belief that it would increase the amount realized from the sale of the property, and no satisfactory reason for denying the request being shown by the referee, the sale was set aside and a resale ordered.

The mortgagee can only demand that the usual terms of sale as to the time of the payment of the purchase money, or so much thereof as is necessary to discharge his debt and the costs of suit, be not departed from without special reasons.[47]

And it has been held, where a party directly interested in the price which the property to be sold should bring, makes a reasonable request as to the order in which the parcels shall be sold, with a view of enhancing the price for which the property may sell, and the request is disregarded without an apparently good cause, that the court will be justified in setting the proceedings aside and in ordering a new sale;[48] and in a case where the mortgaged premises, which were clearly worth more than the mortgage debt and the costs of the suit, had been laid out into city lots, the decree of foreclosure and sale allowed the owners of the equity of redemption to direct the order in which the lots should be sold.[49]

§ 576. Discretion of officer as to selling in parcels.— The provisions of the Nebraska Code leave the ques-

See *Ellsworth* v. *Lockwood,* 42 N. Y. 89.

[46] 37 N. Y. 155, 3 Abb. (N. Y.) Pr. N. S. 434, 35 How. (N. Y.) Pr. 23.

[47] *Brown* v. *Frost,* Hoff, Ch. (N. Y.) 41; *Vandercook* v. *Cohoe's Savings Institute,* 5 Hun (N. Y.) 641.

[48] *King* v. *Platt,* 37 N. Y. 155. See *post,* § 537.

[49] *Walworth* v. *Farmers' Loan & Trust Co.* 4 Sandf. Ch. 51.

tion as to whether the mortgaged premises shall be sold as a whole, or in parcels, in the discretion of the officer making such sale, in case the court does not, in the decree, direct the manner in which the sale shall be made.[50] In some cases the facts will be such that the officer will be called upon to exercise a discretion, which is judicial in its nature,[51] in which case an honest exercise of that discretion will be as final as the action of any judicial tribunal.[52] In those cases in which it is proper for the officer making the sale to determine whether the property shall be sold in parcels, it seems that the parties to the action are entitled to every possible benefit which might follow from the judicious exercise of that discretion.[53] And it seems that where the officer making the sale, instead of exercising his discretion, relies upon the purchaser for his information, the sale may be treated as invalid.[54]

Thus, it has been held where the mortgaged premises are contiguous and adjoining and appear always to have been controlled by a single person, that it is in the sound discretion of the referee conducting the sale of such premises on a mortgage foreclosure to sell the same in one piece or in parcels, and that the careful and honest exercise of such discretion will not be disturbed by the court directing the sale.[55]

[50] *Mallory* v. *Patterson*, 63 Neb. 429, 88 N. W. 686. See *Iowa Loan & Trust Co.* v. *Estate of Devall*, 63 Neb. 826, 89 N. W. 381.

[51] Where the decree directs the referee or officer making the sale, to inquire and ascertain in what order the different parcels of the mortgaged premises should be sold under the decree, in order to protect the equitable rights of the several persons claiming to have interests therein, or liens on the respective parcels, such referee or other officer, in determining this question, acts as a *quasi* judge of the court. *Snyder* v. *Stafford*, 11 Paige Ch. (N. Y.) 71. See *ante*, § 542.

[52] *O'Donnell* v. *Lindsay*, 39 N. Y. Supr. Ct. (7 J. & S.) 529. See *Hughes* v. *Riggs*, 84 Md. 502, 36 Atl. 269. See *post*, § 605.

[53] *O'Donnell* v. *Lindsay*, 39 N. Y. Supr. Ct. (7 J. & S.) 523, 530; *Russell* v. *Conn*, 20 N. Y. 83. See *Meux* v. *Trezevant*, 132 Cal. 487, 64 Pac. 848.

[54] *O'Donnell* v. *Lindsay*, 39 N. Y. Supr. Ct. (7 J. & S.) 523, 530.

[55] *Whitbeck* v. *Rowe*, 25 How. (N. Y.) Pr. 403. See *Waldo* v. *Williams*, 3 Ill. (2 Scam.) 470; *Benton* v. *Wood*, 17 Ind. 260;

Whether the property on a mortgage foreclosure sale is to be sold as an entirety or in parcels, is in some cases determined by the court—generally through a referee—while in other cases it is left to the discretion of the officer making the sale. When the method of the sale is determined by the court, the order of sale sometimes directs the form and manner of the division of the property, and designates the order in which the parcels shall be offered for sale,[56] and the presumption is that the officer making the sale followed the directions in the decree.[57]

The order of the sale may be based upon the facts shown at the hearing, or upon the consent of the parties;[58] and where an order is once made, it will not be disturbed without good cause therefor being first shown.[59] Where the statute directs that only so much of the mortgaged premises shall

White v. *Watts,* 18 Iowa, 74; *Lay* v. *Gibbons,* 14 Iowa, 377, 81 Am. Dec. 487. See *Butters* v. *Butters,* 153 Mich. 153, 117 N. W. 203.

Where the sheriff has offered the rents and profits of the lots levied on for sale and then the lots, separately, he is justified in offering all the lots together. *Nix* v. *Williams,* 110 Ind. 234, 11 N. E. 36. See *Carpenter* v. *Russell,* 129 Ind. 571, 29 N. E. 36. The supreme court of Indiana, in *Shannon* v. *Hay,* 106 Ind. 589, 7 N. E. 376, say that where a tract of land consisting of three "full forties" and a "fractional forty," included in a mortgage to the State of Indiana for the use of a congressional township, was therein described as a single tract or lot, the auditor of the county is not required by Indiana Revised Statutes." Ind. Rev. Stat. 1881, § 4392, to offer for sale, to pay the debt, any certain or specific less quantity or parcel of the whole tract. Although the land is susceptible of sale in separate parcels, it is sufficient to inquire "who will take a less quantity than the whole and pay the amount due on such note and mortgage," and, no bid being received, to sell the entire tract. See *Anglo-Californian Bank* v. *Cerf,* 142 Cal. 303, 75 Pac. 902; *Tichy* v. *Simecek,* 5 Neb. (Unof.) 81, 97 N. W. 323; *Bechtel* v. *Wier,* 152 Cal. 443, 15 L.R.A. (N.S.) 549, 93 Pac. 75; *Connick* v. *Hill,* 127 Cal. 162, 59 Pac. 832. See also *Hurxthal's Executrix* v. *Hurxthal's Heirs,* 45 W. Va. 584, 32 S. E. 237.

[56] *Bard* v. *Steele,* 3 How. (N. Y.) Pr. 110; *Cissna* v. *Haines,* 18 Ind. 496; *Brugh* v. *Darest,* 16 Ind. 79.

[57] *Walsh* v. *Colby,* 153 Mich. 602, 126 Am. St. Rep. 546, 117 N. W. 207.

[58] *Cord* v. *Southwell,* 15 Wis. 211.

[59] *Vaughn* v. *Nims,* 36 Mich. 297.

be sold as will pay the amount due to the plaintiff and the costs of the suit, if a division of the property into parcels is possible, the statute will control the case,[60] the court being required simply to determine whether the property can be subdivided without injury to the parties in interest.

§ 577. Sale of premises subdivided into lots after execution of mortgage.—Where lands have been mortgaged as an undivided tract or parcel, and are subsequently cut up into lots for the convenient occupation of the mortgagor, or for the purpose of sale, the mortgagor will have no right upon foreclosure to insist that the mortgagee shall sell the premises in lots, according to the map, instead of selling the whole as one undivided tract according to the description contained in the mortgage,[61] because by the terms of the mortgage the whole premises are pledged for the payment of the mortgage debt, and the contract of the parties is, that in case of non-payment, the whole land shall be sold; and no court has any power to alter or impair that contract in any particular, or to direct that only a part of the land shall be sold, and that the remainder shall be given away or dedicated to the public. The mortgagor cannot, by laying out the mortgaged premises in village lots, bounded upon and intersected by streets, withdraw from the lien of the mortgage the land included in the streets.[62]

§ 578. Sale of moiety—Land held by tenants in common.—Where land is held by tenants in common, and they

[60] *Bank of Ogdensburg* v. *Arnold*, 5 Paige Ch. (N. Y.) 38.

[61] *Griswold* v. *Fowler*, 24 Barb. (N. Y.) 135, 4 Abb. (N. Y.) Pr. 238; *Lamerson* v. *Marvin*, 8 Barb. (N. Y.) 9; *Hubbell* v. *Sibley*, 5 Lans. (N. Y.) 51, distinguishing *Ellsworth* v. *Lockwood*, 42 N. Y. 89; *Lane* v. *Conger*, 10 Hun (N. Y.) 1; *Ellsworth* v. *Lockwood*, 9 Hun (N. Y.) 548; *Hanscom* v. *Meyer*, 57 Neb. 786, 73 Am. St. Rep. 544, 78 N. W. 367.

[62] *Griswold* v. *Fowler*, 24 Barb. (N. Y.) 135, 4 Abb. (N. Y.) Pr. 238. See *Hubbell* v. *Sibley*, 5 Lans. (N. Y.) 51; *Lane* v. *Conger*, 10 Hun (N. Y.) 1; *Ellsworth* v. *Lockwood*, 9 Hun (N. Y.) 548.

unite in executing a joint mortgage to secure a joint and several debt, one of them cannot compel the mortgagee to receive half the debt and to proceed against his co-tenant's moiety for the collection of the other half of the mortgage debt; and this is true, notwithstanding he may tender a sufficient bond of indemnity against eventual loss. And on a foreclosure of the mortgage against both mortgagors, a decree will not be made for a sale of the undivided moieties separately for the respective half parts of the debt.[63]

But it seems that where tenants in common mortgage their land for a joint debt and afterwards make a partition of the land, each half will be chargeable primarily with one-half of the debt and one-half of the costs of the suit.[64] This is presumably on the principle that equity will require each portion of the mortgaged premises to bear its own proportion of the mortgage debt.

Where the owner of an undivided half of real estate mortgaged the same, and the land was afterwards partitioned, it was held that the portion of the land set off to the mortgagor must be first sold. In such a case, where the officer making the sale was tendered the whole amount of the debt and costs, for which sale was directed to be made of the undivided half set off to the mortgagor, but refused such bid and sold the whole mortgaged premises, the court set the sale aside.[65] The equitable effect of the sale of an undivided one-half of mortgaged premises by the mortgagor, and the payment of the purchase money to him, is to cast the burden of the payment of the mortgage debt primarily on the remaining half, if that is sufficient to pay the incumbrance.[66] It is proper to direct a sale of an undivided two-thirds of the property, in order to preserve the wife's inchoate right of dower.[67]

[63] *Frost* v. *Frost,* 3 Sandf. Ch. (N. Y.) 188. See *Scott* v. *Ford's Executrix,* 20 Ky. Law. Rep. 1932, 50 S. W. 552.

[64] *Rathbone* v. *Clarke,* 9 Paige Ch. (N. Y.) 648.

[65] *Quaw* v. *Lameraux,* 36 Wis. 626.

[66] *Schrack* v. *Shriner,* 100 Pa. St. 451.

[67] *State Bank* v. *Backus,* 160 Ind. 682, 67 N. E. 512. See also *Smith*

§ 579. Sale in parcels when only part of mortgage due.—The New York Code provides that where a part only of the mortgage debt has become due, and the mortgaged property is so situated that it can be sold in parcels without injury to the interests of the parties, the final judgment must direct that no more of the property be sold, in the first place, than will be sufficient to satisfy the sum due with the costs and expenses of the sale.[68] The fact that the premises are a meager security for the debt and are depreciating in value for want of proper care, will not justify a sale of the entire premises for a debt, only a portion of which is due.[69] It seems that under such circumstances, in order to secure a sale of the whole property, it is necessary that it should be alleged in the pleadings and decided by the court that the premises cannot be divided without manifest injury to the parties concerned.[70] If a part only of the debt is due and the premises are so situated that they cannot be divided, the whole premises should be directed to be sold;[71] and the decree should provide for the payment of the money to the mortgagee for the extinction of the debt, unless some safe course more beneficial to the mortgagor is suggested to the court.[72]

Where there is a sale of the whole premises for an installment due, such sale exhausts the remedy of the mortgagee and passes a clear title to the purchaser,[73] because, as against

v. *Sparks*, 162 Ind. 270, 70 N. E. 253.

[68] N. Y. Code Civ. Proc. § 1636; *Long* v. *Lyons*, 54 How. (N. Y.) Pr. 129. See *Caufman* v. *Sayre*, 2 B. Mon. (Ky.) 202. It has been said that where there is no statutory requirement, a court of equity will order a sale in parcels where the premises consist of different tracts, which are together worth more than the amount secured. *Ryerson* v. *Boorman*, 7 N. J. Eq. (3 Halst.) 167, 640.

[69] *Blazey* v. *Delius*, 74 Ill. 299.

[70] *Blazey* v. *Delius*, 74 Ill. 299.

[71] N. Y. Code Civ. Proc. § 1637.

[72] *Walker* v. *Hallett*, 1 Ala. 379, 393. See *Knapp* v. *Burnham*, 11 Paige Ch. (N. Y.) 330; *Levert* v. *Redwood*, 9 Port. (Ala.) 79, 96.

[73] *Poweshiek Co.* v. *Denison*, 36 Iowa, 244, 248, 15 Am. Rep. 521. See *Packer* v. *Rochester & S. R. R. Co.* 17 N. Y. 287; *Holden* v. *Sackett*, 12 Abb. (N. Y.) Pr. 473; *Lansing* v. *Goelett*, 9 Cow. (N. Y.) 346. See also *Bradford* v. *Harper*, 25 Ala. 337; *Kelly* v. *Payne*, 18 Ala. 371; *Hobby* v. *Pemberton*, Dudley

the mortgagee, the presumption is, in all cases, that the property sells for its full value.[74] In such a case the mortgagee is entitled to retain from the proceeds of the sale enough to satisfy unpaid installments, though not yet due.[75] Where judgment of foreclosure is rendered upon a mortgage securing both matured and unmatured notes, and the land is ordered to be sold as not divisible, the plaintiff may bid the whole amount due and to become due on the mortgage, besides the costs of the action, and upon paying the costs and simply receipting for the whole amount of the judgment, the same will constitute a valid payment.

§ 580. Sale of portion of premises for part of debt due.—Failure to pay subsequent installments.—Where a portion of the mortgage debt is not yet due, and the judgment directs that so much of the mortgaged premises be sold as will be sufficient to pay the amount then due on the mortgage, with the costs of the suit ,and there has been a sale of such separate portion, the judgment will remain in force as a security against any subsequent default.[76] And if there should be a default

(Ga.) 212; *Marston* v. *Marston,* 45 Me. 412; *Haynes* v. *Wellington,* 25 Me. 458; *Brown* v. *Tyler,* 72 Mass. (8 Gray), 135, 69 Am. Dec. 239; *Ritger* v. *Parker,* 62 Mass. (8 Cush.) 145, 54 Am. Dec. 744; *Clower* v. *Rawlings,* 17 Miss. (9 Smed. & M.) 122, 47 Am. Dec. 108; *Stark* v. *Mercer,* 4 Miss. (3 How.) 377; *Carter* v. *Walker,* 2 Ohio St. 339; *West Branch Bank* v. *Chester,* 11 Pa. St. 282, 57 Am. Dec. 547; *McCall* v. *Lenox,* 9 Serg. & R. (Pa.) 302; *Pierce* v. *Potter,* 7 Watts. (Pa.) 477; *Berger* v. *Hiester,* 6 Whart. (Pa.) 210; *Hodson* v. *Treat,* 7 Wis. 263; *Tallman* v. *Ely,* 6 Wis. 244; *Hope.* v. *Booth,* 1 Barn. & Ad. 498.

[74] *Escher* v. *Simmons,* 54 Iowa. 269.

[75] *Fowler* v. *Johnson,* 26 Minn. 338.

[76] See *Kilmer* v. *Gallaher,* 107 Iowa, 676, 78 N. W. 685. Under a statute (as Cal. Code Civ. Proc. § 728), providing that, where a sale has been made under a mortgage for the amount of a debt then due, more of the property may be ordered to be sold as other parts become due, the creditor does not lose his right to a sale because he has not sold any of the property till the whole debt has become due. *National Bank* v. *Godfrey,* 77 Cal. 612, 20 Pac. 142. *The* court in this case say that, although the proper practice to procure a

subsequent to the judgment in the payment of any portion of the interest or any installment of the principal, the court will, upon a proper petition of the plaintiff, due notice having been served upon the parties interested, by further order founded upon the first judgment, direct a sale to be made of so much of the mortgaged premises as will be necessary to satisfy the amount of interest, or the installment of the principal then due, together with the costs of the petition and of the subsequent proceedings thereon. And this proceeding may be repeated as often as a subsequent default is made.[77]

It would seem that the provisions of the New York Code, relating to a foreclosure sale for installments not due at the commencement of the suit, apply only to the foreclosure of mortgages executed to secure the payment of money by installments, and cannot be applied to mortgages conditioned for the performance of covenants other than for the payment of money.[78] Thus, in an action brought to foreclose a mortgage, conditioned merely for the support of the mortgagee, no relief can be granted for neglect to support after the commencement of the action, except by a new foreclosure, if only a portion of the premises were sold.[79]

§ 581. Petition for order of second sale—Reference thereon to compute amount due.—Where a portion of the premises have been sold for an installment due, and there has been a subsequent default, the plaintiff should apply by petition

modification of a decree for the sale of sufficient of the mortgaged property to pay the amount then due, by ordering a payment of other sums which have become due, is by a motion, yet where the plaintiff has filed what he termed an amended petition for that purpose before any sale has been made, the petition may be properly treated as such a motion as the California Code of Civil Procedure authorizes.

[77] N. Y. Code Civ. Proc. § 1636. See *Malcolm* v. *Allen*, 49 N. Y. 448.

[78] *Ferguson* v. *Ferguson*, 2 N. Y. 360, modifying 3 Barb. Ch. (N. Y.) 616.

[79] *Morrison* v. *Morrison*, 4 Hun (N. Y.) 410; *Ferguson* v. *Ferguson*, 2 N. Y. 360.

to the court for a subsequent sale of the residue of the premises, or so much thereof as may be necessary to pay the installment or interest then due, besides the costs of the proceeding. Such a petition should bear the title of the action and be addressed to the court in which the judgment of foreclosure was obtained. It should contain all the essential points upon which the previous order for sale was founded, and should recite the judgment, and the continuance thereof as security for subsequent defaults. It should also set forth briefly the facts in the case showing the amount of the installment or interest due, the time when it became due, and other particulars for the full information of the court. It should be verified on the oath of the petitioner and contain a prayer for the relief desired, the same as other petitions. Due notice of application to the court for the second sale should be served upon all the parties interested who have appeared in the action.[80]

If all the parties are adults, and have been personally served, the court will order a second sale on a petition without a reference; but if any of the defendants are absentees or infants who are not represented in the action, the court will not proceed and order a second sale without a reference.

The referee will have duties and authority similar to those of a referee appointed to compute the amount due upon an application for judgment on default.[81] If there are further installments yet to become due, the referee should ascertain whether the premises still remaining unsold can be sold in parcels without prejudice to the interests of the parties. But where, upon a bill for the foreclosure of a mortgage payable by installments, some of which were not due and payable at the time of granting the decree of sale, the referee appointed by the court upon the first reference, reported that the premises could not be sold in parcels, it seems that it will not be necessary to obtain another report upon that subject previous

[80] *Knapp* v. *Burnham,* 11 Paige Ch. (N. Y.) 330.

[81] *Knapp* v. *Burnham,* 11 Paige Ch. (N. Y.) 330.

to obtaining a second order of sale to pay installments which have become due subsequently to the decree.[82]

§ 582. Order for second sale.—If there has been a second reference, on the coming in of the referee's report, the order for a second sale will follow as a matter of course, as under the original order of reference, and the manner of conducting the sale will be the same. The second order of sale should refer to, and be founded upon the first judgment, and should in a similar manner direct the sale of the mortgaged premises, or so much thereof as will be necessary to satisfy the amount due, besides costs, and the payment of the same to the petitioner; it should also contain all the other essential requisites of a judgment in foreclosure.

The report of the referee to compute the amount due, must be filed and confirmed before the plaintiff will be entitled to apply for an order of sale founded upon it. In those cases where any of the defendants attend before the referee and contest the reference, the order of the court, together with the petition and the report of the referee upon which it was founded, and all the other orders and papers in the proceedings must be filed before applying for an order of sale.[83]

§ 583. Where proceedings stayed by payment—Subsequent default.—The New York Code of Civil Procedure provides,[84] where an action is brought to foreclose a mortgage upon real property, upon which a portion of the principal or interest is due, and a portion of either is to become due, and after a final judgment directing a sale is rendered, but before the sale is made, that if the defendant pays into court the amount due for principal and interest, and the costs of the action, together with the expenses of the proceedings to

[82] *Knapp* v. *Burnham*, 11 Paige Ch. (N. Y.) 330 .

[83] *Knapp* v. *Burnham*, 11 Paige Ch. (N. Y.) 330.

[84] N. Y. Code Civ. Proc. § 1634, 1635.

sell, if any, all proceedings upon the judgment must be stayed; but that upon a subsequent default in the payment of principal or interest, the court may make an order directing the enforcement of the judgment for the purpose of collecting the sum then due.

If after such stay, the defendant makes default in the payment of any subsequent installment of principal or interest when it becomes due, the plaintiff may apply to the court upon petition, setting forth the default subsequent to the judgment, the amount due on the mortgage, and the time when it became due, and ask that leave be granted to enforce his judgment by a sale of the mortgaged premises.

The application must be made to the court upon due notice to all parties who have appeared in the action; all the proceedings are substantially the same as those in the case of a failure to pay subsequent installments, where a portion of the premises have been sold to pay an installment due, except that a reference in this case is not necessary, as the judgment fixes the rights of the parties; if the facts are not disputed, the order follows as a matter of course[85]

[85] N. Y. Code Civ. Proc. § 1635. The general rule is that the acceptance by a mortgagee of money to be applied on the mortgage debt, after foreclosure, waives the foreclosure and restores the mortgage. *Scott* v. *Childs,* 64 N. H. 566, 15 Atl. 206. And the fact of payment after the bill has been filed is properly set up by answer, and not by cross-bill. *Kaelbe* v. *Goebbel* (N. J. Ch.) 4 Cent. Rep. 242.

The tender to a mortgagee of the principal, interest, and costs after maturity of the debt, and before any sale or foreclosure proceedings have been begun, is available on his refusal of the tender only to stop interest and save subsequent costs, where the money is not deposited or kept ready for the mortgagee in case of demand, or to be tendered at the trial. *Parker* v. *Beasley,* 116 N. C. 1, 33 L.R.A. 231, 21 S. E. 955; *Knollenberg* v. *Nixon,* 171 Mo. 445, 94 Am. St. Rep. 790, 72 S. W. 41; *McNeil* v. *Sun & Evening Sun Building Mutual Loan & Accumulating Fund Ass'c.* 75 App. Div. 290, 78 N. Y. Supp. 90. And the tender of unpaid interest six months after the maturity of a note and the right of foreclosure of a mortgage has accrued under an option to consider the whole sum due will not defeat the foreclosure. *Swearingen* v. *Lahner,* 93 Iowa, 147, 61 N. W. 431, 26 L.R.A. 765, 57 Am. St. Rep. 261.

In this case the interest became

due on the notes March 1st, and was not paid or tendered until the following September 23d, when it was refused by the plaintiff, who commenced action to foreclose on October 14th, without further notice. In the course of the opinion the court say: "Some courts have held that contracts in notes and mortgages given to secure them are separate and independent, and each contract must be construed with reference to its own particular terms. *White* v. *Miller,* 52 Minn. 367, 54 N. W. 736; 19 L.R.A. 673; *McClellan* v. *Bishop,* 42 Ohio St. 113; *Indiana & I. Cent. R. Co.* v. *Sprague,* 103 U. S. 756, 26 L. ed. 554. Should we adopt this rule, then it is clear from the authorities cited that the stipulation in the mortgage itself authorizes the remedy sought to be obtained in this case. But the decided weight of authority in this country is that a note and mortgage executed at the same time and as one transaction are to be construed together, and, so far as possible, construed as one instrument, See *Noell* v. *Gaines,* 68 Mo. 649; *Chambers* v. *Marks,* 93 Ala. 412, 9 So. 74; *Wheeler & Wilson Mfg. Co.* v. *Howard,* 28 Fed. 741; *Schoonmaker* v. *Taylor,* 14 Wis. 313; *Stanclift* v. *Norton,* 11 Kan. 218; *Mallory* v. *West Shore & H. R. R. Co.* 3 Jones & S. (N. Y.) 174; *Lantry* v. *French,* 33 Neb. 524, 50 N. W. 679. This rule is adopted by this court in *Clayton* v. *Whitaker,* 68 Iowa 412, 27 N. W. 296; *Sloat* v. *Bean,* 47 Iowa, 60; *Dobbins* v. *Parker,* 46 Iowa, 357; *Dean* v. *Ridgeway,* 82 Iowa, 575, 48 N. W. 923; *German Bank* v. *Griffin,* 54 Iowa 749, 6 N. W. 155; *Cramer* v. *Kebman,* 9 Iowa, 114."

CHAPTER XXIV.

SALE IN INVERSE ORDER OF ALIENATION.

General Rule—Determining Order of Sale—Court Directing Order—Equitable Rights Between Subsequent Grantees and Lienors.

§ 584. Rule for selling in inverse order of alienation.
§ 585. Same—Where the mortgaged land has been platted.
§ 586. Same—Where mortgage taken with notice of equities.
§ 587. Same—In case of subsequent mortgagee.
§ 588. Same—In case of lessee not a party.
§ 589. Rule in Iowa, Kentucky and Georgia.
§ 590. Rule where conveyance by grantees of mortgagor.
§ 591. Determining order of sale where various grantees—Equities between them.
§ 592. Directions by court for the order of sale.
§ 593. Application to the court for directions.
§ 594. Equitable rights between subsequent grantees and lienors.
§ 595. Equities between grantees—Time of acquiring title.
§ 596. Rights of successive subsequent mortgagees—New Jersey rule.
§ 597. Rights of purchaser of part of mortgaged premises subject to mortgage.
§ 598. Order of sale in parcels where subsequent grantee of part has assumed mortgage.
§ 599. When rule for sale in inverse order does not apply.
§ 600. Contribution according to value—Valuation, when made.
§ 601. Where the mortgagee has other securities and there are subsequent mortgagees.
§ 602. Rule where portions alienated have been released.
§ 603. Rule for order of sale where the mortgage covers homestead and other lands.

§ 584. Rule for selling in inverse order of alienation.—Upon a sale of mortgaged premises in an action for foreclosure, if the mortgagor, subsequent to the execution of the mortgage, has made successive transfers of separate parcels of the mortgaged premises to different persons, that portion, if any, still remaining in his hands, must first be sold to satisfy

the mortgage debt and the costs and expenses of the action; and if a sufficient sum for that purpose is not realized from such sale, then the various portions of the mortgaged lands conveyed by the mortgagor must be sold in the inverse order of their alienation,[86] according to the equitable rights of the different grantees as among themselves, until a sufficient sum is realized to satisfy the mortgage debt.

The same principle of equity is applicable to subsequent incumbrances upon different portions of the mortgaged premises, either by mortgage or by judgment,[87] as well as to sales of parcels of the equity of redemption,[88] because subsequent incumbrances are deemed sales within the rule above stated.[89] The

[86] But it is thought that an omission to sell mortgaged premises in the inverse order of alienation is not such an illegality as affects the jurisdiction or vitiates the title acquired on the sale. *Jenks* v. *Quinn*, 137 N. Y. 223, 33 N. E. 376, 50 N. Y. S. R. 795.

A parcel of a mortgaged tract of land, conveyed by the mortgagor after the execution of the mortgage, will be sold under a decree of foreclosure of such mortgage, where the proceeds of a sale of the balance of the tract are insufficient to satisfy all the mortgage liens covering the entire tract, the satisfaction of which is decreed in the foreclosure suit, provided such parcel is covered by any of the incumbrances embraced within such decree. *Wilmer* v. *Huntington* (Ky.) 25 S. W. 602, 16 Ky. L. Rep. 4.

Where there is a junior mortgage.—On the foreclosure of a mortgage upon lands, a part of which are covered by a junior mortgage, the part not included therein should be sold first. *Millsaps* v. *Bond*, 64 Miss. 453, 1 So. 506. See *Monarch Coal & Mining Co.* v. *Hand*, 99 Ill. App. 322.

Successive conveyances.—Where L. first executed a mortgage to complainant; then executed another mortgage to V; conveyed a portion of the land to D, and remainder to W. On foreclosure of complainant's mortgage, the court held that the lands must be sold in the following order: Lands conveyed to W, not including portion mortgaged to V; portion mortgaged to V; portion conveyed to D. *New York Mut. L. Ins. Co.* v. *Dowden* (N. J. Ch.) 2 Cent. Rep. 221.

[87] *Bernhardt* v. *Lymburner*, 85 N. Y. 172; *Stuyvesant* v. *Hall*, 2 Barb. Ch. (N. Y.) 151, 155; *New York Life Insurance and Trust Co.* v. *Milnor*, 1 Barb. Ch. (N. Y.) 353; *Snyder* v. *Stafford*, 11 Paige Ch. (N. Y.) 71; *Fassett* v. *Mulock*, 5 Colo. 466; *Conrad* v. *Harrison*, 3 Leigh (Va.) 532.

[88] *Steere* v. *Childs*, 15 Hun, N. Y. 511; *Dodds* v. *Snyder*, 44 Ill. 53.

[89] *Milligan's Appeal*, 104 Pa. St.

rule also applies where there is a subsequent lease on the premises,[90] or a subsequent grant of a right of way.[91]

This rule has been adopted throughout the states of the Union, and now prevails in New York,[92] Alabama,[93] Colorado,[94] Florida,[95] Illinois,[96] Indiana,[97] Maine,[98] Maryland,[99]

503. See *Fassett* v. *Mulock,* 5 Colo. 466. See *post,* §§ 595, 596.

[90] *Mack* v. *Shafer,* 135 Cal. 113, 67 Pac. 40.

[91] *Merced Security Savings Bank* v. *Simon,* 141 Cal. 11, 74 Pac. 356.

[92] *Bernhardt* v. *Lymburner,* 85 N. Y. 172; *Hopkins* v. *Wolley,* 81 N. Y. 77; *Barnes* v. *Mott,* 64 N. Y. 397, 402, 21 Am. Rep. 625; *Chapman* v. *West,* 17 N. Y. 125; *Ingalls* v. *Morgan,* 10 N. Y. 178; *Howard Ins. Co.* v. *Halsey,* 8 N. Y. 271, 59 Am. Dec. 478; *Crafts* v. *Aspinwall,* 2 N. Y. 289; *McDonald* v. *Whiting,* 2 N. Y. Week. Dig. 529; *Woods* v. *Spalding,* 45 Barb. (N. Y.) 608; *Lafarge Fire Ins. Co.* v. *Bell,* 22 Barb. (N. Y.) 54; *St. John* v. *Bumpstead,* 17 Barb. (N. Y.) 102; *Weaver* v. *Toogood,* 1 Barb. (N. Y.) 238; *Ferguson* v. *Kimball,* 3 Barb. Ch. (N. Y.) 616; *Stuyvesant* v. *Hall,* 2 Barb. Ch. (N. Y.) 151; *New York Life Ins. & Trust Co.* v. *Milnor,* 1 Barb. Ch. (N. Y.) 353; *Ex parte Merrian,* 4 Den. (N. Y.) 254; *VanSlyke* v. *VanLoan,* 26 Hun (N. Y.) 344; *Coles* v. *Appleby,* 22 Hun (N. Y.) 72; *Steere* v. *Childs,* 15 Hun (N. Y.) 518; *Clowes* v. *Dickenson,* 5 Johns. Ch. (N. Y.) 235, 9 Cow. (N. Y.) 403; *Gill* v. *Lyon,* 1 Johns. Ch. (N. Y.) 447; *Kellogg* v. *Rand,* 11 Paige Ch. (N. Y.) 59; *Rathbone* v. *Clark,* 9 Paige Ch. (N. Y.) 648; *Schryver* v. *Teller,* 9 Paige Ch. (N. Y.) 173; *Farmers' Loan & Trust Co.* v. *Maltby,* 8 Paige Ch. (N. Y.) 361; *Patty* v. *Pease,* 8 Paige Ch. (N. Y.) 277, 35 Am. Dec. 683; *Skeel* v. *Spraker,* 8 Paige Ch. (N. Y.) 182; *Guion* v. *Knapp,* 6 Paige Ch. (N. Y.) 35, 29 Am. Dec. 741; *Jenkins* v. *Freyer,* 4 Paige Ch. (N. Y.) 47; *Gouverneur* v. *Lynch,* 2 Paige Ch. (N. Y.) 300; *James* v. *Hubbard,* 1 Paige Ch. (N. Y.) 228; *New York Life Ins. & Trust Co.* v. *Cutler,* 3 Sandf. Ch. (N. Y.) 176; *Thomas* v. *Moravia Foundry & Machine Co.* 43 Hun (N. Y.) 487. See *Kels* v. *West,* 56 Misc. 126, 106 N. Y. Supp. 1108.

[93] *Mobile M. D. & M. Ins. Co.* v. *Huder,* 35 Ala. 713; *Howser* v. *Cruikshank,* 122 Ala. 256, 82 Am. St. Rep. 76, 25 So. 206; *Farmers' Savings & Buliding & Loan Ass'c.* v. *Kent & Sabotka,* 117 Ala. 624, 23 So. 757; *B. Scheuer & Bro.* v. *Kelly,* 121 Ala. 323, 26 So. 4.

[94] *Fassett* v. *Mulock,* 5 Colo. 466.

[95] *Ritch* v. *Eichelberger,* 13 Fla. 169; *Ellis* v. *Fairbanks,* 38 Fla. 257, 21 So. 107.

[96] *Niles* v. *Harmon,* 80 Ill. 396; *Moore* v. *Chandler,* 59 Ill. 466; *Sumner* v. *Waugh,* 56 Ill. 531; *Tompkins* v. *Wiltberger,* 56 Ill. 385; *Lock* v. *Fulford,* 52 Ill. 166; *Dodds* v. *Snyder,* 44 Ill. 53; *Iglehart* v. *Crane,* 42 Ill. 261; *Matteson* v. *Thomas,* 41 Ill. 110; *McLaurie* v. *Thomas,* 39 Ill. 291; *Marshall* v. *Moore,* 36 Ill. 321; *Boone* v. *Clark,* 129 Ill. 466, 5 L.R.A. 276, 21 N. E.

Massachusetts,[1] Michigan,[2] Minnesota,[3] Mississippi,[4] Missouri,[5] Nebraska,[6] New Hampshire,[7] New Jersey,[8] Ohio,[9]

850; *Domestic Building Ass'c.* v. *Nelson,* 172 Ill. 386, 50 N. E. 194; *Vogel* v. *Brown,* 120 Ill. 338, 11 N. E. 327, 12 N. E. 252.

[97] *Evansville Gas Light Co.* v. *State,* 73 Ind. 219, 38 Am. Rep. 129; *Medsker* v. *Parker,* 70 Ind. 509; *McCullum* v. *Turpie,* 32 Ind. 146; *Aiken* v. *Bruen,* 21 Ind. 137; *Williams* v. *Perry,* 20 Ind. 437, 83 Am. Dec. 327; *Cissna* v. *Haines,* 18 Ind. 496; *Day* v. *Patterson,* 18 Ind. 114; *Jennings* v. *Moon,* 135 Ind. 168, 34 N. E. 996.

[98] *Sheperd* v. *Adams,* 32 Me. 63; *Holden* v. *Pike,* 24 Me. 427.

[99] See *Hopper* v. *Smyser,* 90 Md. 363, 45 Atl. 206.

[1] *Beard* v. *Fitzgerald,* 105 Mass. 134; *Pike* v. *Goodnow,* 94 Mass. (12 Allen) 474; *George* v. *Wood,* 91 Mass. (9 Allen) 80, 85 Am. Dec. 741; *Kilborn* v. *Robbins,* 90 Mass. (8 Allen) 466; *George* v. *Kent,* 89 Mass. (7 Allen) 16; *Chase* v. *Woodbury,* 60 Mass. (6 Cush.) 143; *Allen* v. *Clark,* 34 Mass. (17 Pick.) 47. But see *Parkman* v. *Welch,* 36 Mass. (19 Pick.) 231.

[2] *McVeigh* v. *Sherwood,* 47 Mich. 545; *Sager* v. *Tupper,* 35 Mich. 134; *McKinney* v. *Miller,* 19 Mich. 142; *Ireland* v. *Woolman,* 15 Mich. 253; *Cooper* v. *Bigly,* 13 Mich. 463; *Briggs* v. *Kaufman,* 2 Mich. N. P. 160; *Mason* v. *Payne,* Walk. Ch. (Mich.) 459; *Gray* v. *H. M. Loud & Sons Lumber Co.* 128 Mich. 427, 54 L.R.A. 731, 87 N. W. 376.

[3] *Johnson* v. *Williams,* 4 Minn. 260, 268.

[4] *Millsaps* v. *Bond,* 64 Miss. 453, 1 So. 506.

[5] *Holy Ghost Ass'c.* v. *Fehlig,* 72 Mo. App. 473; *Crosby* v. *Farmers' Bank,* 107 Mo. 436, 17 S. W. 1004.

[6] *Bradfield* v. *Sewall,* 58 Neb. 637, 79 N. W. 615.

[7] *Brown* v. *Simons,* 44 N. H. 475; *Mahagan* v. *Mead,* 63 N. H. 570, 3 Atl. 919.

[8] *Hill* v. *McCarter,* 27 N. J. Eq. (12 C. E. Gr.) 41; *Mutual L. Ins. Co. of N. Y.* v. *Boughrum,* 24 N. J. Eq. (9 C. E. Gr.) 44; *Mount* v. *Potts,* 23 N. J. Eq. (8 C. E. Gr.) 188; *Weatherby* v. *Slack,* 16 N. J. Eq. (1 C. E. Gr.) 491; *Keene* v. *Munn,* 16 N. J. Eq. (1 C. E. Gr.) 398; *Gaskill* v. *Sine,* 13 N. J. Eq. (2 Beas.) 400, 78 Am. Dec. 105; *Winters* v. *Henderson,* 6 N. J. Eq. (2 Halst.) 31; *Wikoff* v. *Davis,* 4 N. J. Eq. (3 H. W. Gr.) 224; *Britton* v. *Updike,* 3 N. J. Eq. (2 H. W. Gr.) 125; *Shannon* v. *Marselis,* 1 N. J. Eq. (Saxt.) 413; *Harrison* v. *Guerin,* 27 N. J. Eq. (12 C. E. Gr.) 219; *Mount* v. *Potts,* 23 N. J. Eq. (8 C. E. Gr.) 188; *Weatherby* v. *Slack,* 16 N. J. Eq. (1 C. E. Gr.) 491; *Shannon* v. *Marselis,* 1 N. J. Eq. (Saxt.) 413; *Thompson* v. *Bird,* 57 N. J. Eq. 175, 40 Atl. 857. But see *Jackson* v. *Condict,* 57 N. J. Eq. 522, 41 Atl. 374.

[9] *Sternberger* v. *Hanna,* 42 Ohio St. 305; *Nellons* v. *Truax,* 6 Ohio St. 97; *Cary* v. *Folsom,* 14 Ohio 365; *Commercial Bank of Lake Erie* v. *Western Reserve Bank,* 11 Ohio, 444, 38 Am. Dec. 739. But see *Green* v. *Ramage,* 18 Ohio, 428, 51 Am. Dec. 458.

Pennsylvania,[10] South Carolina,[11] Texas,[12] Vermont,[13] Virginia,[14] and Wisconsin.[15] The same rule also prevails in England.[16] But a different rule obtains in Iowa, Kentucky and Georgia.[17]

§ 585. Same—Where the mortgaged land has been platted.—The same rule applies where the mortgaged land has been platted into streets and lots.[18] However, upon a foreclosure of the mortgage purchasers by the plat as well as junior incumbrancers, having liens upon portions of the platted premises, cannot insist that the portions embraced in the platted streets and alleys donated to the public shall be treated as premises released, and their value credited upon the mortgage debt.[19]

§ 586. Same—Where mortgage taken with notice of equities.—Where an assignee of a mortgage takes it with

[10] *Milligan's Appeal,* 104 Pa. St. 503; *Carpenter* v. *Koons,* 20 Pa. St. 222; *Warren* v. *Sennett,* 4 Pa. St. 114; *Cowden's Estate,* 1 Pa. St. 267; *Presbyterian Corporations* v. *Wallace,* 3 Rawle (Pa.) 109; *Donley* v. *Hays,* 17 Serg. & R. (Pa.) 400; *Nailer* v. *Stanley,* 10 Serg. & R. (Pa.) 450, 13 Am. Dec. 691.

[11] *Norton* v. *Lewis,* 3 S. C. 25; *Stoney* v. *Shultz,* 1 Hill (S. C.) Eq. 465, 27 Am. Dec. 429; *Meng* v. *Houser,* 13 Rich. (S. C.) Eq. 210.

[12] *Rippetoe* v. *Dwyer,* 49 Tex. 498; *Miller* v. *Rogers,* 49 Tex. 398; *First State Bank of Teague* v. *Cox,* 139 S. W. 1 (Tex. Civ. App.); *Hawkins* v. *Potter,* 130 S. W. 643 (Tex. Civ. App.); *Watson* v. *Vansickle,* 114 S. W. 1160 (Tex. Civ. App.).

[13] *Root* v. *Collins,* 34 Vt. 173; *Lyman* v. *Lyman,* 32 Vt. 79, 76 Am. Dec. 151.

[14] *Jones* v. *Myrick,* 8 Gratt. (Va.) 179; *Henkle* v. *Allstadt,* 4 Gratt. (Va.) 284; *Conrad* v. *Harrison,* 3 Leigh. (Va.) 532; *Miller* v. *Holland,* 84 Va. 652, 5 S. E. 701. See *Lynchburg Perpetual Building & Loan Co.* v. *Fellers,* 96 Va. 337, 70 Am. St. Rep. 851, 31 S. E. 505.

[15] *Aiken* v. *Milwaukee & St. P. R. Co.* 37 Wis. 469; *State of Wisconsin* v. *Titus,* 17 Wis. 241; *Worth* v. *Hill,* 14 Wis. 559; *Ogden* v. *Glidden,* 9 Wis. 46.

[16] See *Hartley* v. *O'Flaherty,* Lloyd & Goold Cas. Temp. Plunkett, 208; *Averall* v. *Wade,* Lloyd & Goold Cas. Temp. Suyden, 252; *Hamilton* v. *Royse,* 2 Sch. & Lef. 315. But see *Barnes* v. *Racster,* 1 Young & C. C. R. 401.

[17] See *post,* § 589.

[18] *Hudson* v. *Barham,* 101 Va. 63, 99 Am. St. Rep. 849, 43 S. E. 189.

[19] *Boone* v. *Clark,* 129 Ill. 466, 5 L.R.A. 276, 21 N. E. 850.

notice of the existence of circumstances which would render it inequitable for the lands to be sold in the inverse order of alienation on the foreclosure of the prior mortgage, he has no right to insist upon a sale in that order.[20]

§ 587. Same—In case of subsequent mortgagee.—It is thought the rule in equity, that where a prior mortgagee holds a lien upon lands, and a subsequent mortgagee holds a mortgage upon a portion of the same lands, on foreclosure by the prior mortgagee, he should first offer for sale that part not covered by the junior mortgage, has no application to cases where the lands omitted in the previous mortgage "are excluded from all remedies of creditors in all courts."[21] The holder of a mortgage which was taken expressly subject to another mortgage on the same lands has no right, on a foreclosure of the latter, to insist on the lands being sold in the inverse order of alienation.[22] And a mortgagee who has acquired from the grantee of the mortgagor the title to part of the mortgaged premises is not entitled, on a foreclosure of the mortgage, to a judgment for the sale of the other portion first, for the payment of his mortgage.[23]

§ 588. Same—In case of lessee not a party.—In a case where the lessee of a part of the mortgaged premises is not made a party to the foreclosure, his right may properly be protected by the court by selling first the portions of the premises not embraced in the lease.[24]

§ 589. Rule in Iowa, Kentucky and Georgia.—The courts of Iowa, Kentucky and Georgia hold, contrary to the

[20] *Boone* v. *Clark*, 129 Ill. 466, 5 L.R.A. 276, 21 N. E. 850.

[21] *Armitage* v. *Toll*, 64 Mich. 412, *sub. nom. Armitage* v. *Davenport*, 31 N. W. 408.

[22] *Boone* v. *Clark*, 129 Ill. 466, 5 L.R.A. 276, 21 N. E. 850.

[23] *Sanford* v. *Van Arsdall*, 53 Hun (N. Y.) 70, 5 N. Y. S. R. 433, 6 N. Y. Supp. 494.

[24] *Collins* v. *Cunningham*, 21 Can. S. C. 139.

The same rule applies where the lessees are made parties. *Mack* v. *Shafer*, 135 Cal. 113, 67 Pac. 40.

general rule above stated, that where several parts of a mortgaged estate are conveyed in distinct parcels to different persons, at different times, the several owners must contribute to the payment of the mortgage debt *pro rata,* according to the value of their respective portions of the property.[25]

The supreme court of Iowa, in stating the arguments in favor of this rule in Bates v. Ruddick,[26] said: "When we come to settle the question, however, as between two grantees purchasing the different parcels of the incumbered premises, at different times, there is no more moral obligation on the one to pay than on the other. Both of them have purchased premises that are alike affected by a lien, which neither created nor undertook to pay. The purchased premises are liable to be sold, because of the failure of their grantor to discharge his undertaking, and not because of any failure on their part. In such cases their interest is common, their rights are equal and there should be an equality of burden. It is difficult for us to see why the last purchaser, any more than the first, sits in the seat of the grantor."

In Kentucky, in the case of Dickey v. Thompson,[27] Chief Justice Marshall held it to be decided by authority, even if not by reason, so far as that state is concerned, that the rule as to the application of property to the satisfaction of a mortgage in the inverse order of its transfer by the mortgagor, does not prevail, but that the transferees must contribute ratably.

In Barden v. Grady,[28] the supreme court of Georgia held

[25] *Huff* v. *Farewell,* 67 Iowa, 298; *Barney* v. *Myers,* 28 Iowa, 472; *Griffith* v. *Lovell,* 26 Iowa, 226; *Massie* v. *Wilson,* 16 Iowa, 391; *Bates* v. *Ruddick,* 2 Iowa, 423, 65 Am. Dec. 174; *Campbell* v. *Johnson,* 4 Dana (Ky.) 182; *Hughes* v. *Graves,* 1 Litt. (Ky.) 317; *Poston* v. *Eubanks,* 3 J. J. Marsh. (Ky.) 44; *Dickey* v. *Thompson,* 8 B. Mon. (Ky.) 312; *Burk* v. *Chrisman,* 3 B. Mon. (Ky.) 50; *Hunt* v. *McConnell,* 1 T. B. Mon. (Ky.) 219. See also *Stanly* v. *Stocks,* 1 Dev. (N. C.) Eq. 314; *Borden* v. *Grady,* 37 Ga. 660; *Dillivan* v. *German Savings Bank,* 124 N. W. 350 (Iowa); *Griffin* v. *Gingell,* 25 Ky. Law Rep. 2031, 79 S. W. 284. See *Martin* v. *Turner,* 115 S. W. 833 (Ky.).

[26] 2 Iowa, 423, 65 Am. Dec. 774.

[27] 8 B. Mon. (Ky.) 312, 319.

[28] 37 Ga. 660, overruling *Cumming* v. *Cumming,* 3 Ga. 460. See

that, inasmuch as a judgment binds all the property of the defendant from its date, equity will not compel the plaintiff to levy on that portion of the property last sold by the mortgagor, and sell that part, before he can proceed against property previously sold.

§ 590. Rule where conveyance by grantees of mortgagor.—The rule, that if successive sales of portion of mortgaged lands are made by the mortgagor to different persons, the part unsold shall first be liable to satisfy the mortgage debt, and after it, the parcels alienated in the inverse order of the sales, applies also to successive conveyances with warranty by the mortgagor's grantees.[29] Thus, where the grantee of a mortgagor conveys the mortgaged premises in separate parcels, and the grantees of such parcels subsequently convey them in parcels, the parcels subsequently conveyed will be subject to sale in the inverse order of their conveyance.[30]

The same rule applies where there are general liens upon the entire mortgaged premises and subsequent incumbrances on separate parcels thereof, in which case the general liens are primarily chargeable on the parcels in the inverse order of the dates of the subsequent incumbrancers.[31] This rule, however, will not be enforced in any case where its application would work injustice to any party.[32]

Where two tracts of land are mortgaged, by trust deeds, one of which the mortgagor owns in his own right and the other as trustee under a resulting trust, the tract which he owns absolutely will be first sold for the satisfaction of the trust deeds.[33]

Knowles v. *Lawton,* 18 Ga. 476, 63 Am. Dec. 290; *Hammond* v. *Myrick,* 14 Ga. 77.

[29] *Mahagan* v. *Mead,* 63 N. H. 570.

[30] *Hiles* v. *Cult,* 30 N. J. Eq. (3 Stew.) 40. See *Guion* v. *Knapp,* 6 Paige Ch. (N. Y.) 35.

[31] *Schryver* v. *Teller,* 9 Paige Ch. (N. Y.) 173. See *Stuyvesant* v. *Hall,* 2 Barb. Ch. (N. Y.) 151.

[32] *Hill* v. *McCarter,* 27 N. J. Eq. (12 C. E. Gr.) 41. See *Irvine* v. *Perry,* 119 Cal. 352, 51 Pac. 544, 949.

[33] *Condit* v. *Maxwell,* 142 Mo. 266, 44 S. W. 467.

§ 591. Determining order of sale where various grantees—Equities between them.—In a contest between successive purchasers as to whose premises shall be sold first to pay the mortgage debt, the order of sale will be determined *prima facie* by the dates when their respective titles vested;[34] but the holder of a junior conveyance may show that, prior to the execution and delivery of the senior conveyance, he was in the actual and open possession of the parcel of land purchased by him, under a contract of sale, and that he had so far performed his part of the contract as to be entitled to a specific performance thereof prior to the date of the record title held by a senior grantee.[35] The rule providing for the sale of parcels of mortgaged premises in the inverse order in which the conveyances thereof were made, has been said to rest upon the principle that where the mortgagor sells a part of the mortgaged premises without reference to the incumbrance, it is right between him and the purchaser, that the part still held by the mortgagor should first be applied to the payment of the debt.[36]

The supreme court of Illinois[37] has held, that "where the owner of land mortgaged conveys a portion of it with warranty, it is his duty to protect the grantee against the mortgage; and, in foreclosing the mortgage,[38] it is just and right that it should be satisfied, if may be, out of the portion of the land which remains in the mortgagor, and that it should be first charged with the debt. This protects the interest of the purchaser of the part, and makes the mortgagor but pay his

[34] *Watson* v. *Vansickle*, 114 S. W. 1160 (Tex. Civ. App.).

[35] *Sternberger* v. *Hanna*, 42 Ohio St. 305.

[36] *Lock* v. *Fulford*, 52 Ill. 166; *Hoy* v. *Bramhall*, 19 N. J. Eq. (4 C. E. Gr.) 563, 97 Am. Dec. 687; *Gaskill* v. *Sine*, 13 N. J. Eq. (2 Beas.) 400, 78 Am. Dec. 105; *Messervey* v. *Barelli*, 2 Hill (S. C.) Eq. 567. See *Dickey* v. *Thompson*, 8 B. Mon. (Ky.) 314; *Blight* v. *Banks*, 6 T. B. Mon. (Ky.) 197, 17 Am. Dec. 136; *Blackledge* v. *Nelson*, 2 Dev. (N. C.) Eq. 66; *Mervey's Appeal*, 4 Pa. St. 80.

[37] *Niles* v. *Harmon*, 80 Ill. 396, 399.

[38] See also *Cohn* v. *Souders*, 175 Mo. 455, 75 S. W. 413.

own debt out of his own land. It saves such purchaser from loss and injury, and does no harm to any one else. And should the mortgagor convey the portion remaining in him to a second purchaser, he takes the land as it was in the hands of the mortgagor, subject to the equity of being first charged with the payment of the mortgage debt, and it is thus equitable that the portion of the land held by the second purchaser should first be sold for the satisfaction of the debt, before resort is had to the land of the first purchaser."

The portion of the mortgaged premises retained by the mortgagor, being regarded as equitably charged with the payment of the debt, if the mortgagor afterwards sells another parcel thereof, the second purchaser will take his parcel charged with the payment of the mortgage debt, as between him and the purchaser of the first lot; but as between such second purchaser and his vendor, the land still retained by the mortgagor will be primarily liable for the payment of the whole debt. The same principle will apply to every successive alienation throughout the entire order thereof.[39]

Where it has been established by statutory enactment, or by the decisions of the courts, in the case of the sale of mortgaged premises on foreclosure, where portions thereof have been sold by the mortgagor at various times subsequent to the execution of the mortgage, that the parcels shall be subject to sale in the inverse order of their alienation, it is held that this rule, being a rule of property, is binding on the courts of the United States sitting in that state.[40]

§ 592. Directions by court for the order of sale.—If the original mortgagor or his grantee has made several successive

[39] *Iglehart* v. *Crane,* 42 Ill. 261. See *Ingalls* v. *Morgan,* 10 N. Y. 178; *Thompkins* v. *Wilkburger,* 56 Ill. 385; *Matteson* v. *Thomas,* 41 Ill. 110; *Weatherby* v. *Slack,* 16 N. J. Eq. (1 C. E. Gr.) 491; *Wikoff* v. *Davis,* 4 N. J. Eq. (3 H. W. Gr.) 224.

[40] *Orvis* v. *Powell,* 98 U. S. (8 Otto) 176, 25 L. ed. 238, 8 Cent. L. J. 74.

conveyances of portions of the mortgaged premises, to different persons, the court, upon judgment of foreclosure and sale, will decree that the parcels shall be sold in the inverse order of their alienation, as shown by the dates of the respective conveyances.[41] In Erie County Savings Bank v. Roop,[42] it was held that "courts of equity have long exercised the power of directing, in foreclosure actions, the order in which the different parcels of the mortgaged premises shall be sold, arising out of the equities of the different parties interested in the equity of redemption as between themselves."[43] This rule is applicable, however, only where the mortgage was originally a lien resting uniformly upon the whole of the land.[44]

In granting a decree of foreclosure and for the sale of mortgaged premises, directions as to the order in which the different parcels of the mortgaged premises shall be sold, will be given as a matter of course, upon information that separate portions of such premises are held or claimed by different persons under conveyances or incumbrances which are subsequent to the mortgage of the plaintiff.[45] In a case where, upon judgment of foreclosure and sale, a motion was made for directions as to the manner of selling the mortgaged property, and such directions were given as the equities of the parties required, it was held that no error was committed; but a motion for such directions cannot be first made in an appellate court.[46]

In case there are conflicting claims, among junior judgment creditors, to the surplus that may arise from the sale of mort-

[41] *Hart* v. *Wandle*, 50 N. Y. 381. See *Erie Co. Sav. Bank* v. *Roop*, 48 N. Y. 292; *New York L. Ins. & T. Co.* v. *Milnor*, 1 Barb. Ch. (N. Y.) 353; *National State Bank* v. *Hibbard*, 45 How. (N. Y.) Pr. 280; *Evansville Gas Light Co.* v. *State*, 73 Ind. 219, 38 Am. Rep. 129.

[42] 48 N. Y. 292, 299.

[43] See *Ferguson* v. *Kimball*, 3 Barb. Ch. (N. Y.) 616; *Rathbone* v. *Clark*, 9 Paige Ch. (N. Y.) 648; *Jumel* v. *Jumel*, 7 Paige Ch. (N. Y.) 591.

[44] *Evansville Gas Light Co.* v. *State*, 73 Ind. 219, 38 Am. Rep. 129.

[45] *New York L. Ins. & T. Co.* v. *Milnor*, 1 Barb. Ch. (N. Y.) 353.

[46] *Haggerty* v. *Byrne*, 75 Ind. 499. See *Medsker* v. *Parker*, 70 Ind. 509.

gaged premises, should the parcels be sold in any special manner, such creditors shall apply to the court, previously to the sale under the decree, for directions that the premises be sold in such manner as will enable them to settle their respective claims upon the reference for the distribution of the surplus.

§ 593. Application to the court for directions.—Where a party to an action brought to foreclose a mortgage and to obtain a sale of the mortgaged premises, desires to have the parcels of such premises sold in a particular order, he should ask to have a clause to that effect inserted in the decree of sale.[47] An application for directions in the judgment as to the order of sale, should be made at the trial or at a special term of the court; failure to give directions for such order of sale will not be a sufficient ground for a reversal of the judgment on appeal.[48]

If a person wishing a clause inserted in the decree directing the order in which the referee shall sell the premises, neglects to apply to the court at the time the decree is rendered, or at a special term thereafter, he may apply to the referee personally, requesting the sale to be made in a particular order; and if such request be proper, and is disregarded by the referee without reason, the person aggrieved may, after sale, move to set the same aside.[49]

Where an application is made at the trial for the insertion of directions in the decree of sale as to the order in which the parcels shall be sold, the proper form of decree is that the referee or other officer making the sale of the mortgaged premises, shall sell the parcels thereof in the inverse order of their alienation, and according to equity as between the

[47] *Vandercook* v. *Cohoes Savings Institution*, 5 Hun (N. Y.) 641; *Bergen* v. *Backhouse*, 7 N. Y. Week. Dig. 113.

[48] *Bergen* v. *Backhouse*, 7 N. Y. Week. Dig. 113; *Vandercook* v. *Cohoes Savings Institution*, 5 Hun (N. Y.) 641.

[49] *Vandercook* v. *Cohoes Savings Institution*, 5 Hun (N. Y.) 641.

several defendants, leaving the officer making the sale to settle the details of the order of sale upon principles of equity.[50]

It was held in the case of Knickerbacker v. Eggleston,[51] that where a controversy exists between different defendants in relation to the order in which the several portions of the mortgaged premises shall be sold, instead of directing a reference preliminary to the decree to settle the order of the sale of the different parcels, a provision should be inserted in the decree of sale referring it to some suitable person to make the sale, and directing that if it shall appear to such referee that separate parcels of the mortgaged premises have been conveyed or incumbered by the mortgage, or by those claiming under him subsequent to the lien of the complainant's mortgage, then the referee shall sell the mortgaged premises in parcels, in the inverse order of their alienation, according to the equitable rights of the parties who are subsequent grantees or incumbrancers, as such rights shall be made to appear to the officer making the sale.

§ 594. Equitable rights between subsequent grantees and lienors.—Where the entire mortgaged premises are to be sold, it can make but little difference which parcel is sold first. The proceeds will go into a common fund and be taken into court to be distributed according to the equitable rights rights of the parties to the suit.[52] If a part of the mortgaged premises is incumbered by a second mortgage, and the residue thereof is sold and conveyed absolutely, subsequent to such second mortgage, the part mortgaged should be sold first and the surplus proceeds of that sale, beyond the amount of principal and interest due on the second mortgage, should be applied in payment of the first mortgage before resorting to the sale of the part of the premises which was conveyed abso-

[50] *Rathbone* v. *Clark,* 9 Paige Ch. (N. Y.) 648.

[51] 3 How. (N. Y.) Pr. 130.

[52] *Snyder* v. *Stafford,* 11 Paige Ch. (N. Y.) 71. See *Oppenheimer* v. *Walker,* 3 Hun (N. Y.) 30.

lutely.[53] But where the second mortgage is executed subsequently to the alienation of part of the premises, it is proper to sell the part alienated first before resorting to the second mortgage.[54]

The right to have the lands which have been sold by the mortgagor charged on foreclosure with the payment of the mortgage debt in the inverse order of alienation, is not strictly a legal but an equitable right, and is governed by those equitable principles by which courts of equity protect the rights of sureties or those who stand in the relation of sureties.[55] And the rights and duties of the party who holds the mortgage under foreclosure will not be affected, unless he is informed of the facts upon which the equitable rights of the parties depend, or unless he has sufficient notice of the probable existence of the rights to make it his duty to ascertain whether such equitable rights do, in fact, exist.[56]

§ 595. Equities between grantees—Time of acquiring title.—Where subsequent to the execution of a mortgage, the mortgaged premises are sold by the mortgagor in separate parcels at different times to different purchasers, who have no notice of the mortgage, and one of the parties takes a conveyance executed and delivered prior to the giving of a deed to another party, whose later conveyance is first recorded, upon a sale on foreclosure of the mortgage, the purchaser whose deed was first executed and delivered will take precedence over the party whose deed was excuted last but record-

[53] *Kellogg* v. *Rand*, 11 Paige Ch. (N. Y.) 59.

[54] *Devine* v. *United States Mortgage Co.* 48 S. W. 585 (Tex. Civ. App.)

[55] *Guion* v. *Knapp*, 6 Paige Ch. (N. Y.) 35, 42. See *Bernhardt* v. *Lymburner*, 85 N. Y. 172, 175.

[56] *Guion* v. *Knapp*, 6 Paige Ch. (N. Y.) 35, 42, 29 Am. Dec. 741. See *Colgrove* v. *Tallman*, 67 N. Y. 95, 98, 23 Am. Rep. 90; *Howard Ins. Co.* v. *Halsey*, 8 N. Y. 271, 273, 59 Am. Dec. 478; *Kendall* v. *Niebuhr*, 45 N. Y. Supr. Ct. (13 J. & S.) 542, 551, 58 How. (N. Y.) Pr. 156, 163; *Stuyvesant* v. *Hall*, 2 Barb. Ch. (N. Y.) 151; *Patty* v. *Pease*, 8 Paige Ch. (N. Y.) 277, 285, 35 Am. Dec. 683; *Stuyvesant* v. *Hone*, 1 Sandf. Ch. (N. Y.) 419, 423.

ed first, and he will have a prior equity in respect to the order in which the several parcels are to be sold.[57]

This rule does not apply, however, in case there has been a condemnation of a part of the mortgaged lands for a public use under the power of eminent domain. Thus, in a case where, after five mortgages had been given on a tract of land, a small strip thereof was condemned and taken for a railroad, and the owner paid therefor, the court held that the decree on foreclosure should order, first, the sale of all the land, except the strip condemned for the railroad, to satisfy, in their order, all five of the mortgages, and in case of a deficiency, then the sale of that strip.[58]

Where land which has been mortgaged is subsequently sold in parcels under executions issued upon various judgments, upon a foreclosure of the mortgage, the parcels should be liable to sale in the inverse order of the dates when the respective judgments became liens, and not of the dates of the actual sales and the times when the conveyances were made.[59] But it would seem where the administrator of a deceased mortgagor obtains an order of the probate court for the sale of a portion of the mortgaged premises to pay debts other than those secured by the mortgage, and which have been allowed against the estate, that the residue of the mortgaged premises owned by the heirs of the mortgagor must be first resorted to for the satisfaction of the mortgage, that portion held by the purchaser at an administrator's sale being only secondarily liable.[60]

[57] *Ellison* v. *Pecare,* 29 Barb. (N. Y.) 333; *VanSlyke* v. *Van Loan,* 26 Hun (N. Y.) 344; *Meacham* v. *Steele,* 93 Ill. 135; *Lausman* v. *Drahos,* 8 Neb. 457.

A different rule, however, prevails in Michigan. *Gray* v. *H. M. Loud & Sons Lumber Co.* 128 Mich. 427, 54 L.R.A. 731, 87 N. W. 376.

[58] *Foster* v. *Union Nat. Bank of Rahway,* 34 N. J. Eq. (7 Stew.) 48.

[59] *Wood* v. *Spalding,* 45 Barb. (N. Y.) 602. It would seem that a different rule prevails in Pennsylvania. See *Carpenter* v. *Koons,* 20 Pa. St. 222.

[60] *Moore* v. *Chandler,* 59 Ill. 466.

§ 596. Rights of successive subsequent mortgagees—New Jersey rule.—It is held in New Jersey that the rule for selling in the inverse order of alienation does not apply to the holders of subsequent mortgages. Thus, where a party holds a second mortgage upon part of the premises embraced in a first mortgage, upon the remaining part whereof another person holds a second mortgage, he will be entitled to have the two parcels sold separately under proceedings to foreclose the first mortgage, if such a sale can be made without prejudice to the rights of the plaintiff; yet, if the property be sold in such a manner, the proceeds of the sales of the several parcels must pay their just proportion of the amount due on the first mortgage, besides the costs, according to their respective values.[61]

And it seems that where the plaintiff's mortgage covers several parcels of land, which have been conveyed by subsequent incumbrances, the decree of foreclosure of the first mortgage may direct the whole of the property to be sold, and the proceeds to be applied to satisfy the subsequent incumbrances, after payment of the complainant's mortgage, and this may be done, although the complainant's mortgage be satisfied by a sale of only a part of the premises.[62]

Where a part of the mortgaged premises has been mortgaged a second time, and the residue thereof has been sold and conveyed absolutely, the mortgage being but a qualified conveyance of the property and the mortgagor still retaining an interest therein, the part mortgaged should be sold on the foreclosure of the prior mortgage before resorting to that part which was conveyed absolutely; and this is true whether the sale of a portion of the mortgaged premises was made prior or subsequent to the execution of the second mortgage.[63]

[61] *Pancoast* v. *Duval*, 26 N. J. Eq. (11 C. E. Gr.) 445. See also *Hellyer* v. *Stover*, 42 Atl. 98 (N. J. Eq.)

[62] *Ely* v. *Perrine*, 2 N. J. Eq. (1 H. W. Gr.) 396.

[63] *Kellogg* v. *Rand*, 11 Paige Ch. (N. Y.) 59; *Sager* v. *Tupper*, 35 Mich. 134.

§ 597. Rights of purchaser of part of mortgaged premises subject to mortgage.—Where, in a conveyance of real estate, it is expressly stated that it is agreed by and between the parties to such conveyance, that the premises conveyed are subject to a mortgage, and to all sums due and to become due thereon, as between the grantor and the grantee, the entire mortgaged premises remain the primary fund for the payment of the mortgage debt. And should the grantee afterwards be compelled to pay the entire debt to the mortgagee, he will be entitled in equity to be subrogated to the rights of the latter and to re-imburse himself out of the whole mortgaged premises.[64]

And a subsequent purchaser of the premises thus conveyed will take them subject to the same equity,[65] although his deed may not in terms refer to the lien of the mortgage, nor describe the lands as conveyed subject to such lien.[66] The purchaser of an equity of redemption, at a judicial sale, takes the land burdened with the mortgage, and he will have no right, therefore, to ask that some other fund be applied to the discharge of the mortgage debt in order to relieve his estate.[67]

§ 598. Order of sale in parcels where subsequent grantee of part has assumed mortgage.—Where the owner of mortgaged premises sells a portion thereof to a purchaser who assumes and agrees to pay, as a part of the purchase price, the whole or a part of the mortgage debt, the purchaser is legally and equitable bound to pay off and to satisfy such mortgage;[68] by such assumption he becomes the principal debtor, and the part of the land conveyed to him the primary fund out of which the mortgage is to be paid,

[64] *Jumel* v. *Jumel*, 7 Paige Ch. (N. Y.) 591.

[65] See *Colchester Savings Bank* v. *Brown*, 75 Conn. 69, 52 Atl. 316.

[66] *Jumel* v. *Jumel*, 7 Paige Ch. (N. Y.) 591.

[67] *Krueger* v. *Ferry*, 41 N. J. Eq. (14 Stew.) 432.

[68] *Torrey* v. *Bank of Orleans*, 9 Paige Ch. (N. Y.) 649. See *Warren* v. *Boynton*, 2 Barb. (N. Y.) 13.

the mortgagor remaining simply a surety, and the remainder of the property being liable only secondarily.[69]

The purchaser, therefore, is bound to protect the mortgagor and his grantees from all liability on account of the mortgage debt.[70] And should the mortgagor or his grantee be compelled to pay the mortgage debt, or any part thereof, he will be entitled to an assignment of such mortgage to enable him to obtain satisfaction out of the land of the party who assumed the payment thereof.[71]

The grantee of a portion of the mortgaged premises, where a former grantee of the remainder thereof has assumed and agreed to pay the existing incumbrance, is not bound to take any notice of an action to foreclose the mortgage; it is the duty of the grantee who assumed and agreed to pay the mortgage to appear therein and to protect the interests of his surety, and if he fails to do so and a subsequent grantee of another portion of the premises is consequently deprived of his

[69] *Wilcox* v. *Campbell,* 106 N. Y. 325; *Michigan State Ins. Co.* v. *Soule,* 51 Mich. 312; *Perry* v. *Ward,* 82 Vt. 1, 71 Atl. 721; *Murray* v. *Emery,* 85 Ill. App. 348; *Skinner* v. *Harker,* 23 Colo. 333, 48 Pac. 648; *Germania Life Ins. Co.* v. *Casey,* 98 App. Div. 88, 90 N. Y. Supp. 418; *Thompson* v. *Bird,* 57 N. J. Eq. 175, 40 Atl. 857; *Fleming* v. *Reed, as adm'r, etc.* 20 Ind. App. 462, 49 N. E. 1087; *Priddy* v. *Miners' & Merchants' Bank,* 132 Mo. App. 279, 111 S. W. 865; *Heidahl* v. *Geiser Mfg. Co.* 127 N. W. 1050 (Minn.). See *Harts* v. *Emery, as Ex'r. etc.* 84 Ill. App. 317; *Thompson* v. *Cheesman,* 15 Utah, 43, 48 Pac. 477; *Jackson* v. *Pescia,* 124 N. Y. Supp. 735; *Hyde* v. *Miller,* 45 App. Div. 396, 60 N. Y. Supp. 974; *Wyatt* v. *Dufrene, as Ex'r. etc.* 106 Ill. App. 214; *Pratt* v. *Conway,* 148 Mo. 291, 71 Am. St. Rep. 602, 49 S. W. 1028; *Regan* v. *Williams,* 185 Mo. 620, 105 Am. St. Rep. 600, 84 S. W. 959; *Poe* v. *Dixon,* 60 Ohio St. 124, 71 Am. St. Rep. 713, 54 N. E. 86; *Miller* v. *Kennedy,* 12 S. D. 478, 81 N. W. 906; *Iowa Loan & Trust Co.* v. *Schnose,* 19 S. D. 248, 103 N. W. 22; *Merriam* v. *Miles, as Ex'r. etc.* 54 Neb. 566, 69 Am. St. Rep. 731, 74 N. W. 861; *Gregory* v. *Arms,* 96 N. E. 196 (Ind. App.). See also *North End Savings Bank* v. *Snow,* 197 Mass. 339, 125 Am. St. Rep. 368, 83 N. E. 1099.

[70] *Wilcox* v. *Campbell,* 106 N. Y. 325; *Fleming* v. *Reed, as adm'r. etc.* 20 Ind. App. 462, 49 N. E. 1087. See *Lowy* v. *Boenert,* 110 Ill. App. 16; *Perry* v. *Ward,* 82 Vt. 1, 71 Atl. 721.

[71] *Halsey* v. *Reed,* 9 Paige Ch. (N. Y.) 446.

land, such purchaser will be liable to him in damages,[72] because the obligation on the part of the purchaser who assumed and agreed to pay the mortgage debt is not affected by the subsequent conveyance from the mortgagor. Where such purchaser fails to protect the residue of the land from sale under the mortgage, he will be liable alike to the mortgagor and to his grantee for the damages thus caused. The measure of damages will be the fair value of the land.[73]

In an action to foreclose a mortgage covering two farms, it appeared that L., the mortgagor, conveyed one of the farms to K., who agreed to pay $2,500 of the mortgage as part of the purchase money. L. had contracted to purchase a piece of land of B., who agreed to take the bond of K. secured by a mortgage on the farm so to be conveyed to him for part of the purchase price, and concurrent with the conveyance from L. to K., the latter executed his bond and mortgage to B. who conveyed to L. as agreed. B. knew, when he took his mortgage, of the existence of the prior mortgage and of K.'s assumption to pay a portion thereof. The court held that the judgment properly directed the sale first of the farm conveyed to K., and that the circumstances under which the mortgage to B. was given did not change the equitable rights of the parties.[74]

§ 599. When rule for sale in inverse order does not apply.—The rule that parcels of mortgaged property alienated subsequently to the execution of the mortgage, are to be sold in the inverse order of their alienation, does not apply where the purchaser of one of the parcels has assumed and agreed to pay the mortgage debt;[75] and where a mortgagor

[72] *Wilcox* v. *Campbell,* 106 N. Y. 325; *Cooley* v. *Murray,* 11 Colo. App. 241, 52 Pac. 1108.

[73] *Wilcox* v. *Campbell,* 106 N. Y. 325; *Haas* v. *Dudley,* 30 Or. 355, 48 Pac. 168.

[74] *Bowne* v. *Lynde,* 91 N. Y. 92.

[75] *Warren* v. *Boynton,* 2 Barb. (N. Y.) 13; *Torrey* v. *Bank of Orleans,* 9 Paige Ch. (N. Y.) 649; *Halsey* v. *Reed,* 9 Paige Ch. (N. Y.) 446; *Ross* v. *Haines,* 5 N. J. Eq. (1 Halst.) 632; *Engle* v. *Haines,* 5 N. J. Eq. (1 Halst.) 186,

sells a portion of the mortgaged premises, and in the deed of conveyance expressly stipulates, that it is "subject to the payment by the said grantee of the existing liens upon said premises," the rule does not apply.[76]

And if by the terms of the sale of a part of the mortgaged premises, the mortgage is to remain a common charge upon the whole premises, and is to be paid by the mortgagor and the purchaser, and there is no special agreement as to the proportion which each one shall pay, the parcels will be subject to their *pro rata* share of the incumbrance.[77] Where a purchaser of a portion of the mortgaged premises assumes and agrees to pay the mortgage debt, or a specified portion thereof, and afterwards conveys the part purchased to a person who has notice of his agreement and obligation, the equitable rights of such second purchaser will be as fully bound as are those of his vendor.[78]

Thus, where after the execution of a mortgage, a portion of the premises were sold to a party who assumed and agreed to pay the mortgage, and such purchaser afterwards mortgaged the part purchased to a party having notice of the assumption, it was held that such parcel remained the primary fund for the payment of the debt,[79] and that the remaining portion of the premises covered by the first mortgage, was merely security for the payment of the balance of the debt if any, remaining after exhausting the primary fund.[80]

43 Am. Dec. 624; *Mowry* v. *Mowry*, 137 Mich. 277, 100 N. W. 388. See *Mead* v. *Peabody*, 183 Ill. 126, 55 N. E. 719. See also *Skinner* v. *Harker*, 23 Colo. 333, 48 Pac. 648. See *ante*, § 598.

[76] *Brisco* v. *Power*, 47 Ill. 447; *Hoy* v. *Bramhall*, 19 N. J. Eq. (4 C. E. Gr.) 563; *New England Loan & Trust Co.* v. *Stephens*, 16 Utah, 385, 52 Pac. 624; *Wood* v. *Harper*, 9 App. Div. 229, 41 N. Y. Supp. 242. See *Monarch Coal & Mining Co.* v. *Hand*, 197 Ill. 288, 64 N. E. 381.

[77] *Brisco* v. *Power*, 47 Ill. 447; *Hoy* v. *Bramhall*, 19 N. J. Eq. (4 C. E. Gr.) 563, 97 Am. Dec. 687.

[78] *Torrey* v. *Bank of Orleans*, 9 Paige Ch. (N. Y.) 649; *Ross* v. *Haines*, 5 N. J. Eq. (1 Halst.) 632; *Engle* v. *Haines*, 5 N. J. Eq. (1 Halst.) 186, 43 Am. Dec. 624. See *ante*, § 597.

[79] *Steere* v. *Childs*, 15 Hun, 511.

[80] *Warfield* v. *Crane*, 4 Abb. Ct.

§ 600. **Contribution according to value—Valuation, when made.**—Where land which has been mortgaged is subsequently conveyed to different parties, the mortgage remaining a common charge upon the whole land so that each part will be required to bear its due proportion of the debt, equity will compel every part to a just contribution.[81] Such contribution will be enforced *pro rata* according to the value of the several parcels. It has been said that in making the apportionment of the burden which each parcel should bear, due regard should be had to the relative value of each parcel at the date of the mortgage.[82]

But in some cases it is held that the distribution of the burden of paying the mortgage should be according to the value of the parcels when they are sold.[83] Chancellor Kent has held that the parcels are bound to contribute according to their actual relative value, and not according to the prices for which they are sold at the sheriff's sale,[84] from which it has been inferred by some courts that the relative value of the parcels is to be estimated at the time when they are called upon for contribution.[85]

The fact that a part of the premises mortgaged is sold subject to a proportionate part of the mortgage debt will not be sufficient to prevent the operation of the rule requiring contribution in inverse order of conveyance as to parts of such parcel which are sold to a subsequent purchaser.[86] And those cases where there is no specific agreement as to the proportion

App. Dec. (N. Y.) 525; *Woods* v. *Spalding*, 45 Barb. (N. Y.) 607; *Stuyvesant* v. *Hall*, 2 Barb. Ch. (N. Y.) 151; *Steere* v. *Childs*, 15 Hun (N. Y.) 511, 518.

[81] *Aderholdt* v. *Henry*, 87 Ala. 415, 6 So. 625, 6 L.R.A. 451.

[82] *Stevens* v. *Cooper*, 1 Johns. Ch. (N. Y.) 425, 7 Am. Dec. 499; *Morrison* v. *Beckwith*, 4 T. B. Mon. (Ky.) 73, 16 Am. Dec. 736. See *Lyon* v. *Robbins*, 45 Conn. 513; *Dickey* v. *Thompson*, 8 B. Mon. (Ky.) 312; *Hall* v. *Morgan*, 79 Mo. 47.

[83] *Burk* v. *Chrisman*, 3 B. Mon. (Ky.) 50.

[84] *Cheesebrough* v. *Millard*, 1 Johns. Ch. (N. Y.) 409, 7 Am. Dec. 494.

[85] *Dickey* v. *Thompson*, 8 B. Mon. (Ky.) 312, 316.

[86] *Moore* v. *Schurtleff*, 128 Ill. 370, 21 N. E. 775.

of the mortgage debt which each part of the mortgaged premises is to bear, where a portion is sold subject to a proportionate part of the incumbrance, contribution must be made according to the relative value of each part.[87] In the case of Tarbull v. Durant,[88] where the equitable owner of land mortgaged by a deed absolute in form to a creditor had sold a part of it, a note and mortgage therefor being taken by the creditor as a substitute for the legal title to that part, and assigned the note, subject to the creditor's claim, on foreclosure by such creditor of all the land, such assignee, and one who, by a prior attachment, has acquired an interest in the other part of the land, must contribute proportionally.

§ 601. Where the mortgagee has other securities and there are subsequent mortgagees.—Where a mortgage has been executed upon a whole tract of land and subsequently another mortgage is executed upon a portion of the land, the first mortgagee will be required to exhaust that portion of the land not covered by the second mortgage before resorting to the latter portion.[89] And where a mortgagee holds a mortgage on two tracts of land securing his debt, and there have been subsequent conveyances or mortgages of one of the tracts, he will be required to exhaust his

[87] *Moore* v. *Shurtleff*, 128 Ill. 370, 21 N. E. 775.

[88] 61 Vt. 516, 17 Atl. 44.

[89] See *Ingalls* v. *Morgan*, 10 N. Y. 178; *York & Jersey Steamboat Ferry Co.* v. *Associates of the Jersey Co.* Hopk. Ch. (N. Y.) 460; *Evertson* v. *Booth*, 19 Johns. (N. Y.) 486; *Hayes* v. *Ward*, 4 Johns. Ch. (N. Y.) 123, 8 Am. Dec. 554; *Stevens* v. *Cooper*, 1 Johns. Ch. (N. Y.) 425, 7 Am. Dec. 499; *Cheesebrough* v. *Millard*, 1 Johns. Ch. (N. Y.) 409, 7 Am. Dec. 494; *James* v. *Hubbard*, 1 Paige Ch. (N. Y.) 228, 235; *Terry* v. *Rosell*, 32 Ark. 478; *Andreas* v. *Hubbard*, 50 Conn. 351; *Chicago & G. W. R. Co.* v. *Peck*, 112 Ill. 408; *Swift* v. *Conboy*, 12 Iowa, 444; *Sibley* v. *Baker*, 23 Mich. 312; *Trowbridge* v. *Harleston*, Walk. Ch. (Mich.) 185; *Warwick* v. *Ely*, 29 N. J. Eq. (2 Stew.) 82; *Ramsey's Appeal*, 2 Watts (Pa.) 228, 27 Am. Dec. 301; *Fowler* v. *Barksdale*, Harp. (S. C.) Eq. 164; *Scott* v. *Webster*, 44 Wis. 185. See also *Lanoy* v. *Athol*, 2 Atk. 444, 446; *Wright* v. *Nutt*, 1 H. Bl. 150; *Aldrich* v. *Cooper*, 8 Ves. 382, 395; *Averall* v. *Wade*, Lloyd & Goold, Cas. Temp. Sugden, 252.

remedies against the portion which has not been mortgaged or conveyed before resorting to the other portion.[90]

If the mortgagee of the north half of a lot of land, having notice that it is equitably chargeable with, and of sufficient value for the payment of a prior mortgage upon the whole lot, becomes the purchaser of such prior mortgage, he cannot, in equity, enforce it against the remainder of the lot.[91] In such a case the north half, being chargeable with the payment of the mortgage upon the whole lot, must first be applied to that purpose; and if it is sufficient to satisfy the debt in full, the mortgage will be held discharged as to the remainder of the premises.[92]

But a trustee mortgagee, whose mortgage is a senior lien on land, cannot be deprived of such lien, merely because he may have a right to satisfy the mortgage debt out of a bond executed by his predecessor in the trust, by virtue of which the mortgage came to him.[93]

It has been held, where there are mortgages of lands and of chattels to secure the payment of the same debt, and the mortgagee seizes the chattels after condition broken, that a subsequent purchaser of the land from the mortgagor will have a right to compel the mortgagee to apply the value of the chattels seized to the satisfaction of the mortgage debt; and that if he loses the chattels by his neglect, he will be compelled to deduct their value from the amount due, and the mortgage can be foreclosed only for the amount remaining unpaid after such deduction.[94]

[90] *Raun* v. *Reynolds*, 11 Cal. 14; *Andreas* v. *Hubbard*, 50 Conn. 351; *Burpee* v. *Parker*, 24 Vt. 567; *Bagley* v. *Weaver*, 72 Ark. 29, 77 S. W. 903.

[91] *McIntire* v. *Parks*, 59 N. H. 258.

[92] *McIntire* v. *Parks*, 59 N. H. 258.

[93] *Shuey* v. *Latta*, 90 Ind. 136.

[94] *Moody* v. *Haselden*, 1 S. C. (N. S.) 129. See *Fowler* v. *Barksdale*, Harp. (S. C.) Eq. 164; *Gist* v. *Pressley*, 2 Hill (S. C.) Eq. 318; *Gadberry* v. *McClure*, 4 Strob. (S. C.) Eq. 175; *Bank of Hamburg* v. *Howard*, 1 Strob. (S. C.) Eq. 173. See also *Cohn* v. *Souders*, 175 Mo. 455, 75 S. W. 413.

§ 602. Rule where portions alienated have been released.—From the equitable doctrine of the sale of mortgaged premises in the inverse order of alienation subsequent to the execution of the mortgage, it follows as a corollary that if the mortgagee, with actual notice of the fact of the subsequent conveyances of the parts of the mortgaged premises, releases from the mortgage one or more parcels of the premises primarily liable, he thereby releases *pro rata* the portion secondarily liable,[95] and he cannot enforce the lien against the residue without deducting the value of the part released from the amount due on the mortgage.[96]

In case the value of the property released is equal to the full amount of the mortgage debt, the mortgagee will, of course, lose his debt so far as the lien of his mortgage is concerned.[97] But it has been held that where the subsequent purchasers or mortgagees are not prejudiced by the release, as where the mortgagor had no title to the lot released at

[95] *Inglehart* v. *Crane*, 42 Ill. 261, 268.

[96] *Stuyvesant* v. *Hall*, 2 Barb. Ch. (N. Y.) 151; *Stevens* v. *Cooper*, 1 Johns. Ch. (N. Y.) 425, 7 Am. Dec. 499; *Cheesebrough* v. *Millard*, 1 Johns. Ch. (N. Y.) 409, 7 Am. Dec. 494; *Patty* v. *Pease*, 8 Paige Ch. (N. Y.) 277, 35 Am. Dec. 683; *Skeel* v. *Spraker*, 8 Paige Ch. (N. Y.) 195; *Guion* v. *Knapp*, 6 Paige Ch. (N. Y.) 35, 29 Am. Dec. 741; *Birnie* v. *Main*, 29 Ark. 591; *Inglehart* v. *Crane*, 42 Ill. 261, 268; *Matteson* v. *Thomas*, 41 Ill. 110; *Taylor* v. *Short, Adm'r*, 27 Iowa, 361, 1 Am. Rep. 280; *George* v. *Wood*, 91 Mass. (9 Allen) 80, 85 Am. Dec. 741; *Chase* v. *Woodbury*, 89 Mass. (6 Cush.) 143; *Parkman* v. *Welch*, 36 Mass. (19 Pick.) 231; *James* v. *Brown*, 11 Mich. 25; *Harrison* v. *Guerin*, 27 N. J. Eq. (11 C. E. Gr.) 219; *Mount* v. *Potts*, 23 N. J. Eq. (8 C. E. Gr.) 188; *Hoy* v. *Bramhall*, 19 N. J. Eq. (4 C. E. Gr.) 563, 97 Am. Dec. 687; *Vanorden* v. *Johnson*, 14 N. J. Eq. (1 McCar.) 376, 82 Am. Dec. 254; *Gaskill* v. *Sine*, 13 N. J. Eq. (2 Beas.) 400, 78 Am. Dec. 105; *Reilly* v. *Mayer*, 12 N. J. Eq. (1 Beas.) 55; *Blair* v. *Ward*, 10 N. J. Eq. (2 Stockt.) 119; *Mickle* v. *Rambo*, 1 N. J. Eq. (1 Saxt.) 501; *Shannon* v. *Marselis*, 1 N. J. Eq. (1 Saxt.) 413; *Taylor* v. *Maris*, 5 Rawle (Pa.) 51; *Miller* v. *Rogers*, 49 Tex. 398; *Lyman* v. *Lyman*, 32 Vt. 79, 76 Am. Dec. 151; *Deuster* v. *McCamus*, 14 Wis. 307. But see *Stuyvesant* v. *Hone*, 1 Sandf. Ch. (N. Y.) 419.

[97] *Woodward* v. *Brown*, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2. See *Crisman* v. *Lanterman*, 149 Cal. 647, 117 Am. St. Rep. 167, 87 Pac. 89.

the time the first mortgage was executed, this rule will not apply.[98]

A creditor having a lien upon two parcels of land may release the lien from one without impairing his legal claim upon the other, if he has no reason to suppose that such discharge will interfere with the equitable rights of any other person.[99] To affect the mortgagee, he must have actual notice of the subsequent transfer of a portion or portions of the mortgaged premises, before a release by him of a portion of such premises will bar his right to foreclose his mortgage upon the remaining portion.[1]

A mortgagee is not required to search the records from time to time to ascertain whether subsequent incumbrances have been placed upon the mortgaged premises, or whether a portion thereof has been transferred;[2] furthermore, the record is not constructive notice to the prior mortgagee of such incumbrance.[3] And where an attorney has been employed by a mortgagee to foreclose a mortgage upon a particular piece of property, and such attorney learns, from other sources, and not in connection with his business of foreclos-

[98] *Taylor* v. *Short's Adm'r,* 27 Iowa, 361, 1 Am. Rep. 280.

[99] *Stuyvesant* v. *Hone,* 1 Sandf. Ch. (N. Y.) 419; *Guion* v. *Knapp,* 6 Paige Ch. (N. Y.) 35, 43.

[1] *Stuyvesant* v. *Hall,* 2 Barb. Ch. (N. Y.) 151; *King* v. *McVickar,* 3 Sandf. Ch. (N. Y.) 192; *Blair* v. *Ward,* 10 N. J. Eq. (2 Stockt.) 119; *Bridgewater Roller Mills Co.* v. *Receivers of Baltimore Building & Loan Ass'c,* 124 Fed. 718.

[2] *Howard Ins. Co.* v. *Halsey,* 8 N. Y. 271, 59 Am. Dec. 478; *Talmage* v. *Wilgers,* 1 N. Y. Leg. Obs. 42. See *Cheesebrough* v. *Millard,* 1 Johns. Ch. (N. Y.) 409, 7 Am. Dec. 494; *Stuyvesant* v. *Hone,* 1 Sandf. Ch. (N. Y.) 419; *Birnie* v. *Main,* 29 Ark. 591; *Ritch* v. *Eichelberger,* 13 Fla. 169; *Chase* v. *Woodbury,* 60 Mass. (6 Cush.) 143; *James* v. *Brown,* 11 Mich. 25; *Brown* v. *Simons,* 44 N. H. 475; *Shannon* v. *Marselis,* 1 N. J. Eq. (1 Saxt.) 413; *Taylor* v. *Maris,* 5 Rawle (Pa.) 51; *Lyman* v. *Lyman,* 32 Vt. 79, 76 Am. Dec. 151. See also *Bridgewater Roller Mills Co.* v. *Strough, as guardian, etc.* 98 Va. 721, 37 S. E. 290.

[3] *Howard Ins. Co.* v. *Halsey,* 8 N. Y. 271, 59 Am. Dec. 478; *Talmage* v. *Wilgers,* 1 N. Y. Leg. Obs. 42; *Bridgewater Roller-Mills Co.* v. *Strough, as guardian, etc.* 98 Va. 721, 37 S. E. 290.

ing the mortgage on such property, that there are subsequent mortgages or conveyances of a part of the mortgaged premises, such knowledge of the attorney will not be deemed notice to his client, the prior mortgagee.[4]

§ 603. Rule for order of sale where the mortgage covers homestead and other lands.—Where the mortgage covers the homestead of a family, together with other lands, the mortgagor will have no right to require, and the court will not be warranted in granting, an order directing that the other lands be sold first and that the homestead be resorted to only in case there is a deficiency.[5] The mortgagee may release the other land and still retain his lien upon the homestead.[6] And this is true although the remainder of the property mortgaged, without the homestead, is sufficient to satisfy the mortgage.[7]

[4] *Howard Ins. Co.* v. *Halsey,* 8 N. Y. 271, 59 Am. Dec. 478.

[5] *Dodds* v. *Snyder,* 44 Ill. 53; *Chapman* v. *Lester,* 12 Kan. 592; *Searle* v. *Chapman,* 121 Mass. 19; *White* v. *Polleys,* 20 Wis. 503, 91 Am. Dec. 432; *Jones* v. *Dow,* 18 Wis. 241.

But a contrary rule prevails in some of the states. See *McLaughlin* v. *Hart,* 46 Cal. 639; *Dickson* v. *Chorn,* 6 Iowa, 19, 71 Am. Dec. 382. It is said in the case of *Hall* v. *Harris,* 113 Ill. 410, 413, that on the foreclosure of such a mortgage there can be no sale until the homestead is assigned to the widow; and that a decree of foreclosure directing an assignment of the homestead before sale of the residue is not the granting of affirmative relief to her upon answer, but is for the benefit of the complainant, and is warranted under the prayer in the bill for "such other and further relief as equity may require."

It was held, by a divided court, in the case of *Armitage* v. *Toll* (64 Mich. 412; *sub nom. Armitage* v. *Davenport,* 31 N. W. 408) that in foreclosing a mortgage executed by a husband and his wife upon several parcels of land, including his homestead, the homestead can be sold only to pay the deficiency remaining after sale of all the other property mortgaged, and that a second mortgagee has no right to have the liability of the homestead increased by requiring it to be first sold to satisfy the mortgage debt. See also *Butters* v. *Butters,* 153 Mich. 153, 117 N. W. 203.

[6] *Chapman* v. *Lester,* 12 Kan. 592. See *Dodds* v. *Snyder,* 44 Ill. 53; *Searle* v. *Chapman,* 121 Mass. 19.

[7] *Searle* v. *Chapman,* 121 Mass. 17.

And it has been said that where the mortgage covers the homestead together with other lands, the mortgagor will have no right to require the latter property to be sold for the payment of the mortgage debt before resorting to the homestead.[8] The fact that a part of the property is a homestead does not alter the rule requiring a party having security on two funds first to exhaust his remedy against the fund upon which he alone is secured, if there is another party having security on the other part.[9]

[8] See *Chapman* v. *Lester,* 12 Kan. 592; *Searle* v. *Chapman,* 121 Mass. 19; *White* v. *Polleys,* 20 Wis. 503, 91 Am. Dec. 432.

[9] *In re Sauthoff,* 7 Biss. C. C. 167.

CHAPTER XXV.

CONDUCT OF SALE.

PERSONAL ATTENDANCE OF REFEREE—DISCRETIONARY POWERS ON SALE—ADJOURNMENTS—WHO MAY PURCHASE—REPORT OF SALE BY REFEREE—CONFIRMATION THEREOF.

§ 604. Personal attendance of the officer conducting the sale.
§ 605. Discretionary powers of referee to sell—Powers of loan commissioners.
§ 606. Postponement and adjournment of sale.
§ 607. Publishing notice of adjournment—Adjourning sale under statutory foreclosure.
§ 608. Holding sale open.
§ 609. Who may purchase at foreclosure sale.
§ 610. Purchase by mortgagee.
§ 611. Memorandum of sale.
§ 612. Report of officer making sale.
§ 613. What referee's report should show.
§ 614. Confirmation of referee's report.
§ 615. Referee's report should state amount of deficiency.
§ 616. Substituted or supplemental report of referee—Notice to defendant.

§ 604. Personal attendance of the officer conducting the sale.—It is the duty of the referee appointed by the court to conduct the sale on a mortgage foreclosure, to attend the sale in person at the time and place appointed. The sale must be made at public auction, to the highest bidder, unless the court has otherwise directed. It must be made by the officer appointed by the decree of foreclosure and sale, or designated by the statute,[10] or under his immediate personal supervision and direction;[11] he must receive bids as long as they are offered, waiting a reasonable length of time after

[10] *Heyer* v. *Deaves*, 2 Johns. Ch. (N. Y.) 154. See *May* v. *May*, 11 Paige Ch. (N. Y.) 201.

[11] *Blossom* v. *Milwaukee & Chicago R. R. Co.* 70 U. S. (3 Wall.) 196, 205, 18 L. ed. 43.

a bid is made for others, and if no other is made he must strike off the premises to the highest bidder.[12]

In Heyer v. Deaves,[13] it was held that all sales of mortgaged premises under a decree of the court must be made by a master,[14] or under his immediate direction,[15] and if such officer fails to be present and to direct such sale, it will be irregular and may be set aside upon motion. The court held in that case, that "the statute intended that such sales should be under the immediate direction of a known and responsible public officer. An under or deputy master is not an officer known in the law." The case of Heyer v. Deaves was distinguished in Connolly v. Belt,[16] where the court held that "neither the New York statute nor that case is applicable to the present case, which is a sale under a common deed of trust. The time, place, terms and conditions were such as were deemed by the trustee most for the interest of the parties concerned in the said sale, as appears by the answer of the trustee; and a sale made by an agent of the trustee, according to the terms and conditions at the time and place prescribed, is a sale by the trustee, there being no law requiring him to be present personally at the auction." The distinction, it seems, is between what involves a discretion and a power to do a certain specific act. In the former case the trustee must act in person; in the latter case he was authorized to delegate his power.[17]

[12] *Bicknell* v. *Byrnes,* 23 How. (N. Y.) Pr. 486.

[13] 2 Johns. Ch. (N. Y.) 154.

[14] The old master in chancery has been supplanted by the modern referee.

[15] See *Reynolds* v. *Wilson,* 15 Ill. 394, 60 Am. Dec. 753; *Blakey* v. *Abert,* 1 Dana (Ky.) 185; *Meyer* v. *Bishop,* 27 N. J. Eq. (12 C. E. Gr.) 145; *Blossom* v. *Milwaukee & C. R. Co.* 70 U. S. (3 Wall.) 205, 18 L. ed. 43, 46; *Williamson* v. *Berry,* 49 U. S. (8 How.) 495, 544, 12 L. ed. 1170, 1191.

[16] 5 Cr. C. C. 405, 408.

[17] *Powell* v. *Tuttle,* 3 N. Y. 396. Thus, where an administrator is authorized by a decree of court to sell land for the payment of debts, the sale must be made by him personally or by his agent in his presence. *Sebastian* v. *Johnson,* 72 Ill. 283, 22 Am. Rep. 145. See

§ 605. Discretionary powers of referee to sell—Powers of loan commissioners.—The reason for requiring the presence and personal supervision of the officer delegated to make the sale, is said to be that the statute imposes a duty upon such officer, and presupposes that he will ascertain the situation of the property before the time of the sale, and will sell it as the best interests of the parties may require. Again, there may be cases in which the exercise of his discretionary powers will become necessary, in which case the honest exercise of such discretion is said to be as final as a decision in like cases of any judicial tribunal.[18] And in such cases it seems that the parties have a legal right to whatever possible benefit may follow from the honest exercise of such discretion.[19]

The exercise of such discretion cannot be delegated, and for that reason a sale made by a person delegated by the referee, or other officer, in his absence, may be set aside as irregular, on a direct application made in the course of the proceedings, although a deed made by the officer will pass the title to the premises and will be valid and effective in collateral proceedings, as the act of an officer *de facto*.[20]

Thus, it has been held that the New York statute, creating the office of loan commissioners, and investing such officers with certain discretionary powers and providing for the loaning of moneys on mortgage security and for the foreclosure of such mortgages on failure to pay the interest or principal,

Berger v. *Duff*, 4 Johns. Ch. (N. Y.) 368; *Taylor* v. *Hopkins*, 40 Ill. 442.

[18] *O'Donnell* v. *Lindsey*, 38 N. Y. Supr. Ct. (7 J. & S.) 523, 529, citing *Litchfield* v. *Register*, 76 U. S. (9 Wall.) 577, 19 L. ed. 682; *The Secretary* v. *McGarrahan*, 76 U. S. (9 Wall.) 311, 19 L. ed. 64; *Gaines* v. *Thompson*, 74 U. S. (7 Wall.) 349, 19 L. ed. 62. See *ante*, § 576.

[19] *O'Donnell* v. *Lindsey*, 39 N. Y. Supr. Ct. (7 J. & S.) 523, 529, 530. See *Russell* v. *Conn*, 20 N. Y. 81.

[20] *Meyer* v. *Patterson*, 28 N. J. Eq. (1 Stew.) 239; *Meyer* v. *Bishop*, 27 N. J. Eq. (12 C. E. Gr.) 141. See also *People* v. *Collins*, 7 Johns. (N. Y.) 549; *Potter* v. *Luther*, 3 Johns. (N. Y.) 431; *Wilcox* v. *Smith*, 5 Wend. (N. Y.) 231, 21 Am. Dec. 213; *State* v. *Carroll*, 38 Conn. 449, 9 Am. Rep. 409.

invests them with a special authority and must be strictly pursued;[21] consequently the sale of mortgaged premises made by one loan commissioner in the absence of his associates has been held to be irregular, and to be ineffective to pass the title to the premises to the purchaser.[22]

In the case of King v. Stow,[23] it was said that the assent of the absent commissioner was to be presumed, as no dissent was afterwards expressed by him, and he united in the deed to the purchaser, and that though it was the duty of both commissioners to be present at the sale, yet the absence of one of them from necessity or just cause would not affect the validity of a sale otherwise regular and fair. But this case was directly overruled by the decision in Powell v. Tuttle.[24]

§ 606. Postponement and adjournment of sale.—The sale of mortgaged premises may be postponed from time to time, or an adjournment may be had to another place, unless the place of sale is fixed by the decree of foreclosure,[25] in the discretion of the referee or other officer making the sale,[26] either for want of bidders or for any other reasonable cause,

[21] *Powell* v. *Tuttle,* 3 N. Y. 396, 400. See *Sherwood* v. *Reade,* 7 Hill (N. Y.) 431; *Sharpe* v. *Speir,* 4 Hill N. Y. 76; *Downing* v. *Rugar,* 21 Wend. (N. Y.) 178, 34 Am. Dec. 223.

[22] *York* v. *Allen,* 30 N. Y. 104, 111; *Pell* v. *Ulmar,* 18 N. Y. 139, 144, 21 Barb. (N. Y.) 500; *Olmsted* v. *Elder,* 5 N. Y. 144, 147; *Powell* v. *Tuttle,* 3 N. Y. 396.

[23] 6 Johns. Ch. (N. Y.) 323.

[24] 3 N. Y. 396.

[25] *Richards* v. *Holmes,* 59 U. S. (18 How.) 143, 16 L. ed. 320. The Maryland courts have gone so far as to confirm a sale adjourned to a place different from that named in the decree. *Farmers' Bank of Maryland* v. *Clarke,* 28 Md. 145.

[26] It was held by the Supreme Court of the United States in *Blossom* v. *Milwaukee & Chicago Railroad Company* (70 U. S. (3 Wall.) 196, 18 L. ed. 43), where the decree was to the effect that the premises should be sold at a certain time, unless the mortgagor should previously pay the mortgage debt, that a few brief adjournments for the purpose of enabling the mortgagor to make arrangements to pay the amount due on the mortgage, were allowed for a sufficient cause, although made at the request of the plaintiff's solicitor.

inducing him to believe that a future day or another place will be more favorable for making an advantageous sale.[27]

The application for a postponement or adjournment generally comes from some one or more of the interested parties [28] and is not infrequently made by the plaintiff's attorney; but the referee possesses a discretionary power in the matter [29] and should not be governed by the directions of the plaintiff's attorney, nor by the request of other parties; there may be occasions when it will be the duty of the officer to adjourn the sale without the request of any one, and even against the express wishes of a party in interest.[30] The referee is not a mere agent of the plaintiff, but an officer of the court, having a legal duty to perform and a quasi-judicial discretion to exercise. In case he acts unreasonably, the sale may be set aside and a resale ordered.[31]

[27] *Tinkom* v. *Purdy,* 5 Johns. (N. Y.) 345; *Russell* v. *Richards,* 11 Me. (2 Fairf.) 371, 25 Am. Dec. 254; *Warren* v. *Leland,* 9 Mass. 265; *Strong* v. *Catton,* 1 Wis. 471; *Richards* v. *Holmes,* 59 U. S. (18 How.) 143, 16 L. ed. 320.

It is well established that trustees under a trust deed have, in their sound discretion, the right, for good cause, to adjourn a sale to another day, especially where the trust deed confers the power to repeat and postpone from time to time as they deem expedient. *Crutchfield* v. *Hewett,* 2 App. Cas. D. C. 373, 22 Wash. L. Rep. 127. But in the absence of any statute on the subject, a trustee having a naked power to sell under a trust deed, has no power to adjourn a sale before the day of sale by simply changing the time for the sale in the notice published. *Wolff* v. *Ward,* 104 Mo. 127, 16 S. W. 161.

[28] Where the defendant desires an adjournment of the sale, he may properly be required to pay the costs of re-advertising as a condition of the adjournment, but he cannot properly be required to pay money as a condition for such adjournment. *Holland Trust Company* v. *Hogan,* 17 N. Y. Supp. 919, 44 N. Y. S. R. 577.

[29] See *Connick* v. *Hill,* 127 Cal. 162, 59 Pac. 832.

[30] *Tinkom* v. *Purdy,* 5 Johns. (N. Y.) 345; *Astor* v. *Romayne,* 1 Johns. Ch. (N. Y.) 310; *McGown* v. *Sandford,* 9 Paige Ch. (N. Y.) 290; *Ward* v. *James,* 8 Hun (N. Y.) 526; *Russell* v. *Richards,* 11 Me. (2 Fairf.) 371, 26 Am. Dec. 532; *Richards* v. *Holmes,* 59 U. S. (18 How.) 143, 147, 16 L. ed. 320. See *Birbeck Investment, Savings & Loan Co. of America* v. *Gardner,* 55 N. J. Eq. 632, 37 Atl. 767.

[31] *Breese* v. *Bushby,* 13 How. (N. Y.) Pr. 485, 489. See *post,* chap. 25.

In New York, the Code of Civil Procedure [32] provides that where the officer appointed to make the sale does not appear, the sale may be adjourned by the plaintiff's attorney for a period not to exceed four weeks, during which time application may be made to the court to have another person appointed to make the sale.

§ 607. Publishing notice of adjournment—Adjourning sale under statutory foreclosure.—In case a sale is postponed or adjourned, the statute requires that a notice of such postponement must be published in the paper or papers wherein the notice of sale was published.[33] The day to which the sale is adjourned should be announced at the time of the adjournment;[34] but if this cannot be done on account of an injunction, or for other reasons, a general adjournment may be made on the day to which the sale is adjourned subsequently advertised.[35] But where the defendant has procured

[32] § 1678.

[33] N. Y. Code Civ. Proc. § 1678. See also *LaFarge* v. *VanWagenen,* 14 How. (N. Y.) Pr. 54.

In New Jersey a published notice of adjournment of the sale need not describe the lands to be sold. *Avon-by-the-Sea Land & Improvement Co.* v. *Finn,* 56 N. J. Eq. 808, 41 Atl. 360.

A notice of postponement of a sale under a trust deed need not be advertised for the same length of time required for the original notice. *Crutchfield* v. *Hewett,* 2 App. Cas. D. C. 373, 22 Wash. L. Rep. 127. Neither is it necessary to add the names of the trustees in the trust deed to the notice of postponement of the sale added to the original notice, which, with the names of the trustees thereto, is republished; the name of the authorized auctioneer being held to be sufficient. *Crutchfield* v. *Hewett,* 2 App. Cas. D. C. 373, 22 Wash. L. Rep. 127.

[34] *LaFarge* v. *VanWagenen,* 14 How. (N. Y.) Pr. 54.

[35] *LaFarge* v. *VanWagenen,* 14 How. (N. Y.) Pr. 54.

In a case where notice of one of the adjournments of a foreclosure sale was not published until the day of the sale, when all the adjournments were published, and the referee's report of the sale was duly served on all the parties and confirmed, the irregularity was held to be one which the parties are competent to waive; and if none of the parties make any complaint, the objection is not available to impeach the title to the property. *Beachstein* v. *Schultz,* 120 N. Y. 168, 24 N. E. 388, 30 N. Y. S. R. 576. The supreme court of Illinois, in the case of *Ritchie* v. *Judd* (137

a stay of proceedings which is vacated on the day of the sale, because such stay was improperly granted, the sale will not be set aside and a resale ordered, simply because the party procuring the stay had made no preparation to attend the sale.[33]

The proceedings in the statutory foreclosure of a mortgage will not be void because the day of sale specified in the advertisement happens to be on Sunday. The mortgagee or the officer having charge of the sale may postpone it before the advertised day of such sale to a subsequent day without affecting the regularity thereof.[37] And where the day, not a legal holiday, fixed for the sale of the mortgaged premises, is afterwards appointed to be a legal holiday, the referee, or other officer making the sale, may adjourn the sale to another day.[38]

Where, upon a statutory foreclosure, the mortgagee attends upon the day of sale mentioned in the advertisement and the sale is adjourned to another day, it must be made on the day to which it is adjourned; and if there is a variance between the day announced at the adjournment and the day published in the newspapers, the sale will be irregular.[39] It is questionable whether a sale can be postponed before the day upon which it is advertised to occur.[40] And it has been held that where a notice of postponement of sale has been given prior

Ill. 453, 27 N. E. 682), say that a mortgagor is not prejudiced by a re-advertisement of a sale under the mortgage, upon a discovery of an error in the first notices, in the absence of evidence of a bad motive in so doing.

[36] *Peck* v. *New Jersey & N. Y.* R. Co. 22 Hun (N. Y.) 129.

[37] *Sayles* v. *Smith,* 12 Wend. (N. Y.) 57, 27 Am. Dec. 117; *Westgate* v. *Handlin,* 7 How. (N. Y.) Pr. 372. See *Bunce* v. *Reed,* 16 Barb. (N. Y.) 347, 349.

[38] *White* v. *Zust,* 28 N. J. Eq. (1 Stew.) 107.

[39] *Miller* v. *Hull,* 4 Den. (N. Y.) 104; *LaFarge* v. *VanWagenen,* 14 How. (N. Y.) Pr. 54, 58; *Lantz* v. *Worthington,* 4 Pa. St. 153, 45 Am. Dec. 682. As to commissions and expenses, in the case of an adjournment made at the request of the owner of the equity of redemption, see *Neptune Ins. Co.* v. *Dorsey,* 3 Md. Ch. 334.

[40] See *Jackson* v. *Clark,* 7 Johns. (N. Y.) 217; *Frederick* v. *Wheelock,* 3 T. & C. (N. Y.) 210.

to the day on which it is advertised to occur, and the sale is afterwards made on the day originally advertised, such sale will be irregular and void.[41]

§ 608. Holding sale open.—A defendant to a foreclosure bid off the premises at the sale and asked for time to produce the money, and two days' time was given him for that purpose. The sale was held open for that length of time, and a public announcement thereof was made at the time. The party failed to make good his bid, and a new sale was thereupon made at the time to which it was held open; such sale was held to be regular and could not be set aside as a matter of right at the instance of the defendant who first bid off the premises, where he had no equities entitling him to a resale.[42]

It has been held, where property on a foreclosure is struck off to a purchaser who offers to pay in good bank bills, but specie is demanded, that it is the duty of the officer making the sale to hold it open a sufficient length of time to enable such purchaser to obtain specie instead of bank bills.[43]

§ 609. Who may purchase at foreclosure sale.—Any one who is competent to bid at a sale on mortgage foreclosure, may become the purchaser at such sale, either directly or indirectly.[44]

Under the provisions of the rules of practice,[45] the decree of foreclosure and sale must contain a clause providing that the plaintiff or any other party to the suit may become the

[41] See *Jackson* v. *Clark*, 7 Johns. (N. Y.) 217; *Frederick* v. *Wheelock*, 3 T. & C. (N. Y.) 210. See *Miller* v. *Hull*, 4 Den. (N. Y.) 104; *LaFarge* v. *Van Wagenen*, 14 How. (N. Y.) Pr. 54.

[42] *Isabell* v. *Kenyon*, 33 Mich. 63.

[43] *Baring* v. *Moore*, 5 Paige Ch. (N. Y.) 48.

[44] Where the ostensible purchaser at a trustee's sale under a trust deed directs the deed to be made to another, a stranger to the sale, cannot, in the absence of fraud, complain that the real purchaser did not make his bid in person. *Jones* v. *Hagler*, 95 Ala. 529, 10 So. 345.

[45] N. Y. Supreme Court Rule 61. See *ante*, § 534.

purchaser of the premises on such sale; this rule, however, will not permit one defendant to bid in premises belonging to another and to hold them against the latter contrary to equity.[46]

THE ATTORNEY of the plaintiff may purchase the premises for his own benefit, where his conduct is fair and honest;[47] but it has been said that the attorneys for a plaintiff in an action to foreclose a mortgage made to a trustee for the benefit of the bondholders of a street railroad company, being also the attorneys for the receiver of such company, are disqualified from purchasing the mortgaged property for their own benefit when sold by the receiver under the decree of foreclosure, with the consent of the trustee but without that of the bondholders.[48]

THE BENEFICIARIES under a trust deed may be the purchasers at a sale made thereunder.[49] In those cases where the beneficiary bids off the property, the trustee should allow a reasonable time to appear before the court and give security; and if this is not done the trustee may properly make a deed, instead of giving a certificate of sale.[50] And in enforcing a trust deed against a portion of the land as to which the trustees has made an invalid release, the land, on purchase by the beneficiaries, must be charged with the amount paid to them, through the trustee, upon such release, in preference to the amount due to them under the trust deed.[51]

A CREDITOR OF THE MORTGAGOR may purchase at the foreclosure sale, for, it is said, the fiduciary relation of a creditor

[46] *Bennett* v. *Austin,* 81 N. Y. 308.

[47] *Holland Trust Co.* v. *Hogan,* 17 N. Y. Supp. 919, 44 N. Y. S. R. 577; *Chappell* v. *Dann,* 21 Barb. (N. Y.) 17. But see *Gardiner* v. *Ogden,* 22 N. Y. 327, 78 Am. Dec. 192; *Squier* v. *Norris,* 1 Lans. (N. Y.) 282.

[48] *Kreitzer* v. *Crovatt,* 94 Ga. 694; 21 S. E. 585.

[49] Freeman's Appeal, 74 Conn. 247, 50 Atl. 748. See *Chillicothe Paper Co.* v. *Wheeler,* 68 Ill. App. 343.

[50] *Updike* v. *Merchants Elevator Co.* 96 Mo. 160, 8 S. W. 779.

[51] *Browne* v. *Davis,* 109 N. C. 23, 13 S. E. 703.

to his debtor with respect to lands held under a deed of trust to secure the debt constituting the first lien thereon will not invalidate his purchase at a sale under such deed, made after the debtor has declared his inability to pay, as against a subsequent judgment creditor, although he requested the trustee to make the sale.[52]

EXECUTORS AND ADMINISTRATORS may purchase at such sales. Thus it has been said an executor or administrator holding a second mortgage, and purchasing the premises at a sale under a prior mortgage, acquires the fee as against third persons, although upon distribution the property is considered as personalty.[53] And the executors of a deceased partner may buy in for his estate firm property sold under foreclosure of a mortgage given by the firm in the lifetime of such partner to secure a firm debt, and are entitled to the possession of the property when they pay off the same out of funds not belonging to the firm.[54]

A MORTGAGEE'S RIGHT TO PURCHASE the mortgaged premises is fully treated in the following section.

A MORTGAGOR may become the purchaser at a sale under the mortgage,[55] whether he still holds or has sold the equity of redemption. But the purchase at a trustee's sale by the mortgagor who has sold the land, the vendee assuming the payment of the debt, does not operate in favor of the vendee as a satisfaction of the mortgage; nor does his assignment of the bid to a third person.[56]

ONE WHOSE PROPERTY IS LIABLE FOR THE DEFICIENCY may not only purchase, but it is thought he may, in some cases of mistake, increase his bid after acceptance. Thus the supreme court of California, in the case of Weyant v. Murphy,[57] say

[52] *Turner* v. *Littlefield,* 142 Ill. 630, 32 N. E. 522.

[53] *Watson* v. *Grand Rapids & I. R. Co.* 91 Mich. 198, 51 N. W. 990.

[54] *Heffron* v. *Knickerbocker,* 57 Ill. App. 336.

[55] The heirs of a deceased mortgagor may purchase at a foreclosure sale. *Bank of Pine Bluff* v. *Levi,* 90 Ark. 166, 118 S. W. 250.

[56] *Bensieck* v. *Cook,* 110 Mo. 173, 33 Am. St. Rep. 422, 19 S. W. 642.

[57] 78 Cal. 278, 12 Am. St. Rep. 50, 20 Pac. 568.

that a person interested in having the amount bid on a sale reach the amount of the debt because his own property was liable for the deficiency, who, by a stupid blunder, does not bid that amount, but a less sum only, may be allowed, a few days after, when he has learned his mistake, to increase his bid; and the sale can be reported and confirmed for the amount of the latter bid; and the person entitled to redeem the property, that being primarily liable for the debt, cannot complain.

A PARTY APPRAISING THE MORTGAGED LANDS on foreclosure proceedings is not thereby disqualified from becoming a purchaser at the foreclosure sale; nor does his becoming a purchaser affect his previous appraisement, or shift the burden of proof upon him to show that he was not influenced by selfish motives.[58]

A PURCHASER FROM A MORTGAGOR of the equity of redemption may become the purchaser at foreclosure sale; but it is said that such a purchaser, who bids in the property at a sale under the mortgage, should not pay a sum in excess of the mortgage debt, although the mortgagee holds the former's purchase-money note as collateral to such debt in excess of the amount; but the remainder of the amount due on such note belongs to the mortgagor or owner of the equity of redemption.[59]

A TRUSTEE may purchase at a foreclosure sale in some instances. Thus it has been held that a valid title is vested in a person acting as a trustee for a land company, by a deed made by the auctioneer at a sale under a power contained in a mortgage to such company, which provides that the auctioneer may take a good and perfect title to the purchaser at a sale, and that the mortgagee or his duly authorized agent or trustee may purchase at such sale.[60] But one who, as trustee, holds the legal title to the lands, subject to a

[58] *Ison* v. *Kinnaird* 13 Ky. L. Rep. 569, 17 S. W. 633.

[59] *Troy* v. *May*, 101 Ala. 401, 13 So. 263.

[60] *Gamble* v. *Caldwell*, 98 Ala. 577, 12 So. 424.

mortgage, cannot individually acquire an interest therein by taking an assignment of the bid of the purchaser on a foreclosure sale under such mortgage and by taking a deed from the referee, because a trustee cannot gain an advantage to himself to the detriment of those for whom he is trustee.[61] Until the sale to the original purchaser is consummated by payment and delivery of the deed, the disability of the trustee to take title, individually, is absolute.[62]

A VENDOR of land taking a deed of trust as security for the purchase money may buy the property at a sale under the deed, either for himself or as agent of another.[63]

A MARRIED WOMAN who signs the mortgage only for the purpose of relinquishing her dower and to secure her husband's debts, may acquire title under foreclosure the same as any other person.[64]

A COMMISSIONER, or other officer, making the sale, shall not, nor shall any person, for his benefit, directly or indirectly, purchase, or be interested in the purchase of, any of the property sold.[65]

A TENANT in common with the plaintiff, having no duties towards him other than such as necessarily arise from the co-tenancy, is not prevented from purchasing the premises for his own benefit at a foreclosure sale.[66]

[61] *Toole* v. *McKiernan,* 48 N. Y. Supr. Ct. (16 J. & S.) 163; Ten *Eyck* v. *Craig,* 62 N. Y. 406, 420; *Willcox* v. *Smith,* 26 Barb. (N. Y.) 352; *New York Cent. Ins.* v. *National Protection Ins. Co.* 20 Barb. 470; *Conger* v. *Ring,* 11 Barb. (N. Y.) 364; *Chapin* v. *Weed,* Clarke Ch. (N. Y.) 464; *Fellows* v. *Fellows,* 4 Cow. (N. Y.) 698, 15 Am. Dec. 412; *Matthewson* v. *Johnson,* Hoff. Ch. (N. Y.) 564; *Rogers* v. *Rogers,* Hopk. Ch. (N. Y.) 525; *Van Horne* v. *Fonda,* 5 Johns. Ch. (N. Y.) 407; *Levy* v. *Brush,* 1 Sweeney (N. Y.) 663; *Wright* v. *Ross,* 36 Cal. 432; *Phelan* v. *Boylan,* 25 Wis. 679; *Piatt* v. *Oliver,* 2 McL. C. C. 313. See also *Marquam* v. *Ross,* 47 Or. 374, 83 Pac. 852, 86 Pac. 1.

[62] *Toole* v. *McKiernan,* 48 N. Y. Supr. Ct. (16 J. & S.) 163.

[63] *Loveland* v. *Clark,* 11 Colo. 265, 18 Pac. 544.

[64] *Toliver* v. *Morgan,* 75 Iowa 619, 34 N. W. 858. See *Hesseltine, as trustee, etc.* v. *Hodges,* 188 Mass. 247, 74 N. E. 319.

[65] N. Y. Code Civ. Proc. § 1679.

[66] *Streeter* v. *Shultz,* 45 Hun (N. Y.) 406, explaining *Van Horne* v.

ANY OF THE DEFENDANTS may purchase the mortgaged property of a co-defendant.[67]

A GUARDIAN of an infant party to the action shall not, nor shall any person for his benefit, directly or indirectly, purchase, or be interested in the purchase of, any of the property sold,[68] except that a guardian may, when he is lawfully authorized so to do, purchase for the benefit of his ward.[69]

§ 610. Purchase by mortgagee.—That a junior or a senior mortgagee may purchase at the foreclosure sale of another mortgagee, all the courts are agreed;[70] but regarding

Fonda, 5 Johns. Ch. (N. Y.) 388, 407.

[67] *Neilson* v. *Neilson,* 5 Barb. (N. Y.) 565. See *Rodger* v. *Bowie,* 134 App. Div. 596, 119 N. Y. Supp. 177.

[68] See also *Horton* v. *Maine,* 22 R. I. 126, 46 Atl. 403.

[69] N. Y. Code Civ. Proc. § 1679; *Lefevre* v. *Laraway,* 22 Barb. (N. Y.) 167.

Code Civ. Proc. § 1679 has been held to apply only to a guardian *ad litem* appointed by the court. *Boyer* v. *East,* 161 N. Y. 580, 76 Am. St. Rep. 290, 56 N. E. 114; *Munsell* v. *Munsell,* 33 Misc. 185, 68 N. Y. Supp. 329; *O'Brien* v. *General Synod of Reformed Church in America,* 10 App. Div. 605, 42 N. Y. Supp. 356.

[70] See *Herrick* v. *Tallman,* 75 Iowa 441, 39 N. W. 699; *Manwaring* v. *Jenison,* 61 Mich. 117, 27 N. W. 899; *Huber* v. *Crossland,* 140 Pa. St. 575, 21 Atl. 404.

In Michigan one of two mortgages may purchase the property on a mortgage sale; and it is not necessary that both should be present, or the purchase be made in their joint names. *Manwaring* v. *Jenison,* 61 Mich. 117, 27 N. W. 899.

In Pennsylvania mortgagees having each a lien on the mortgaged premises have the right to purchase the property for their joint benefit, and are not obliged to bid against each other. *Huber* v. *Crosland,* 140 Pa. St. 575, 21 Atl. 404.

Where the mortgagee purchases on execution sale subject to his mortgage the purchase money being paid by the debtor, and at the debtor's request conveyance is made to the wife of the debtor, the mortgagee does not thereby lose his right to foreclose his mortgage. *Corbett* v. *Howell* 10 S. W. 653, 10 Ky. Law. Rep. 793.

It is thought that on the foreclosure of a mortgage, a prior mortgagee need not take notice and bid at the sale. *Herrick* v. *Tallman,* 75 Iowa, 441, 39 N. W. 699. And a junior mortgagee, bidding in the land for an amount less than his mortgage, is not precluded from purchasing the senior mortgage and claiming under its foreclosure. *Herrick* v. *Tallman,* 75 Iowa, 441, 39 N. W. 699.

a mortgagee's right to purchase the property at his own foreclosure sale, the decisions are not uniform. Very few, if any,[71] of the decisions hold such purchases absolutely void.[72] The decree of foreclosure may properly provide that the mortgagee, or complainant in foreclosure, may purchase,[73] or the instrument itself may authorize such a purchase.[74]

In Iowa it has been held that where mortgaged property is not worth more than the mortgage and the interest due, and there being no margin for any creditors of the mortgagor to base attachment suits upon, a purchase by the mortgagee for the amount of the mortgage cannot be successfully attacked,

[71] See *Simpson* v. *Simpson,* 107 N. C. 552, 12 S. E. 447.

[72] *Lovelace* v. *Hutchinson,* 106 Ala. 417, 17 So. 623; *Durden* v. *Whetstone,* 92 Ala. 480; 9 S. 176; *Martinez* v. *Lindsay,* 91 Ala. 334, 8 So. 787; *Craddock* v. *American F. L. Mortg. Co.* 88 Ala. 281, 7 So. 198; *McCall* v. *Mash.* 89 Ala. 487, 18 Am. St. Rep. 145, 7 So. 770; *Very* v. *Russell,* 65 N. H. 646, 23 Atl. 522; *Whitehead* v. *Whitehurst,* 108 N. C. 458, 13 S. E. 166; *Smith* v. *Lusk,* 119 Ala. 394, 24 So. 256. See *Windes* v. *Russell,* 150 Ala. 625, 43 So. 788; *Caldwell* v. *Caldwell,* 173 Ala. 216, 55 So. 515.

[73] *Koerner* v. *Gauss,* 57 Ill. App. 668.

By the general rules of practice in New York, Supreme Court Rule 61, it is required that a provision shall be inserted in every decree of foreclosure and sale of mortgaged property, allowing the plaintiff or any other party to become a purchaser at such sale.

In Alabama, where it is intended to give the owner of a reversionary or other interest in the land, who is a party to the record, the right to become a bidder at the sale of such real estate, a provision to that effect must be inserted in the decree of foreclosure and sale. Where a purchaser of real estate executes to his vendor a purchase money mortgage, and afterwards sells the land to a third person who assumes and agrees to pay the balance due to the vendor on the purchase money mortgage, and agrees further that the land shall remain bound by the mortgage, such purchaser will not be within the rule prohibiting a mortgagee from purchasing at his own sale. *McNeill* v. *McNeill,* 36 Ala. 109, 76 Am. Dec. 320. See *ante,* § 534.

[74] *Ellenbogen* v. *Griffey,* 55 Ark. 268, 18 S. W. 126.

And it is thought that where the mortgage does not expressly authorize the mortgagee to become the purchaser at his own sale, the sale will not be set aside merely because the mortgagee became the purchaser, in the absence of any showing that the sale was unfairly or unfaithfully conducted. *Matthews* v. *Daniels* (Ark.) 21 S. W. 469. See *post,* § 625.

where the mortgagor's assignee has also made a quitclaim deed of the property and the court has approved the sale.[75]

In those cases where the sale is fair and the price paid reasonable, the mortgagee is bound by his purchase where the other parties interested do not complain.[76] And the mortgagee who becomes a purchaser under a decree of foreclosure will not be allowed to object to the title, on the ground that persons in possession of the property without title were not made parties to the action.[77] In those cases where, on the sale of mortgaged premises, the mortgagee becomes the purchaser, he is presumed to take the title with notice of the defects, if any, in the foreclosure proceedings.[78] A mortgagee who holds a bond of indemnity against paramount liens should he foreclose his mortgage and bid in the property with such liens upon it, purchases subject thereto.[79] The plaintiff may buy in any outstanding title and hold it against the mortgagor.[80] This privilege is frequently necessary, in order to prevent a sacrifice of the mortgagee's interests.[81]

Where, by statutory provision, or by the permission of the court, the mortgaged premises are purchased by the mortgagee or his assignee under a decree of foreclosure, such purchase does not extinguish the mortgage debt nor any

[75] *Lynch* v. *Simmons Hardware Co.* 80 Iowa, 503, 45 N. W. 1048.

[76] *Whitehead* v. *Whitehurst,* 108 N. C. 458, 13 S. E. 166. See also *Sherrod* v. *Vass,* 128 N. C. 49, 38 S. E. 133; *Owens* v. *Hornthal,* 72 S. E. 5.

[77] *Ostrom* v. *McCann,* 21 How. (N. Y.) Pr. 431, 433.

[78] *Boyd* v. *Ellis,* 11 Iowa, 97, 102; *Corriell* v. *Doolittle,* 2 G. Greene (Iowa) 385, 389.

In New York a mortgagee who becomes the purchaser at his own foreclosure sale cannot be heard to say that the sale is illegal or irregular where the holder of the subsequent mortgages and the mortgagor make no objection. *Andrews* v. *O'Mahoney,* 112 N. Y. 567, 20 N. E. 374.

[79] *Pioneer Sav. & L. Co.* v. *Freeburg,* 59 Minn. 230, 61 N. W. 25.

[80] *TenEyck* v. *Craig,* 62 N. Y. 406, 421; *Williams* v. *Townsend,* 31 N. Y. 415; *Cameron* v. *Irwin,* 5 Hill (N. Y.) 280; *Shaw* v. *Bunny,* 2 DeG., J. & S. 468, 13 W. R. 374. See *Stover* v. *Stark,* 61 Neb. 374, 87 Am. St. Rep. 460, 85 N. W. 286.

[81] *Holcomb* v. *Holcomb,* 11 N. J. Eq. (3 Stockt.) 281.

balance that may remain unpaid,[82] as the mortgage is not merged or extinguished in the legal title.[83] A mortgagee who purchases at a sale under foreclosure of his mortgage must account for any surplus of his bid over his mortgage.[84]

Where a rule prevails against a purchase by the mortgagee at his own sale, if the mortgagee, through an agent, becomes the purchaser at the sale under the mortgage, the mortgagor may avoid such sale, although no other person can.[85]

§ 611. Memorandum of sale.—It is not essential to the validity of a sale of premises on mortgage foreclosure, that the purchaser sign a memorandum of sale.[86] If the officer making the sale signs the memorandum, it will be sufficient to make the sale valid under the statute of frauds.[87] Should

[82] *Edwards* v. *Sanders,* 6 S. C. 316. See *Innes* v. *Linscheid,* 126 Ill. App. 2/.

[83] *Cooper* v. *Martin,* 1 Dana (Ky.) 23; *Thompson* v. *Chandler,* 7 Me. (7 Grant) 377; *Hunt* v. *Hunt,* 31 Mass. (14 Pick.) 374, 384, 25 Am. Dec. 400; *Gibson* v. *Cohen,* 20 Mass. (3 Pick.) 475; *Parker* v. *Child,* 25 N. J. Eq. (10 C. E. Gr.) 43; *Clas* v. *Bappe,* 23 N. J. Eq. (7 C. E. Gr.) 270; *Hinchman* v. *Emans,* 1 N. J. Eq. (Saxt.) 100, 110; *Milford* v. *Peterson,* 35 N. J. L. (6 Vr.) 127, 131; *Duncan* v. *Smith,* 31 N. J. L. (2 Vr.) 325, 327; *Vanderkemp* v. *Shelton,* 11 Paige Ch. (N. Y.) 28; *Benedict* v. *Gilman,* 4 Paige Ch. (N. Y.) 58; *Forbes* v. *Moffatt,* 18 Ves. 384, 394; *Mocatta* v. *Murgatroyd,* 1 Pr. Wms. 393.

[84] *Hemm* v. *Small,* 56 Ill. App. 480.

In Indiana the same rule prevails. See *Mitchell* v. *Weaver,* 118 Ind. 55, 10 Am. St. Rep. 104, 20 N. E. 525.

[85] *Edmondson* v. *Welsh,* 27 Ala. 578.

[86] *Bicknell* v. *Byrnes,* 23 How. (N. Y.) Pr. 486. See *Wadsworth* v. *Lyon,* 93 N. Y. 201, 219, 45 Am. Rep. 109; *Miller* v. *Collyer,* 36 Barb. (N. Y.) 250; *Willets* v. *Van-Alst,* 26 How. (N. Y.) Pr. 325; *National Fire Ins. Co.* v. *Loomis,* 11 Paige Ch. (N. Y.) 431.

[87] *Bicknell* v. *Byrnes,* 23 How. (N. Y.) Pr. 486.

The court of appeals of New York, in the case of *Andrews* v. *O'Mahoney* (112 N. Y. 567, 572, 20 N. E. 374), say that sales in foreclosure actions are not within the statute of frauds, and are binding upon the purchasers without any written contract or memorandum of the terms of the sale; that a purchaser by bidding subjects himself to the jurisdiction of the court,

the purchaser sign the memorandum of sale, by which he agrees to comply with the conditions thereof, such memorandum does not constitute a contract, either with the officer making the sale or with the plaintiff in the foreclosure, and no action can be maintained upon it.[88] The purchaser by signing the memorandum of sale simply subjects himself to the jurisdiction and control of the court for the purpose of enforcing the specific performance of the purchase according to the terms thereof, or of making him answer in damages for non-compliance therewith.[89]

§ 612. Report of officer making sale.—The general requirement that a judicial sale of real estate shall be reported to the court on the oath of the person making the same, and confirmed by the court before a conveyance is executed, does not apply to mortgage foreclosures.[90] The referee or officer who makes the sale in a mortgage foreclosure acts simply as the agent of the court; and after he has disposed

and, in effect, becomes a party to the proceeding, and may be compelled to complete his purchase by an order of the court, and by its process for contempt, if necessary. See *Cayet* v. *Hubbell,* 36 N. Y. 677, 680; *Miller* v. *Collyer,* 36 Barb. (N. Y.) 253; *Hegeman* v. *Johnson,* 35 Barb. (N. Y.) 200; *Matter of Davis,* 7 Daly (N. Y.) 7, 8; *Willets* v. *Van Alst,* 26 How. (N. Y.) Pr. 325.

A purchaser at a foreclosure sale subjects himself to the jurisdiction of the court in the foreclosure suit, and may be compelled to comply with the conditions of sale; neither mere lapse of time nor the death of one of the parties, is a bar to such relief, where the purchaser has gone into possession. *Cayet* v. *Hubbell,* 36 N. Y. 677.

[88] *Miller* v. *Collyer,* 36 Barb. (N. Y.) 250; *Willets* v. *VanAlst,* 26 How. (N. Y.) Pr. 325, 346.

[89] *Miller* v. *Collyer,* 36 Barb. (N. Y.) 250; *Willets* v. *VanAlst,* 26 How. (N. Y.) Pr. 325. *In re Davis,* 7 Daly (N. Y.) 1, 8; *Miller* v. *Burke,* 6 Daly (N. Y.) 171, 179; *Graham* v. *Bleakie,* 2 Daly (N. Y.) 55.

[90] *Agricultural Ins. Co.* v. *Barnard,* 96 N. Y. 525.

It is said by the supreme court of South Dakota, in the case of *State ex rel. Kunz* v. *Campbell,* 60 N. W. 32, that a report of a sale on foreclosure of a mortgage, and its confirmation by the court, are proper in South Dakota, but does not decide whether or not they are indispensable. See *post,* § 614.

of the mortgaged premises and distributed the proceeds thereof according to the directions of the judgment, he must make a report of the sale and his proceedings to the court.[91]

The report should be prepared and filed by the officer making the sale as soon as practicable after the disposition of the proceeds of the sale, as directed by the judgment.[92] The report of the referee may be excepted to. An error in reciting the date of a decree of foreclosure in such report of sale is immaterial, where the record furnishes the means of correcting it.[93] To sustain a report of sale as against exceptions filed to it, affidavits showing that the terms of sale were different from those reported are inadmissible.[94]

§ 613. What referee's report should show. — The referee's report should be a complete history of his proceedings, and should show that every direction given in the judgment has been fully executed. It should contain a statement of his fees and of the necessary expenses connected with the sale, and should be accompanied by proper receipts or vouchers for all payments and disbursements. All receipts and vouchers should be attached to the report and filed with the clerk, and a note of the day of filing the report should be entered by the clerk in the proper book under the title of the cause.

Where the judgment directs the officer making the sale to report any deficiency that may arise, and the proceeds of the sale are not sufficient to satisfy the mortgage, with the costs and expenses, his report should set forth that fact and specify the amount of such deficiency.

[91] *Carter* v. *Builders' Construction Co.* 134 App. Div. 553, 119 N. Y. Supp. 670. See N. Y. Code Civ. Proc. § 1633, requiring report to be made within thirty days after completion of sale.

[92] Return made more than sixty days after it was issued held not to invalidate sale. *Siwooganock Guaranty Savings Bank* v. *Feltz,* 84 Neb. 706, 121 N. W. 967.

[93] *Ruggles* v. *First Nat. Bank of Centreville,* 43 Mich. 192.

[94] *Koch* v. *Purcell,* 45 N. Y. Supr. Ct. (13 J. & S.) 162.

Where there is a surplus, a report of the sale cannot be filed or confirmed unless accompanied by a proper voucher for the surplus moneys, showing that they have been paid to the proper parties or deposited pursuant to the directions of the judgment.[95]

§ 614. Confirmation of referee's report.—In some states no title passes to the purchaser until the sale is confirmed by the court.[96] It seems, however, that where a deed has been executed and delivered without a confirmation of the sale by the court, long continued possession under it will render the title valid.[97]

An order or confirmation is appealable.[98] Until the report of the sale is confirmed, any person aggrieved may make a summary application to the court for a resale, provided he has just grounds to sustain such application.[99]

Under the New York practice, it seems that it is not necessary for the plaintiff to give notice to any party of the filing of the report of the officer making the sale; neither is it necessary for him to obtain an order confirming the report, preliminary to the issuing of an execution to collect any deficiency specified in the report, and which is provided for in the decree of foreclosure and sale;[1] yet it certainly is the safer practice to give notice of the filing of the report, and after waiting eight days for the filing of exceptions thereto, to move the

[95] N. Y. Supreme Court Rule 61.

[96] *Mills* v. *Ralston,* 10 Kan. 206; *Young* v. *Keogh,* 11 Ill. 642; *Busey* v. *Hardin,* 2 B. Mon. (Ky.) 407; *Allen* v. *Poole,* 54 Miss. 323; *Gowan* v. *Jones,* 18 Miss. (10 Smed. & M.) 164; *Hays' Appeal,* 51 Pa. St. 58.

[97] *Gowan* v. *Jones,* 18 Miss. (10 Smed. & M.) 164. See *post,* chap. XXVII.

[98] *Koehler* v. *Ball,* 2 Kan. 160, 83 Am. Dec. 451; *Detroit Fire & Marine Ins. Co.* v. *Renz,* 33 Mich. 298.

[99] *Brown* v. *Frost,* 10 Paige Ch. (N. Y.) 243. See *Strong* v. *Dollner,* 2 Sandf. (N. Y.) 444, 448. See *post,* § 623.

[1] *Moore* v. *Shaw,* 15 Hun (N. Y.) 428, aff'd 77 N. Y. 512.

court upon the usual notice at a special term for an order confirming the report.[2]

In some states, however, confirmation of a sale can be regularly made only after due notice of motion to the parties adversely interested, that they may show cause against it.[3] It is said in Williamson v. Berry,[4] that "notice of the motion is given to the solicitors in the cause, and confirmation *nisi* is ordered by the court—to become absolute in a time stated—unless cause is shown against it. Then, unless the purchaser calls for an investigation by the master, it is the master's privilege and duty to draw the deed for the purchaser, reciting in it the decree for the sale, his approval of it, and the confirmation by the court of the sale in the manner that such confirmation has been ordered." The supreme court of the United States say in the case last quoted, that "before a purchaser can get a title, he must get a report from the master that he approves the sale, or that he was the best bidder, accordingly as the sale may have been made, either privately or at auction."[5]

But in the more recent case of Blossom v. Milwaukee and Chicago Railroad Company,[6] the same court held that a bidder at a public auction, whose bid has not been accepted, —the sale being adjourned for a sufficient cause, and finally discontinued—cannot insist on leave to pay the amount of his bid, and on an order confirming the sale to him, even though his bid was the highest and best bid, and covered the full amount of the decree, together with the costs of such sale.

It has been held in New Jersey that in a case where fair competition was not interfered with, and no fraud was shown, the fact that the premises were struck off to a solicitor who

[2] *Moore* v. *Shaw*, 15 Hun (N. Y.) 428. See *post*, chap. XXVII.

[3] *Branch Bank of Mobile* v. *Hunt*, 8 Ala. 876.

[4] 49 U. S. (8 How.) 495, 546, 12 L. ed. 1170.

[5] *Williamson* v. *Berry*, 49 U. S. (8 How.) 495, 496, 12 L. ed. 1170.

[6] 70 U. S. (3 Wall.) 196, 18 L. ed. 43.

signed the conditions as "attorney," and afterwards directed the master to report it in the name of another, is no objection to its confirmation.[7]

The question of usury cannot be raised on a motion for confirmation.[8]

§ 615. Referee's report should state amount of deficiency.—It seems that where a judgment in an action to foreclose a mortgage provides, "that if the proceeds of the sale be insufficient to pay the amount so reported to be due to the plaintiff, that said referee specify the amount of such deficiency in his report of the sale, and that the defendant pay the same to the plaintiff," it is not necessary to apply to the court for an order confirming the report of the referee before issuing execution against the defendant for the amount of the deficiency; nor does it appear to be necessary to enter any further judgment upon the filing of said report.[9] But the better practice appears to be to have the report of the referee confirmed and to enter judgment for the deficiency.[10]

It was formerly the practice in New York to have the report of the referee or other officer making the sale confirmed before issuing an execution for any deficiency; but that practice was the result of a rule of chancery and is not provided for by the present Code.[11] A failure under the present practice to procure a confirmation before issuing execution for a deficiency, is a mere irregularity at most, and being purely a question of practice, the decision of the court below will be final.[12]

[7] *Guarantee Trust & S. D. Co.* v. *Jenkens*, 40 N. J. Eq. (13 Stew.) 451, 2 Atl. 13.

[8] *Smith* v. *Myers*, 41 Md. 425, 434.

[9] *Moore* v. *Shaw*, 15 Hun (N. Y.) 428, aff'd 77 N. Y. 512. See N. Y. Code Civ. Proc. § 1627.

[10] *Springsteene* v. *Gillett*, 30 Hun (N. Y.) 260; *Moore* v. *Shaw*, 77 N. Y. 512, aff'g 15 Hun (N. Y.) 428.

[11] See *Moore* v. *Shaw*, 15 Hun (N. Y.) 428, aff'd 77 N. Y. 512.

[12] N. Y. Code Civ. Proc. § 721, sub. 12; *Moore* v. *Shaw*, 77 N. Y. 512, aff'g 15 Hun (N. Y.) 428.

§ 616. Substituted or supplemental report of referee—Notice to defendant.—After the report of the referee or other officer making the sale has been duly confirmed, leave to file a substituted report of the sale, the original report having been lost, and to enter a personal judgment for any deficiency not realized by the sale, should not be allowed, except upon notice to the defendant or some one entitled to represent him.[13]

[13] *Chicago & G. W. R. L. Co.* v. *Peck,* 112 Ill. 408.

CHAPTER XXVI.

SETTING SALE ASIDE AND RESALE.

GENERAL PRINCIPLES—WHO MAY APPLY FOR—GROUNDS FOR—EFFECT OF—TERMS IMPOSED—RESALE.

§ 617. General principles—When sale will be set aside.
§ 618. Same—When sale will not be set aside.
§ 619. Discretion of court.
§ 620. Who may have sale set aside.
§ 621. Effect of setting aside sale by junior lien-holder.
§ 622. How sale may be set aside.
§ 623. Time of making application for resale.
§ 624. When application for resale will be granted—When denied.
§ 625. When sale may be set aside where plaintiff is purchaser.
§ 626. What advance must be bid on resale.
§ 627. What sufficient grounds for setting sale aside.
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§ 629. Same—Sale under agreement.
§ 630. Same—Defective notice.
§ 631. Same—Auctioneer's statement.
§ 632. Same—Defective title and prior incumbrance.
§ 633. Same—In case of homestead.
§ 634. Same—In case of non-resident defendant.
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§ 636. Same—In case of usury.
§ 637. Irregularity in conduct of sale.
§ 638. Same—In sale under power.
§ 639. Not set aside because of few bidders.
§ 640. Inadequacy of price—Setting aside sale for.
§ 641. Same—In case of sale under a power.
§ 642. Same—When objection to be taken.
§ 643. Motion to set sale aside for inadequacy of price.
§ 644. Accident and surprise grounds for setting sale aside.
§ 645. Fraud and misconduct.
§ 646. False statements generally.
§ 647. Misleading statements and representations by referee or plaintiff.
§ 648. Negligence in objecting, and acquiescence in sale.
§ 649. Objections waived by delay.
§ 650. Excusable mistakes as grounds for setting sale aside.

§ 651. Terms imposed.
§ 652. Effect upon purchaser of order setting sale aside.
§ 653. Setting sale aside for benefit of infants.
§ 654. Appeal from order on application for resale.
§ 655. Proceedings on resale.

§ 617. General principles—When sale will be set aside.—The question of setting aside the sale and of enforcing a contract of sale against a purchaser on a mortgage foreclosure, or other judicial sale under a decree of the court of chancery, is to be determined upon equitable principles.[14] To set aside a sale made under a power in a trust deed in a direct proceeding for that purpose, the purchaser must be placed in *statu quo*.[15] In Alabama a mortgage foreclosure sale is to be treated as disaffirmed, and the parties considered as occupying the same relation to each other as before the sale, where the mortgagor files a bill to disaffirm and to let in to redeem, and the mortgagee admits his right to do so.[16] The same court also hold that the validity of a mortgage executed to a foreign corporation not having an office or known place of business or agent within the state, prior to the enactment of the statute [17] to give effect to the constitution,[18] cannot be questioned after a foreclosure and consequent satisfaction of the debt, until the disaffirmance of the foreclosure.[19]

It is thought that a decree obtained in the regular order of proceeding, and which has become absolute, cannot be attacked by a motion to set aside the sale thereunder.[20] And it is said that a complaint by the owner of a decree of foreclosure and by a person to whom he had sold a part of the

[14] *Boorum* v. *Tucher,* 51 N. J. Eq. 135, 26 Atl. 456. See *post,* § 628.

[15] *Chase* v. *Cleburne First Nat. Bank,* 1 Tex. Civ. App. 595, 20 S. W. 1027.

[16] *Lindsay* v. *American Mortg. Co.* 97 Ala. 411, 11 So. 770.

[17] Ala. Act Feb. 28, 1887.

[18] Ala. Const. Art. 4, § 4.

[19] *Craddock* v. *American Freehold Land Mortgage Company,* 88 Ala. 281, 7 So. 196.

[20] *Mann* v. *Jennings,* 25 Fla. 730, 6 So. 771.

land foreclosed, asking to have the judgment of satisfaction of the mortgage set aside, and for leave to resell certain real estate under the decree of foreclosure, because the foreclosure sale was invalid for failure to have the land appraised, is subject to demurrer, because the purchaser from the mortgage creditor was entirely destitute of anything upon which to base an action.[21]

It is held in Louisiana that the seizure and sale under execution upon a judgment on a mortgage containing the clause *de non alienando,* instead of by special writ of seizure and sale, do not affect the validity of the sale as against a purchaser from the mortgagors, although one of the mortgagors is dead, where the actual seizure and sale is within the particular seizure and sale warranted by the judgment.[22]

§ 618. Same—When sale will not be set aside.—A sale made in a mortgage foreclosure will not, as a rule, be disturbed where it was fairly made and is free from fraud, and there is an absence of all circumstances which would justify setting it aside.[23] Some good reason must always be shown

[21] *Peters* v. *Guthrie,* 119 Ind. 44, 20 N. E. 536.

[22] *Truxillo* v. *Delaune,* 47 La. Ann. 10, 16 So. 642.

[23] *McCotter* v. *Jay,* 30 N. Y. 80; *Lefever* v. *Laraway,* 22 Barb. (N. Y.) 167; *Gardiner* v. *Schermerhorn,* Clarke Ch. (N. Y.) 101; *Whitbeck* v. *Rowe,* 25 How. (N. Y.) Pr. 403; *White* v. *Coulter,* 1 Hun (N. Y.) 357, 364; *American Ins. Co.* v. *Oakley,* 9 Paige Ch. (N. Y.) 496, 38 Am. Dec. 561; *Duncan* v. *Dodd,* 2 Paige Ch. (N. Y.) 99. *Nitro-Phosphate Syndicate, Limited, of London* v. *Johnson,* 100 Va. 774, 42 S. E. 995. See *German-American Bank of Rochester* v. *Russell,* 39 App. Div. 646, 57 N. Y. Supp. 171; *Moller* v. *Watts,* 56 App. Div. 562, 67 N. Y. Supp. 488; *Irving Savings Institution* v. *Robinson,* 35 Misc. 449, 71 N. Y. Supp. 193; *Bell* v. *Thompson,* 147 Cal. 689, 82 Pac. 327; *Anglo-Californian Bank, Limited* v. *Cerf,* 142 Cal. 303, 75 Pac. 902; *Ex parte Cooley,* 69 S. C. 143, 48 S. E. 92.

The supreme court of Virginia, in the case of *Miller* v. *Mann,* 88 Va. 212, 13 S. E. 337, 15 Va. L. J. 633, say that a sale made by the trustee in a trust deed, in accordance with the Virginia Code (§ 2442) when proper and regular in all respects, cannot be set aside by the court.

to justify an interference with the sale.[24] If there is no legal right to relief,[25] as a matter of course, the application will be addressed to the sound discretion of the court, and the court must consider the equities of all parties interested, in order that substantial justice may be done.[26]

It has been said that a foreclosure sale should not be set aside merely because some irregularity was committed in its conduct,[27] such as selling a homestead together with other mortgaged premises without inquiring whether the homestead could be sold separately, unless it is clearly shown that some injury was sustained because of such irregularity.[28]

Where a foreclosure sale is regular, it will not be set aside because the newspaper in which the notice of the sale was published, was one of limited circulation and not calculated to give that general information which should be afforded in such cases;[29] and the facts that a party to the suit, who is entitled to the surplus money arising on a sale of the mortgaged premises, is so far deprived of his eye-sight as not to be able to read a newspaper, and that he did not for that reason see the advertisement of the sale, and consequently did not attend such sale, and the property was sold at a sacrifice, do not constitute a sufficient ground for setting the sale aside.[30]

[24] *Terry* v. *Furth,* 40 Wash. 493, 82 Pac. 882.

[25] It is said in *McCotter* v. *Jay,* 30 N. Y. 80, that where foreclosure proceedings are entirely regular and free from fraud, they cannot be disturbed or set aside without some legal reason.

[26] *Wiley* v. *Angel,* Clarke Ch. (N. Y.) 217. See *Tripp* v. *Cook,* 26 Wend. (N. Y.) 143; *Cole* v. *Miller,* 60 Ind. 463; *Wyandotte State Bank* v. *Murray,* 84 Kan. 524, 114 Pac. 847.

[27] *Jones* v. *Miller,* 2 Neb. (Unof.) 582, 92 N. W. 201; *Clark* v. *Wolf,* 2 Neb. (Unof.) 290, 96 N. W. 495.

[28] *Lloyd* v. *Frank,* 30 Wis. 306. See *Warren* v. *Foreman,* 19 Wis. 35.

In those cases where the officer making a sale exercises the discretion reposed in him, the sale will not be set aside for the abuse of such discretion unless it clearly appears to the court that the defendant has suffered substantial injury. *Nix* v. *Williams,* 110 Ind. 234, 11 N. E. 36.

[29] *Wake* v. *Hart,* 12 How. (N. Y.) Pr. 444.

[30] *Parkhurst* v. *Cory,* 11 N. J. Eq. (3 Stockt.) 233. See also *Frazier*

Where the plaintiff in an action for foreclosure was described as an administrator, and as such prosecuted the action to judgment, after proper service on all the defendants, it was held that the judgment and a sale under it could not be assailed because of an irregularity, or even want of jurisdiction, in granting the letters of administration to him.[31] It has also been held that a sale should not be set aside, because the officer conducting it failed to make his report thereof at the next term of the court after the sale;[32] nor because the judgment was entered for too large an amount,[33] for, on an application to set aside a sale made in a foreclosure, the court cannot inquire into the regularity of such action, nor whether the sum for which judgment was entered is greater or less than it should have been.[34]

The fact that the original mortgagee, who assigned his mortgage and guaranteed its payment, and who was made a party to the foreclosure, did not know of the time and place of the sale, will not be a good ground for setting it aside, because such mortgagee was bound to use due diligence in ascertaining the day of the sale in order to protect his rights.[35]

While it is the duty of the officer making the sale[36] to have the mortgaged property duly appraised, as provided by the particular statute governing,[37] yet it is said that a foreclosure cannot be set aside, for an incorrect appraisement except for fraud, unfairness, or mistake other than a mere erroneous opinion as to value of the property.[38] And it is the well

v. *Swimm*, 79 App. Div. 53, 79 N. Y. Supp. 787.

[31] *Abbott* v. *Curran*, 98 N. Y. 665.

[32] *Walker* v. *Schum*, 42 Ill. 462.

[33] *Young* v. *Bloomer*, 22 How. (N. Y.) Pr. 383; *Bullard* v. *Green*, 10 Mich. 268.

[34] *Bullard* v. *Green*, 10 Mich. 268.

[35] *McCotter* v. *Jay*, 30 N. Y. 80.

[36] See *ante*, §§ 539, 540, 541.

[37] See *ante*, § 540.

[38] *Harris* v. *Gunnell* (Ky.) 9 S. W. 376. See *Lawrence* v. *Edelen*, 6 Bush (Ky.) 55; *Peck* v. *Starks*, 64 Neb. 341, 89 N. W. 1040; *Gibson* v. *Sweet*, 64 Neb. 550, 90 N. W. 548; *David Adler & Sons Clothing Co.* v. *Hellman*, 4 Neb. (Unof.) 557, 95 N. W. 467. See *Tootle, Lemon & Co.* v. *Willy*, 1 Neb. (Unof.) 711, 96 N. W. 342; *Hartwick* v. *Woods*, (Unof.) 103, 93 N. W. 415.

settled rule that equity will not set aside a sale made under a trust deed simply upon the ground that at the time of the sale the trust property was incumbered by other trusts and judgment liens, especially where there is no uncertainty or controversy between the parties as to the amounts and priorities of such liens.[39]

Where several adjoining tracts of land are sold in a lump under a decree of foreclosure, the sale will not be set aside on the ground that the mortgagor at the time of the sale requested a sale in separate tracts.[40] Neither will a sale made under a power in a mortgage be set aside because of the nonobservance of a custom among auctioneers to place notices upon the doors or windows of the house for sale, stating the time and place of sale.[41] And the fact that property sold on foreclosure subject to redemption brought a grossly inadequate price will not be ground for setting the sale aside, for the reason that it is not to be reasonably expected that there will be competition at such a sale.[42]

The supreme court of California, in the case of Santa Marina v. Connolly,[43] say that in those cases where, under an agreement between the owner of the land, the mortgagee, and an assignee of the mortgage for collateral security, the owner conveys the land to an outside party for a certain sum; and it is then agreed that the holder of the mortgage shall foreclose it, and shall, at the sale, bid a certain amount in excess of the sum paid for the conveyance, and transfer the certificate of sale to the first purchaser, or if more is bid than the agreed amount, shall pay to such purchaser the sum agreed upon; and that he shall then convey to the original owner—the transactions, being in good faith and carried out accordingly, without fraudulent intent as to junior lien-

[39] *Lallance* v. *Fisher*, 29 W. Va. 512, 2 S. E. 775.

[40] *Hopkins* v. *Wiard*, 72 Cal. 259, 13 Pac. 687. See *ante*, §§ 567, 568, 569, 571, 573, 940.

[41] *Chilton* v. *Brooks*, 69 Md. 584, 16 Atl. 273. See *post*, §§ 627, 944.

[42] *Equitable Trust Co.* v. *Thorpe*, 73 Iowa, 297, 34 N. W. 867.

[43] 79 Cal. 517, 21 Pac. 1093.

holders, are valid, and are not prejudicial to such lien-holders. The purchaser is not prevented by their existence from availing himself of the foreclosure as against such junior liens. The fact that the amount agreed to be bid exceeds the amount paid by the first purchaser of the property is an actual benefit to the junior lien-holders, and not to their prejudice, as it decreases the deficiency of the original mortgage.

§ 619. Discretion of court.—The supreme court, having control over its own judgments and all proceedings thereunder, and having power to exercise this control at the instance of any person whose rights are injuriously affected by such proceedings,[44] has power to set aside and vacate a sale of land made under a judgment upon a foreclosure of a mortgage by an officer thereof, and to order a resale,[45] although there may be no fraud, and the sale was regular in all respects.[46]

An application for a resale is always addressed to the sound discretion of the court of original jurisdiction, and an order granting or denying such a resale is not appealable [47] on the merits. The court held in Wakeman v. Price,[48] that "such relief, where the proceedings have been regular, cannot be claimed as a matter of right, but simply as a matter of favor. It must, therefore, rest in the discretion of the court

[44] *Goodell* v. *Harrington*, 76 N. Y. 547; *Kellegg* v. *Howell*, 62 Barb. (N. Y.) 280; *Gould* v. *Mortimer*, 26 How. (N. Y.) Pr. 167.

[45] *Van Loben Sels* v. *Bunnell*, 131 Cal. 489, 63 Pac. 773.

[46] *Hale* v. *Clauson*, 60 N. Y. 339, 341; *Pruden* v. *Rutler*, 34 Misc. 117, 68 N. Y. Supp. 737.

[47] *Goodell* v. *Harrington*, 76 N. Y. 547; *Hale* v. *Clauson*, 60 N. Y. 339, 341; *Crane* v. *Stiger*, 58 N. Y. 625; *Buffalo Sav. Bank* v. *Newton*, 23 N. Y. 160; *Wakeman* v. *Price*, 3 N. Y. 334; *Bergen* v. *Snedeker*, 8 Abb. (N. Y.) N. C. 50; *Nugent* v. *Nugent*, 54 Mich. 557; *Adams* v. *Haskell*, 10 Wis. 123; *Farmers Loan & T. Co.* v. *Bankers & M. Teleg. Co.* 119 N. Y. 15, 23 N. E. 173, 28 N. Y. S. R. 613. See *Townsend* v. *Johnson*, 10 Kan. App. 547, 63 Pac. 25; *German-American Bank of Rochester* v. *Dorthy*, 39 App. Div. 166, 57 N. Y. Supp. 172; *Koechl* v. *Gate Development Co.* 133 N. Y. Supp. 763.

[48] 3 N. Y. 334, 335.

to grant or refuse it.[49] It is simply a question of practice in the lower court—as clearly so as an order granting or denying a motion to open a default, to dissolve an injunction, or to allow costs."

Where a sale is reported by the referee and the purchaser refuses to comply with its terms, the court may, upon an application by the plaintiff, or by other persons interested, order that cause be shown why the terms of the sale should not be complied with; and if sufficient cause is not shown, the court, after considering all the circumstances of the sale, may either ratify or set it aside, as justice in the case may seem to require.[50] If the sale is ratified and the party still fails to comply with its terms, the court may proceed summarily to direct a resale of the property at the risk of the first purchaser.[51]

But the first sale having been reported by the referee, or other officer making it, no order affecting the rights of the purchaser should be granted without notifying him and affording him an opportunity of opposing the motion for a resale.[52] Parties desiring to have a mortgage foreclosure sale set aside must move promptly after they become aware of the facts of which they complain.[53]

[49] *Humboldt Savings & Loan Society* v. *March,* 136 Cal. 321, 68 Pac. 968.

The supreme court of New York, in the case of *Stevens* v. *Union Trust Company,* 57 Hun (N. Y.) 498, 11 N. Y. Supp. 268, 33 N. Y. S. R. 130, say that the granting of a motion for a resale of property sold under a foreclosure decree, rests in the discretion of the court, even where the purchaser is a *bona fide* one and has paid the consideration.

In Ohio it is held that the discretionary power of the court of common pleas (in which resides the jurisdiction in such cases) to set aside a sale in foreclosure, and the order confirming such sale, at the term at which they were made, is not lost by continuing the motion to the next term. *Niles* v. *Parks,* 49 Ohio St. 370, 34 N. E. 735.

[50] *Schaefer* v. *O'Brien,* 49 Md. 253. See *post* Chapter XXVII on Confirmation of Sale.

[51] *Schaefer* v. *O'Brien,* 49 Md. 253.

[52] *Schaefer* v. *O'Brien,* 49 Md. 253.

[53] *Lyon* v. *Brunson,* 48 Mich. 194.

§ 620. Who may have sale set aside.—Every person whose rights are injuriously affected by a judgment of foreclosure or by a proceeding thereunder, has a right to have it set aside or amended on motion, even though he is not a party to the suit; and hence, he may apply to the court for a resale of the premises.[54] To be entitled to apply for a resale, the party need not have a specific lien upon the land;[55] it will be sufficient if he has an interest or right in the property, which may be affected by the sale.[56] A creditor of the mortgagor, whose debt will be affected,[57] a judgment creditor whose lien will be destroyed,[58] a subsequent judgment creditor

[54] *Goodell* v. *Harrington*, 76 N. Y. 547; *Kellogg* v. *Howell*, 62 Barb. (N. Y.) 280; *Gould* v. *Mortimer*, 26 How. (N. Y.) Pr. 167, 16 Abb. (N. Y.) Pr. 448; *Fuller* v. *Brown*, 35 Hun (N. Y.) 162. See *Brewer* v. *Landis*, 111 Mich. 217, 69 N. W. 493.

[55] *Goodell* v. *Harrington*, 76 N. Y. 547.

[56] *Goodell* v. *Harrington*, 76 N. Y. 547. See *Rohrback* v. *Germania Ins. Co.* 62 N. Y. 47, 20 Am. Rep. 451. See *Kebabian* v. *Shinkle*, 26 R. I. 505, 59 Atl. 743. See also *Bentley* v. *Beacham*, 91 Md. 677, 47 Atl. 1024.

It is incumbent upon the person seeking to have the sale set aside to make it clearly appear that he has an interest in the premises. *Humboldt Savings & Loan Society* v. *March*, 136 Cal. 321, 68 Pac. 968.

[57] *Fuller* v. *Brown*, 35 Hun (N. Y.) 162, 165.

[58] *Kellogg* v. *Howell*, 62 Barb. (N. Y.) 280, 284; *Fuller* v. *Brown*, 35 Hun (N. Y.) 162, 165; *May* v. *May*, 11 Paige Ch. (N. Y.) 201. See *American Ins. Co.* v. *Oakley*, 9 Paige Ch. (N. Y.) 259, 38 Am. Dec. 561. Thus it has been said that a judgment creditor of the mortgagor who was prevented from attending the sale by reason of misinformation from plaintiff's brother, where he is willing to pay a substantial advance on the price bid, is entitled to have the sale set aside and a resale ordered. *Corwith* v. *Barry*, 69 Hun (N. Y.) 113, 23 N. Y. Supp. 200, 53 N. Y. S. R. 583. But it is said in *Melton* v. *Shenango Natural Gas Company*, 157 Pa. St. 627, 27 Atl. 793, that a judgment creditor of a corporation cannot except to the return of a sheriff upon a sale under execution on a mortgage foreclosure of the franchises of the company, on the ground that the mortgage was void as exceeding half the stock paid in, and as an illegal increase of indebtedness, since if the mortgage is invalid and collusive the property of the defendant in execution is not divested by the sale as against *bona fide* creditors, and if valid such creditor cannot attack the creation of the mortgage indebtedness.

whose judgment would be rendered worthless, if the judgment under which the sale was made is fraudulent,[59] a junior incumbrancer whose right of action accrues subsequent to the commencement of the foreclosure under which the sale is made, and who is not a party to such action,[60] or a party who is primarily liable for the payment of the mortgage debt or of any deficiency, who is not made a party to the suit, may move to have the sale set aside, if it did not produce enough to satisfy his claim or to relieve him from personal liability.[61]

It has been held that a party who has no interest in the mortgaged premises, but who is personally liable for any deficiency arising upon the sale, has no right to ask for a resale, if he and the representatives of his surety are discharged from liability for the deficiency to the extent of the full value of the premises, over and above the amount brought at the former sale.[62] An owner of the equity of redemption in mortgaged lands, who has made a general assignment for the benefit of his creditor, still retains an interest in the land, and may apply to have a sale of the lands made under a foreclosure set aside, notwithstanding such assignment.[63]

Each case will be governed by its own peculiar circumstances,[64] but it may be stated as a general rule on which courts act in setting aside sales made on mortgage foreclosures and in ordering resales of the property, that equity

[59] See *Kellogg* v. *Howell,* 62 Barb. (N. Y.) 280, 283; *Chappel* v. *Chappel,* 12 N. Y. 215, 64 Am. Dec. 496.

[60] See *Brown* v. *Frost,* 10 Paige Ch. (N. Y.) 243; *American Ins. Co.* v. *Oakley,* 9 Paige Ch. (N. Y.) 259, 38 Am. Dec. 561.

[61] *Bodine* v. *Edwards,* 2 N. Y. Leg. Obs. 231, 3 Ch. Sent. 46. See *Shuler* v. *Maxwell,* 38 Hun (N. Y.) 240; *Gruner* v. *Ruffner,* 134 App. Div. 837, 119 N. Y. Supp. 942.

[62] *Bodine* v. *Edwards,* 2 N. Y. Leg. Obs. 231, 3 Ch. Sent. 46.

[63] *Delaware, L. & W. R. Co.* v. *Scranton,* 34 N. J. Eq. (7 Stew.) 429.

[64] *Francis* v. *Church,* Clarke Ch. (N. Y.) 475. See *Lefevre* v. *Laraway,* 22 Barb. (N. Y.) 167. See *Stebbins* v. *Heath,* 115 Mich. 661, 74 N. W. 205.

will not allow fraud or unfairness on the part of any person connected with the sale,[65] nor on the part of the purchaser.[66]

But where property is regularly advertised and fairly sold by a referee, or other officer of the court, such sale will not be set aside, and a resale ordered, on motion of parties interested in the proceeds of the sale, in order to protect them against the consequences of their own negligence, where they are adults and were competent to protect their rights on the sale.[67] Where the party making the motion has been guilty of laches, he cannot have relief; and where the period prescribed by the statute, within which an action in equity to redeem from a mortgage can be brought, has been permitted to expire, the court has no power to set the sale aside.[68]

It has been said that parties who have been personally served with summons and appeared in a mortgage foreclosure suit cannot afterwards, to defeat confirmation, assail the decree for a mere irregularity.[69] And a mortgagor who is released from the bond has no interest in the mortgaged premises after their sale under execution against him subject to the lien of the mortgage, which will entitle him to have a judgment *in rem* upon the mortgage opened to allow him to plead usury, since, even if he could be subrogated to the rights of the mortgagee upon payment, he could not enforce the usurious part of the mortgage against the purchaser at execution sale.[70]

The court of appeals of New York, in the case of Andrews

[65] *Stahl* v. *Charles*, 5 Abb. (N. Y.) Pr. 348.

[66] *Murdock* v. *Empie*, 19 How. (N. Y.) Pr. 79.

[67] *American Ins. Co.* v. *Oakley*, 9 Paige Ch. (N. Y.) 259, 38 Am. Dec. 561. See *McCotter* v. *Jay*, 30 N. Y. 80; *Colonial & U. S. Mortgage Co.* v. *Sweet*, 65 Ark. 152, 45 S. W. 60. See *Farr* v. *Lachman*, 130 Mich. 40, 89 N. W. 688.

[68] *Depew* v. *Dewey*, 2 T. & C. (N. Y.) 515, 46 How. (N. Y.) Pr. 441. See *Francis* v. *Church*, Clarke Ch. (N. Y.) 475; *Nicholl* v. *Nicholl*, 8 Paige Ch. (N. Y.) 349; *Warren* v. *Foreman*, 19 Wis. 35.

[69] *Stratton* v. *Reisdorph*, 35 Neb. 314, 53 N. W. 136.

[70] *Reap* v. *Battle* (Pa. C. P.) 6 Kulp, 423.

v. O'Mahoney,[71] say that a mortgagee who himself conducted the foreclosure sale and bid off the property cannot, to avoid his liability to complete the purchase, be heard to say that the sale is illegal or irregular because of the sale of two parcels when one would have been sufficient, where the holder of subsequent mortgages and the mortgagor make no objection.[72] In those cases where the ostensible purchaser at a trustee's sale under a trust deed directs the deed to be made to another, a stranger to the sale cannot, in the absence of fraud, complain that the real purchaser did not make his bid in person.[73] The supreme court of Alabama, in the case of Jones v. Hagler,[74] say that in those cases where the grantor in a trust deed has obtained the credit and benefit of the amount bid at the trustee's sale, neither he nor any other person not a beneficiary can complain because the payment was not made in cash. It is well settled that one not a party to a sale under a trust deed has no right to object that a delay in executing the deed to the purchaser was a badge of fraud, where he

[71] 112 N. Y. 567, 20 N. E. 374, 21 N. Y. S. R. 583.

[72] *Under New Jersey Revised Statutes, p. 110,* §§ *41, 42,* a second mortgagee who took his mortgage after the decree foreclosing the first mortgage had been opened to enable the mortgagor to charge the person in possession with the rents and profits as mortgagee in possession, could not thereafter attack the decree rendered in such proceedings. *Smith* v. *Davis* (N. J. Ch.) 19 Atl. 541.

One of the second-mortgage or income bondholders of a railroad, in behalf of the others, cannot maintain a suit in equity to set aside a foreclosure sale of the railroad on the first mortgage to a committee of the first-mortgage bondholders, or to declare the sale to be in trust for both classes of bondholders, on the ground of a breach of an agreement, made without consideration or mutuality, between committees of both classes of bondholders, that the second-mortgage bondholders should participate in the re-organization of the company after the sale, and rank therein as they ranked previously, where there is no charge of fraud and no offer by the latter to redeem from the sale. *Robinson* v. *Iron R. Co.* 135 U. S. 522, 34 L. ed. 276, 10 Sup. Ct. Rep. 907.

[73] *Jones* v. *Hagler,* 95 Ala. 529, 10 So. 345.

[74] 95 Ala. 529, 10 So. 345.

does not suggest any fact to show that he has any interest which would entitle him to complain of such delay.[75]

The supreme court of Michigan, in Long v. Kaiser,[76] say that where the mortgagee of an entire tract of land afterwards conveyed by the mortgagor in parcels under an agreement whereby the purchaser of the first parcel was to pay the entire mortgage was not called upon to sell in parcels, or to respect the rights of a subsequent purchaser, the latter, who did not take any steps to protect his equities until several months after the sale, cannot maintain a bill to set the sale aside, but can protect his interests only by paying the mortgage and putting himself in the mortgagee's place. And it is said that a third possessor of property seized and sold to satisfy a previous mortgage has no right to question whether the vendee paid the price or complied with the terms of sale, where such possessor is not an heir of the execution defendant or interested in the distribution of the proceeds of the sale.[77]

Where the sale is made by one other than the special master commissioner appointed by the court, the court may set aside the sale on its own motion.[78]

§ 621. Effect of setting aside sale by junior lienholder.—The supreme court of Indiana, in the case of Wright v. Churchman,[79] say that a successful application made by a junior lienor to have a decree of foreclosure set aside as to him does not affect the decree so far as it disposes of the rights of the mortgagor.

§ 622. How sale may be set aside.—When it would be inequitable to permit the sale to stand, the proper remedy for the party aggrieved is by a summary application to the

[75] *Jones* v. *Hagler,* 95 Ala. 529, 10 So. 345.

[76] 81 Mich. 518, 46 N. W. 19.

[77] *Deroner* v. *Herbert,* 46 La. An. 1388, 16 So. 160.

[78] *Penn Mutual Life Insurance Co.* v. *Creighton Theater Bldg. Co.* 54 Neb. 228, 74 N. W. 583.

[79] 135 Ind. 683, 36 N. E. 835.

court on motion in the original suit, for an order setting the sale aside and directing a resale of the premises[80]. Notice of a resale of the premises should be given to all persons who have appeared in the suit, and to all persons who have any interest in the property sold or in the proceeds of the sale, as well as to the purchaser at the sale which it is sought to set aside.[81]

It seems that where a party was so connected with a foreclosure, that he could have moved in that action to set the sale aside, he cannot subsequently maintain a suit to accomplish the same object.[82] And while it may be questionable whether, after a sale on foreclosure, the defendants can have such sale set aside in opposing the purchaser's motion for confirmation, yet there will be no error in setting such sale aside upon an order procured by a defendant requiring the purchaser to show cause why a resale should not be had.[83]

In the early case of Brown v. Frost,[84] it was held that an original bill in chancery cannot be filed by a party to a foreclosure to set aside a master's sale under a decree, when the same relief could have been maintained by a summary application to the court in the action for foreclosure.[85] Chan-

[80] *McCotter* v. *Jay*, 30 N. Y. 80; *Kellogg* v. *Howell*, 62 Barb. (N. Y). 280, 283; *Gould* v. *Mortimer*, 26 How. (N. Y.) Pr. 167, 16 Abb. (N. Y.) Pr. 448.

[81] *Robinson* v. *Meigs*, 10 Paige Ch. (N. Y.) 41. See *Macfarlane* v. *Macfarlane*, 50 Fla. 570, 39 So. 995; *Depew* v. *Dewey*, 46 How. Pr. (N. Y.) 441, 2 T. & C. 515. But see *Kirby* v. *Circuit Court of McCook County*, 10 S. D. 38, 71 N. W. 140.

[82] *Gould* v. *Mortimer*, 26 How. (N. Y.) Pr. 167, 169, 16 Abb. (N. Y.) Pr. 448.

[83] *Hubbard* v. *Taylor*, 49 Wis. 68.

[84] 10 Paige Ch. 243.

[85] The same doctrine is held in *McCotter* v. *Jay*, 30 N. Y. 80; *Kellogg* v. *Howell*, 62 Barb. (N. Y.) 280; *Libby* v. *Rosekrans*, 55 Barb. (N. Y.) 202, 219, 220; *Smith* v. *American Ins. Co.* Clarke Ch. (N. Y.) 307; *Vandercook* v. *Cohoes Sav. Institution*, 5 Hun (N. Y.) 641; *American Ins. Co.* v. *Oakley*, 9 Paige Ch. (N. Y.) 259, 38 Am. Dec. 561; *Nicholl* v. *Nicholl*, 8 Paige Ch. (N. Y.) 349; *Requa* v. *Rea*, 2 Paige Ch. (N. Y.) 339; *Collier* v. *Whipple*, 13 Wend. (N. Y.) 224. Compare *Hackley* v. *Draper*, 60 N. Y. 88, 93.

cellor Walworth held in this case, that it would seriously affect the interests of those whose property was to be sold by a referee on a mortgage foreclosure, if it was understood that questions affecting the rights of the parties to the suit could be litigated and determined in collateral suits, "for," said the chancellor, "no man of ordinary prudence would bid what he believed to be the fair cash value of the property, at a master's sale, if he might be subjected to the expense and delay of a protracted chancery suit to determine whether the proceedings of the master had been strictly regular." [86]

This doctrine seems to be questioned in Hackley v. Draper; [87] and in the case of Vandercook v. Cohoes Savings Institution,[88] it is said that an action may be brought to set aside a sale made under a decree of foreclosure, if the sale was fraudulently conducted to the prejudice of any party interested in the property, even though such person may have a concurrent remedy by motion.

It was held in an early case, where the officer making the sale neglected to give security for the faithful discharge of his duties, as required by law, and assumed to act as such officer and to sell the premises under a decree of foreclosure, and the report of the sale was confirmed by the court, that the remedy of the party aggrieved was by an application in the action for foreclosure, to have the sale set aside for irregularity. But such an objection, when raised in a foreclosure, cannot be heard unless promptly made.[89]

The supreme court of Minnesota, in the case of Russell v. Gunn,[90] say that under the statute of that state,[91] upon a proper application, the district court may set aside or modify its judgments on foreclosure actions and the proceedings in execution thereof, in favor of any party whose rights have

[86] See *Brown* v. *Frost,* Hoff. Ch. (N. Y.) 41.

[87] 60 N. Y. 88, 93.

[88] 5 Hun (N. Y.) 641.

[89] *Nicholl* v. *Nicholl,* 8 Paige Ch. (N. Y.) 349.

[90] 40 Minn. 463, 42 N. W. 391.

[91] Minn. Gen. Stat. c. 66, § 125, as amended by laws, 1887, c. 61.

been injuriously affected. In Michigan it is held that one who seeks to have a sale of land under mortgage foreclosure set aside is properly required to pay the mortgage indebtedness, where the mortgage was extinguished, if at all, only by such sale.[92] The supreme court of Maine, in the case of Haskie v. James,[93] say that an *ex parte* affidavit of an exceptant to a mortgage sale is not a sufficient compliance with the rule requiring the exception to be supported by competent testimony.

§ 623. Time of making application for resale.—An objection to a sale should be made promptly; if made after a great lapse of time, a good excuse must be shown for the delay.[94] As a general rule, the proper time for making an

[92] *De Mey* v. *Defer,* 103 Mich. 239, 61 N. W. 524.

[93] 75 Md. 568, 23 Atl. 1030.

[94] *Lockwood* v. *McGuire,* 57 How. (N. Y.) Pr. 266; *Nicholl* v. *Nicholl,* 8 Paige Ch. (N. Y.) 349; *Hoyt* v. *Pawtucket Inst. of Savings,* 110 Ill. 390. See *McHany* v. *Schenk,* 88 Ill. 357; *Bush* v. *Sherman,* 80 Ill. 160; *Munn* v. *Burges,* 70 Ill. 604; *Dempster* v. *West,* 69 Ill. 613; *Burr* v. *Borden,* 61 Ill. 389; *Beach* v. *Shaw,* 57 Ill. 17; *Hamilton* v. *Lubukee,* 51 Ill. 415; *Cox* v. *Montgomery,* 36 Ill. 396; *Jacobson* v. *Smith,* 73 App. Div. 412, 77 N. Y. Supp. 40; *Connely* v. *Rue,* 148 Ill. 207, 35 N. E. 824; *Nichols* v. *Otto,* 132 Ill. 91, 23 N. E. 411; *Flynn* v. *Wilkinson,* 56 Ill. App. 239; *Harrington* v. *Fidelity Loan & T. Co.* 91 Iowa, 703, 58 N. W. 1059; *Ingalls* v. *Bond,* 66 Mich. 338, 33 N. W. 404; *Morgan* v. *Carter,* 54 Minn. 141, 55 N. W. 147; *Coles* v. *Yorks,* 36 Minn. 388, 31 N. W. 353; *F. G. Oxley Stave Co.* v. *Butler Co.* 121 Mo. 614, 26 S. W. 367; *Cross* v. *Hendrick,* 66 Miss. 61, 7 So. 496; *Pitt* v. *Amend,* 84 Hun (N. Y.) 492; 32 N. Y. Supp. 423; *Benninghoff* v. *Stephenson,* 161 Pa. St. 440, 29 Atl. 87; *Trilling* v. *Schumitsch,* 67 Wis. 186, 30 N. W. 222; *McBride* v. *Gwynn,* 33 Fed. 402; *Crutchfield* v. *Hewett,* 2 App. Cas. D. C. 373, 22 Wash. L. Rep. 127.

Application for relief from a foreclosure judgment and sale, on the ground of excusable neglect, should be made within a year after notice of the proceedings. Rev. Stat. § 2832. Aside from the statute, a delay in this case of more than six years was unreasonable and inexcusable. *Trilling* v. *Schumitsch,* 67 Wis. 186, 30 N. W. 222.

Illinois Doctrine.—In Illinois it is held that a foreclosure sale will not be set aside for irregularity in selling two separate tracts together, after the period of redemption has expired. *Flynn* v. *Wilkinson,* 56 Ill. App. 239. And an application

to set aside a decree of foreclosure on the ground that the sale was for an inadequate price must be denied for laches, where the applicant waited three years after notice of foreclosure, and the property was subject to speculative fluctuations of value, and no fraud is shown in the sale. *Connely* v. *Rue*, 148 Ill. 207, 35 N. E. 824.

It is said in the case of *Nichols* v. *Otto*, 132 Ill. 91, 23 N. W. 411, that where the owner of the equity of redemption knows of the defects attending a sale of the mortgaged premises, he must, as a general rule, proceed with diligence in his application to set the sale aside, or a court of equity will refuse relief.

Iowa Doctrine.—In Iowa it is held that an error in the description of property in the execution issued under a decree of foreclosure and sale, which is carried into the notice of sale, but which is afterwards corrected, does not relieve the part of the land described and the mortgage and the decree, which by the error was excluded from the description in the execution, from the lien in the decree, upon the sale, and the deeds in pursuance thereof being set aside by the court and another special execution ordered, where the mortgage debt is about equal to the value of the whole property mortgaged. *Harrington* v. *Fidelity Loan & T. Co.* 91 Iowa, 703, 58 N. W. 1059.

Michigan Doctrine.—The Michigan supreme court, in the case of *Ingalls* v. *Bond*, 66 Mich. 338, 33 N. W. 404, on a bill to set aside a foreclosure and declare a mortgage canceled filed, before the sheriff's deed became absolute, evidence that the complainant paid the mortgage eighteen months after the alleged assignment, but before it had been placed on record, and without notice thereof, was held to entitle him to the relief prayed for.

Minnesota Doctrine.—In Minnesota a failure to bring an action within five years after the sale, to set aside the foreclosure of a mortgage under a power of sale, invalid by reason of failure to publish the notice of sale the requisite length of time, waives the right given by the state statute, (Minn. Laws, 1883, c. 112), to have the sale declared invalid within five years. *Morgan* v. *Carter*, 54 Minn. 141, 55 N. W. 1117. And it is held in the same state that reasons for setting a foreclosure sale aside, founded upon irregularities in the foreclosure sale, are not available upon an application after confirmation and final decree, unless a sufficient excuse is shown for failure to present such reasons in opposition to the application to confirm the sale. *Coles* v. *Yorks*, 36 Minn. 388, 31 N. W. 353.

Missouri Doctrine.—It is held in Missouri that a sale of lands under a trust deed will not be set aside, more than twenty years afterwards, at the suit of a stranger to the proceedings who has since become interested by purchase, on the sole ground that two of the three trustees appointed to succeed others, who had died, were not made parties, where the sale had been made by a special commissioner appointed by the court. *F. G. Oxley Stave Co.* v. *Butler County*, 121 Mo. 614, 26 S. W. 367.

Mississippi Doctrine.—The Mississippi supreme court, in the case of *Cross* v. *Hedrick*, 66 Miss. 61,

application for a resale is before the confirmation of the report of the officer who conducted the sale;[95] but under special circumstances the court may set the sale aside and order a resale, even after the confirmation of the report.[96]

Where a party moving for a resale has been guilty of

7 So. 496, say that if the right to credits on an account secured by a deed of trust is lost by lapse of time and by failure to claim them on sale of the land, it cannot be revived by annulling the sale for the purpose of allowing them.

New York Doctrine.—The supreme court of New York, in the case of *Pitt* v. *Amend,* 84 Hun (N. Y.) 492, 32 N .Y. Supp. 423, say that failure to give notice of a sale on foreclosure of a mortgage by advertisement, to the personal representatives of a deceased mortgagor, as required by the statute (N. Y. Laws, 1844, c. 346. Since repealed by Code Civ. Proc. § 4), will not warrant a disturbance of the sale after more than twenty-five years where no administration was ever had upon the decedent's estate, it is not shown who the decedent's heirs were, and her husband and co-mortgagor was served with notice, and all the other proceedings were regular.

Pennsylvania Doctrine.—The supreme court of Pennsylvania, in the case of *Benninghoff* v. *Stephenson,* 161 Pa. 440, 29 Atl. 87, say that it is too late to question the validity of the acknowledgment of a mortgage, or the regularity of proceedings under *scire facias* prior to the acknowledgment and delivery of a sheriff's deed on a sale thereunder, after acknowledgment and delivery of the deed.

Federal Court Doctrine.—The United States court of appeals for the District of Columbia, in the case of *Crutchfield* v. *Hewett,* 2 App. Cas. D. C. 373, 22 Wash. L. Rep. 127, hold that a sale under a power in a trust deed requiring publication "in some newspapers" will not be set aside after seventeen years because publication was had but in one newspaper, even if the interpretation of the term by the trustee was mistaken, where no harm can be shown to have resulted from it. And the United States district court for the district of Colorado, in the case of *McBride* v. *Gwynn,* 33 Fed. 402, say objections that notice of a master's sale was not published as long as required by law by only one day, and that part of the property sold for less than it should by reason of such master's incompetency, come too late when made two years after the sale.

[95] *Brown* v. *Frost,* 10 Paige (N. Y.) 243. See *Strong* v. *Dollner,* 2 Sandf. (N. Y.) 444; *Morice* v. *Durham,* 11 Ves. 57; *Watson* v. *Birch,* 2 Ves. 52.

[96] See *Lansing* v. *McPherson,* 3 Johns. Ch. (N. Y.) 424; *Ryder* v. *Gower,* 6 Bro. P. C. 306; *Price* v. *Moxon,* cited 2 Dan. Ch. Pr. 1290; *Watson* v. *Birch,* 2 Ves. 52. See *Senft* v. *Vanek,* 209 Ill. 361, 70 N. E. 720.

laches, relief will not be granted in the absence of a good excuse or of an explanation of the delay;[97] except on the ground of invalidity of the sale;[98] and if the period prescribed by the statute, within which an action in equity may be brought to redeem from a mortgage, has expired, the court will not set the sale aside;[99] because, as has been said, "the courts have found it to be a duty, where a party has lost his rights by lapse of time under statutory provisions relating to them, to deny a motion made for relief after the time for affording the redress claimed has been allowed to expire without an application being made to secure it. Any other course would result in a nullification of the statutes, for it would be doing by indirect means, what in substance the legislature has provided should not be done by any means."[1]

It was held in the case of Fuller v. Brown,[2] that the statutory limitation of one year has no application to a motion to set a sale aside and for a resale, and that "the question of laches and its affect are dependent upon the circumstances of each particular case involving the consideration of them. It would be more strictly applied, as against a purchase in good faith, by a stranger to the proceedings, than to a party privy to it and not a *bona fide* purchaser. Also when the rights of third parties had intervened, which would be affected by giving relief." If there has been no substantial change in the situation, which would make the granting of the relief asked result to the injury of the purchaser, the question of laches will have less importance.[3]

[97] *Lockwood* v. *McGuire*, 57 How. (N. Y.) Pr. 266. See *post*, § 649.

[98] *Strand* v. *Griffith*, 63 Wash. 334, 115 Pac. 512.

[99] *Depew* v. *Dewey*, 46 How. (N. Y.) Pr. 441, 2 T. & C. (N. Y. 515.

[1] *Depew* v. *Dewey*, 46 How. (N. Y.) Pr. 441, 446, 2 T. & C. (N. Y.) 515. See *Salles* v. *Butler*, 27 N. Y. 638; *Wait* v. *Van Allen*, 22 N. Y. 319; *Fry* v. *Bennett*, 16 How. (N. Y.) Pr. 385; *Marston* v. *Johnson*, 13 How. (N. Y.) Pr. 93; *Humphrey* v. *Chamberlain*, 11 N. Y. 274.

[2] 35 Hun (N. Y.) 162, 166.

[3] See *In re Woolsey*, 95 N. Y. 135, 144; *McMurray* v. *McMurray*, 66 N. Y. 176; *Lockwood* v. *McGuire*, 57 How. (N. Y.) Pr. 266; *Viele* v. *Judson*, 15 Hun (N. Y.) 328.

A mortgagor should avail himself without delay of all irregularities in a sale of the mortgaged premises, whether made by an officer of the court under a decree of foreclosure and sale, or by the mortgagee under a power in the mortgage. Thus, it has been held where the former owner knew of the sale shortly after it was made, and neglected to redeem the property by paying the sum due from him, that a delay of four years in filing a bill to set such sale aside on the ground of alleged irregularities and inadequacy of price, was such laches as to bar the relief sought.[4]

§ 624. When application for resale will be granted—When denied.—A resale of mortgaged premises may be ordered in case the sale was improperly, unfairly or unlawfully conducted, and that fact is made to appear to the court.[5] A resale may also be ordered if there was a defect of parties to the suit,[6] or if several parcels were sold in a lump,[7] because the parties interested in such sale have a right to expect and to require that the property shall be offered and sold in the usual manner, and in accordance with the requirements of law. If it appears that the property has been sacrificed by the failure of the officer making the sale to comply with such requirements, the parties injured will be entitled to relief by a resale.[8] And where the order of sale failed to show that a

[4] *Hoyt* v. *Pawtucket Inst. of Savings,* 110 Ill. 390; *Hamilton* v. *Lubukee,* 51 Ill. 415, 99 Am. Dec. 562. See *post,* § 649.

[5] *King* v. *Platt,* 37 N. Y. 155, 35 How. (N. Y.) Pr. 23, 3 Abb. (N. Y.) Pr. N. S. 434; *Marsh* v. *Ridgway,* 18 Abb (N. Y.) Pr. 262; *Lefevre* v. *Laraway,* 22 Barb. (N. Y.) 167; *Griffith* v. *Hadley,* 10 Bosw. (N. Y.) 587; *Wolcott* v. *Schenck,* 23 How. (N. Y.) Pr. 385; *Lents* v. *Craig,* 13 How. (N. Y.) Pr. 72, 2 Abb. (N. Y.) Pr. 294. *James H. Robertson Mfg Co.* v. *Chambers,* 113 Md. 232, 77 Atl. 287.

[6] *Verdin* v. *Slocum,* 71 N. Y. 345.

[7] *Ames* v. *Lockwood,* 13 How. (N. Y.) Pr. 555.

[8] *Brown* v. *Frost,* 10 Paige Ch. (N. Y.) 243. See *Lansing* v. *McPherson,* 3 Johns. Ch. (N. Y.) 424; *Billington* v. *Forbes,* 10 Paige Ch. (N. Y.) 487; *American Ins. Co.* v. *Oakley,* 9 Paige Ch. (N. Y.) 259, 38 Am. Dec. 561; *Requa* v. *Rea,* 2 Paige Ch. (N. Y.) 339; *Tripp* v. *Cook,* 26 Wend. (N. Y.) 146; *Bix-*

payment had been made upon the judgment, a resale will be ordered.[9]

A resale will be ordered where there were no bidders present at the sale except the auctioneer;[10] or where the purchaser refuses to comply with the terms of sale.[11] But if the purchaser is financially responsible, the court may make an absolute order that he complete the purchase, or that an attachment issue against him.[12] If the sale is ratified and the purchaser still refuses to complete his purchase, the court may proceed in a summary way by an order, and direct a resale of the property at the risk of the purchaser at the first sale.[13] In Oklahoma a resale will be ordered where the sale was made within six months without appraisement.[14]

Upon an application for a resale of property in a mortgage foreclosure, all the facts connected with the sale and with the equitable interests of the various parties will be taken into consideration by the court.[15] When a mortgage foreclosure sale is fair and free from fraud, accident or surprise, a resale will not be ordered; especially, if the equities of the case are in favor of the purchaser, as where he has a subsequent lien which will be imperiled by a resale.[16]

In Haines v. Taylor,[17] the court held that "the rule is distinctly and clearly laid down in numerous cases, that the court will not interfere except in very special cases; and never when the mortgagor is an adult and has an opportunity of attend-

ly v. *Mead*, 18 Wend. (N. Y.) 611; *Groff* v. *Jones*, 6 Wend. (N.Y.) 522, 22 Am. Dec. 545.

[9] *Townsend* v. *Johnson*, 10 Kan. App. 547, 63 Pac. 25.

[10] *Campbell* v. *Swan*, 48 Barb. (N. Y.) 109.

[11] *Graham* v. *Bleakie*, 2 Daly (N. Y.) 55, 60.

[12] *Graham* v. *Bleakie*, 2 Daly (N. Y.) 55, 60. See *Miller* v. *Collyer*, 36 Barb. (N. Y.) 250; *Saunders* v. *Gray*, 4 Myl. & C. 515; *Lansdown* v. *Elderton*, 14 Ves. 512. See *post*, § 666.

[13] *Schaefer* v .*O'Brien*, 49 Md. 253. See *post*, § 665.

[14] *Hancock* v. *Youree*, 25 Okl. 460, 106 Pac. 841. (Comp Laws 1909, sections 5977, 5978.)

[15] *Wiley* v. *Angle*, Clarke Ch. (N. Y.) 217.

[16] *Gardiner* v. *Schermerhorn*, Clarke Ch. (N. Y.) 101.

[17] 3 How. (N. Y.) Pr. 206, 207.

ing the sale and taking care of his interests, and the sale is fairly made." [18] Where foreclosure proceedings are entirely regular and free from fraud, the sale will not be set aside without some legal reason. Mere want of knowledge of the time and place of the sale on the part of one who was a party to the foreclosure, and who was bound for that reason to use due diligence in obtaining information of the sale in order to protect his rights, affords no sufficient reason for a resale.[19]

A resale in a mortgage foreclosure will not be ordered merely because the property was not sold in separate parcels,[20] if it appears that no request to sell in parcels was made of the referee, and that the premises, although consisting of several lots, have been so built upon as really to constitute but one parcel.[21] The transfer of a bid made at foreclosure sale is not a good ground for a resale.[22]

The general rule is that the court will always, if possible by ordering a resale, secure to owners of mortgaged land a fair sale at full value, and especially when the purchaser is the plaintiff in foreclosure, or the plaintiff's agent.[23] And in those cases where the defendant has been required to pay moneys merely as a condition of an adjournment of a sale of mortgaged premises, this will be good reason for setting aside the sale and ordering a resale.[24] And it is said that a sale by trustees under a mortgage will be set aside when

[18] See *McCotter* v. *Jay,* 30 N. Y. 80; *White* v. *Coulter,* 1 Hun (N. Y.) 357; *Livingston* v. *Byrne,* 11 Johns. (N. Y.) 555; *Billington* v. *Forbes,* 10 Paige Ch. (N. Y.) 487; *American Ins. Co.* v. *Oakley,* 9 Paige Ch. (N. Y.) 259, 38 Am. Dec. 561; *Duncan* v. *Dodd,* 2 Paige Ch. (N. Y.) 101.

[19] *McCotter* v. *Jay,* 30 N. Y. 80.

[20] *The Geuda Springs Town and Water Company* v. *Lombard,* 57 Kan. 625, 47 Pac. 532; *Hibernia Savings & Loan Society* v. *Behnke,* 121 Cal. 339, 53 Pac. 812; *Connick* v. *Hill,* 127 Cal. 162, 59 Pac. 832. See *Meux* v. *Trezevant,* 132 Cal. 487, 64 Pac. 848.

[21] *McLaughlin* v. *Teasdale,* 9 Daly (N. Y.) 23.

[22] *Culver* v. *McKeown,* 43 Mich. 322.

[23] *New York Eastern C. & B. Assoc.* v. *Bishop,* 28 N. Y. S. R. 22, 8 N. Y. Supp. 60.

[24] *Holland Trust Co.* v. *Hogan.*

made to one who has previously made a higher bid and withdrawn it at the suggestion of the trustee, although such suggestion was made in the belief that the purchaser was induced to make the bid by puffing bids to others.[25]

In the case of Fishburne v. Smith,[26] it is said that a sale under a mortgage cannot be sustained when the purchaser did not make the cash payment required by the terms of sale, although he represented the mortgagees, where costs and expenses are first to be paid out of the proceeds.[27] And it is said that a mistake of a purchaser at foreclosure sale of two adjoining lots, as to the street upon which they fronted, by which he was led to believe that each had a house upon it, and to purchase them at equal prices less than the value of one and greater than that of the other, when, in fact, the houses were upon the same lot, which was thereby made one of much greater value than the other, entitles him, as against a purchaser of the equity of redemption who seeks to redeem only the more valuable lot, to have the sale set aside and a new foreclosure of the mortgage.[28]

17 N. Y. Supp. 919, 44 N. Y. S. R. 577.

[25] *Fishburne* v. *Smith,* 34 S. C. 330; 13 S. E. 525.

A second sale by the trustee in a trust deed after delivery, acceptance, and recording of the deed upon the first sale, and a subsequent reconveyance by the purchaser, made without the consent of the mortgagor, to the same purchaser, for the purpose of relieving the latter from paying a surplus which by the terms of the trust deed was payable to the mortgagor, is a nullity and conveys no title, even though the original purchase was made upon unauthorized representations by the trustee that the surplus might be applied upon prior debts due from the mortgagor to the purchaser. *Gair* v. *Tuttle,* 49 Fed. 198.

[26] 34 S. C. 330, 13 S. E. 525. See *Convers* v. *Clay,* 86 Mich. 375, 49 N. W. 473.

[27] Demanding immediate payment of amount of bid by the commissioner at a foreclosure sale of several parcels of land of the highest bidder for one parcel, and, the same not being produced on the spot, sold all the parcels in a lump, and afterwards refused to accept the amount previously bid on the one parcel and give a deed thereof, a resale is properly ordered without imposing conditions upon the exceptants. *Converse* v. *Clay,* 86 Mich. 375, 49 N. W. 473.

[28] *Root* v. *King,* 91 Mich. 488, 51 N. W. 1118.

The New Jersey court of chancery, in the case of Miller v. Kendrick,[29] say that a resale in foreclosure proceedings will be ordered on the application of the mortgagor, although he did not object to the report advertising a sale in the manner which was pursued, where it appears that a larger sum can be obtained on resale.

It seems that an order for a resale is unnecessary in a suit to correct a mistake in the description of land in a foreclosure decree and commissioner's deed, if the conduct of the mortgagor amounts to a waiver, and the subsequent grantees from him do not hold in good faith.[30]

The supreme court of Iowa, in the case of Brown v. Brown,[31] say that where one judgment in foreclosure is against one defendant, and two other judgments in foreclosure are against him and another person jointly, they cannot be satisfied by one sale, and an attempted sale must be held invalid as to both defendants.

An injury, just before sale, to the mortgaged property by the elements, is not a ground for setting the sale aside. Thus it has been said that a sale under a trust deed will not be set aside because made just after a disastrous overflow, where there is no reason to believe that the sale would have been averted had the overflow not occurred.[32] And it has been held that a mortgage foreclosure sale will not be set aside on the application of a defendant merely because the premises were bought by plaintiff's attorney for his own benefit, where the latter's conduct was fair and honest.[33]

In those cases where there is a sale for a gross sum of premises claimed to constitute several parcels, and sold to different vendees subsequent to the execution of the mortgage, is voidable, and not void,[34] and will not be set aside

[29] 15 Atl. 259.

[30] *Merrifield* v. *Ingersoll,* 61 Mich. 4, 27 N. W. 714.

[31] 73 Iowa, 430, 35 N. W. 507.

[32] *Dunton* v. *Sharpe,* 70 Miss. 850, 12 So. 800.

[33] *Holland Trust Co.* v. *Hogan,* 44 N. Y. S. R. 577, 17 N. Y. Supp. 919.

[34] See *ante,* §§ 567–576.

where the latter have not objected to the sale, or shown any excuse for not doing so, and no fraud is charged.[35] And the supreme court of Kentucky, in Commonwealth v. Robinson,[36] say that a sale under foreclosure of a mortgage will be set aside and a resale ordered, where the owner of a judgment upon which an execution had been issued and levied upon the property was not a party to the proceeding, under the Kentucky statute,[37] providing that no sale of property under the lien shall be ordered prejudicial to the rights of the owners of other liens, although no action was taken under the levy for more than a year after it was made, pending a motion for a new trial.

The supreme court of the United States say that the holders of second mortgage bonds cannot avoid a sale under the first mortgage, on the ground of the incapacity of the state as trustee in that mortgage to purchase at the sale, without tendering reimbursement of the amount of the first mortgage.[38] And it has been held that a motion to open a decree foreclosing a mortgage, and bring in as defendant a grantor who does not appear by the judgment roll to have been unmarried, is properly denied where such grantor described himself in his deed as unmarried, and it appears that the party in interest making the application was a party to various suits to which the grantor made affidavits that he was unmarried.[39]

§ 625. When sale may be set aside where plaintiff is purchaser.—A mortgagee has an equal right with disinterested parties to purchase the mortgaged premises,[40] and the mere fact that he purchased the premises at a low price, will constitute no ground for setting the sale aside where it

[35] *Clark* v. *Kraker,* 51 Minn. 444, 53 N. W. 706.

[36] 96 Ky. 553, 29 S. W. 306, 16 Ky. L. Rep. 558.

[37] Ky. Civ. Code, § 694, ¶ 3.

[38] *Cunningham* v. *Macon, & B. R. Co.* 156 U. S. 400, 39 L. ed. 471, 61 Am. & Eng. R. Cas. 661, 15 Sup. Ct. Rep. 361.

[39] *Holland Trust Co.* v. *Hogan,* 17 N. Y. Supp. 919, 44 N. Y. S. R 577.

[40] See *ante,* § 610.

was fair and open, and the bidders were in no way deceived.[41] Yet a sale will be set aside and a resale ordered upon less evidence of fraud, surprise, accident or misconduct of the officer conducting the sale, if the plaintiff or mortgagee is the purchaser, and the rights of third parties or *bona fide* purchasers do not intervene, than where a stranger to the suit is the purchaser.[42]

In the case of Tripp v. Cook,[43] the court held that "where the mortgagee or complainant himself becomes the purchaser, the court has not always held the sale so conclusive as where the property has been purchased by one who was an entire stranger to the suit, who had bid for the purpose of investment merely." Where the mortgagee becomes the purchaser of the premises at a sum less than the amount of his mortgage, the sale may be opened on motion of the person who is bound to make good the deficiency, upon the payment of a reasonable advance upon the price at which the premises were publicly sold.[44]

Where a rule prevails against a purchase by the mortgagee at his own sale, if the mortgagee, through an agent becomes the purchaser at the sale under the mortgage, the mortgagor may avoid such sale, although no other person can.[45]

§ 626. What advance must be bid on resale.—Before a sale made in pursuance of a judgment of foreclosure has been confirmed, the court may open the biddings and order a resale, at the instance of any one who is liable to the deficiency, on his offering a sufficient advance over the sum

[41] *Mott* v. *Walkley*, 3 Edw. Ch. (N. Y.) 590. See N. Y. Supreme Court Rule 61.

[42] *Kellogg* v. *Howell*, 62 Barb. (N. Y.) 280; *Tripp* v. *Cook*, 26 Wend. (N. Y.) 143. See *Nugent* v. *Nugent*, 54 Mich. 557; *Campbell* v. *Gardner*, 11 N. J. Eq. (3 Stock.) 423, 69 Am. Dec. 598.

[43] 26 Wend. (N. Y.) 143, 145.

[44] *Littell* v. *Zuntz*, 2 Ala. 256, 36 Am. Dec. 415. See *Mott* v. *Walkley*, 3 Edw. Ch. (N. Y.) 590; *Woodhull* v. *Osborne*, 2 Edw. Ch. (N. Y.) 614; *Lansing* v. *McPherson*, 3 Johns. Ch. (N. Y.) 424.

[45] *Edmondson* v. *Welsh*, 27 Ala. 578.

received,[46] and paying the costs of the former sale.[47] Under the English practice it seems that while the court does not confine itself to a particular rate per centum, ten pounds per centum has been adopted as a prevailing rule.[48] But this practice has never been generally adopted in this country,[49] because its tendency is considered prejudicial to the fair conduct of judicial sales.[50] In this country, neither before nor after the confirmation of the report of sale, will a resale be ordered merely upon an offer of an increase of price.[51]

But in Alabama, where property is sold under a decree of foreclosure and is purchased by the mortgagee, the biddings

[46] See *Montague* v. *International Trust Co.* 142 Ala. 544, 38 So. 1025. See also *Colonial & U. S. Mortgage Co.* v. *Sweet,* 65 Ark. 152, 67 Am. St. Rep. 910, 45 S. W. 60. See *ante,* §§ 617, 618, 619.

[47] See *Lansing* v. *McPherson,* 3 Johns. Ch. (N. Y.) 424; *Farlow* v. *Weildon,* 4 Madd. 460. It is said in a note to *Farlow* v. *Weildon,* that "when biddings are opened, the person who opens them pays all the costs of the former purchaser; and I am informed that he has been allowed the costs of an agent who traveled a considerable distance for the purpose of buying for his principal."

[48] *Garstone* v. *Edwards,* 1 Sim. & Stu. 20. In this case it is said that the cases of *Brooks* v. *Snaith,* 3 Ves. & B. 144, and *White* v. *Wilson,* 14 Ves. 151, and *Ex parte Partington,* 1 Ball. & B. 209 established the fact that where an advance so large as five hundred pounds is offered, the court will act upon it though it be less than ten pounds per centum.

[49] *Woodhull* v. *Osborne,* 2 Edw. Ch. (N. Y.) 614. See *Lefevre* v. *Laraway,* 22 Barb. (N. Y.) 167, 173; *Lansing* v. *McPherson,* 3 Johns. Ch. (N. Y.) 424; *Williamson* v. *Dale,* 3 Johns. Ch. (N. Y.) 290; *Duncan* v. *Dodd,* 2 Paige Ch. (N. Y.) 99; *Collier* v. *Whipple,* 13 Wend. (N. Y.) 224; *Jackson* v. *Warren,* 32 Ill. 331; *Foreman* v. *Hunt,* 3 Dana. (Ky.) 614; *Delaware, L. & W. R. Co.* v. *Scranton,* 34 N. J. Eq. (7 Stew.) 429, 432; *Adams* v. *Haskell,* 10 Wis. 123; *Harris* v. *Gunnell,* 9 S. W. 376 (Ky.)

[50] *Delaware, L. & W. R. Co.* v. *Scranton,* 34 N. J. Eq. (7 Stew.) 429; *Conover* v. *Walling,* 15 N. J. Eq. (2 McCar.) 173, 178.

[51] *Lefevre* v. *Laraway,* 22 Barb. (N. Y.) 167, 173. See *Brown* v. *Frost,* 10 Paige Ch. (N. Y.) 243, 249; *American Ins. Co.* v. *Oakley,* 9 Paige Ch. (N. Y.) 259, 38 Am. Dec. 561; *Tripp* v. *Cook,* 26 Wend. (N. Y.) 143; *Collier* v. *Whipple,* 13 Wend. (N. Y.) 224; *Adams* v. *Haskell,* 10 Wis. 123.

will be opened and a resale ordered before a confirmation of the sale, if an advance of not less than ten per centum upon the former sale is offered and the money is deposited in court; but it seems that a resale will not be ordered where the deposit is less than two hundred dollars.[52]

In a Kentucky case the court say: "One who was present at the sale, or who at least might have been, should not be allowed to make it a mere matter of play by thereafter offering an advanced price. It follows that the bond given in this case stipulating that upon a resale eighty acres of the land should be made to pay the debt, or bring as much as the entire tract brought at the sale in question, did not, of itself, authorize another sale." [53]

It is the general rule that as a condition of such opening and resale the court may impose terms.[54] But the supreme court of Michigan, in the case of Page v. Kress,[55] say that a resale of mortgaged premises will not be ordered upon the offer of an increase of price alone, when the property has not been sold at a sacrifice; and that the fact a person is willing to give $1,000 for property worth $900, is not a sufficient ground for granting a resale. And the supreme court of New York, in the case of Wesson v. Chapman,[56] say that a resale of premises sold under foreclosure of a mortgage will not be granted upon an offer to bid double the amount, given by one who was absent at the time of the sale, where but little benefit will result to him therefrom, and the prejudice to the purchaser as well as to the public may be considerable, particularly when the one making the application is not free from the imputation of laches, and the sale was fairly conducted by the referee. But it is said by the same court, in the former case of Corwith v. Barry,[57] that a resale in a fore-

[52] *Littell* v. *Zuntz*, 2 Ala. 256, 36 Am. Dec. 415.

[53] *Harris* v. *Gunnell* (Ky.) 9 S. W. 376.

[54] See *post*, § 651.

[55] 80 Mich. 85, 20 Am. St. Rep. 504, 44 N. W. 1052.

[56] 76 Hun (N. Y.) 592, 28 N. Y. Supp. 192, 58 N. Y. S. R. 252.

[57] 69 Hun (N. Y.) 113, 23 N. Y. Supp. 200, 53 N. Y. S. R. 53.

closure action is properly ordered upon the application of a judgment creditor of the mortgagor who was prevented from attending the sale by reason of misinformation from plaintiff's brother, and who expresses a willingness to pay twice the amount for which the property is sold.

And it has been held that a sale of the whole premises under a decree of foreclosure will be set aside at the instance of a purchaser of a half interest therein subject to the mortgage, on due security being given for an advance bid, where such purchaser of the half interest has been led into the belief that the sale would not divest his interest, and there is some evidence of an understanding with one of the holders of the mortgage that his half interest in the mortgaged premises should be released.[58]

§ 627. What sufficient grounds for setting sale aside.— It has been said that equity is ready to receive the excuses of the mortgagor, not only to allow him time to procure the money due on the mortgage before foreclosure, but also to open the foreclosure, if he shows any good reason why he did not appear.[59] If the referee sells the property under a decree of foreclosure at an improper time, or in such a manner as to prevent a fair competition, or if from any other cause it is inequitable that such sale should be permitted to stand, the sale will be set aside on motion.[60]

Thus, where a sale under a statutory foreclosure was made when no person was present, except the officer conducting the sale who bid in the property on behalf of the mortgagee,

[58] *Scranton Savings Bank & Trust Co.* v. *Pier* (Pa. C. P.) 1 Lackw. L. News, 87.

[59] *Golden* v. *Fowler,* 26 Ga. 451, 463.

[60] *Marsh* v. *Ridgeway,* 18 Abb. (N. Y.) Pr. 262; *Lefevre* v. *Laraway,* 22 Barb. (N. Y.) 167; *Griffith* v. *Hadley,* 10 Bosw. (N. Y.) 587; *Wolcott* v. *Schenck,* 23 How. (N. Y.) Pr. 385; *Brown* v. *Frost,* 10 Paige Ch. (N. Y.) 243.

Setting aside sale for failure of offier to be personally present at sale, see *ante,* § 604.

the sale was set aside.[61] And where the officer making the sale disregards the written request and instructions of the plaintiff and sells the property at a great sacrifice, the sale may be set aside, if the purchaser knew of such written instructions.[62] A sale may be set aside, especially before confirmation, for fraud, unfairness or irregularity,[63] or for want of notice;[64] but it seems not for mere inadequacy of price,[65] unless it results in a clear sacrifice.[66]

The confirmation of the referee's report, it seems, will cure all irregularities in proceedings for the sale of mortgaged premises and in the conduct of such sale;[67] but it will not cure a defect arising from want of jurisdiction of the court, either over the cause of action or the parties interested. Mere accident or mistake, which will generally invalidate a contract, may be a good ground for setting a sale aside even after confirmation.[68] But clearer and stronger evidence of fraud or misconduct, or of other causes for rendering the sale invalid, will be required to set a sale aside after than before confirmation.[69]

A sale under a decree of foreclosure will be set aside upon good and sufficient cause shown. What is good and sufficient cause rests largely in the discretion of the court. It has been held that a sale will be set aside where there has been a manifest disposition to favor the purchaser at the expense of the defendant;[70] where it appears that the purchaser made no

[61] *Campbell* v. *Swan,* 48 Barb. 109.

[62] *Requa* v. *Rea,* 2 Paige Ch. (N. Y.) 339.

[63] *Forman* v. *Hunt,* 3 Dana (Ky.) 614.

[64] *Nugent* v. *Nugent,* 54 Mich. 557.

[65] *American Ins. Co.* v. *Oakley,* 9 Paige Ch. (N. Y.) 259, 38 Am. Dec. 561; *Henderson* v. *Lowry,* 5 Yerg. (Tenn.) 240; *Hill* v. *Hoover,* 5 Wis. 354, 68 Am. Dec. 70; *Strong* v. *Catton,* 1 Wis. 471; *West* v. *Davis,* 4 McL. C. C. 241.

[66] *Garrett* v. *Moss,* 20 Ill. 549.

[67] *Terry* v. *Furth,* 40 Wash. 493, 82 Pac. 882.

[68] See *Jackson* v. *Warren,* 82 Ill. 331.

[69] *Lansing* v. *McPherson,* 3 Johns. Ch. (N. Y.) 424.

[70] Thus it is held that a sale of mortgaged premises for less than half their value will not be confirmed, where there has been an adjournment once each week for at least twelve times, in the interest of the purchaser, and the attorney for

payment;[71] where the date of sale in the advertisement was wrong;[72] where no duplicate of the certificate of purchase has been filed for record as required by statute, and it is doubtful whether such certificate has been delivered to the purchaser;[73] where there has been misleading information given out by the mortgagor or his assignor, who is foreclosing;[74] where several lots are sold as one parcel;[75] where the sale is made at an unsuitable hour;[76] where there has been unwarrantable interference with the bidders by any one

the owner of a three-fourths interest in the property, who has been present each preceding time, was detained in his office until after the time of the sale, and both he and his clients were surprised at its being sold without his presence, as he had stated on the preceding evening that he intended to bid, and the purchaser did not buy in his own interest or for a stranger to the action. *Workingmen's Mut. Bldg. Loan Asso.* v. *McGillick* (N. J. Ch.) 28 Atl. 468.

[71] *Harwood* v. *Cox,* 26 Ill. App. 374.

[72] Where the date of sale in the advertisement of sale was wrong, the supreme judicial court of Kentucky say that the sale under foreclosure of a mortgage should not be confirmed, although it recited that it was to be made on county court day, which is a fixed date. *Hendrix* v. *Nesbitt,* 96 Ky. 652, 29 S. W. 527, 16 Ky. L. Rep. 746.

[73] *Harwood* v. *Cox,* 26 Ill. App. 374.

[74] *Misleading information.*—Thus the common pleas court of the State of Pennsylvania have held that a foreclosure sale under a mortgage upon the whole premises will be set aside at the instance of a purchaser of a half interest subject to such mortgage, on due security being given for an advanced bid, where he has been led into the belief that the sale would not divest his interest, and there is some evidence of an understanding with one or more of the holders of the mortgage that his interest should be released. *Scranton Sav. Bank & T. Co.* v. *Pier,* (Pa. C. P.) 1 Lackw. L. News, 87.

[75] *Bozarth* v. *Largent,* 128 Ill. 95, 21 N. E. 218; *Larkin* v. *Brouty,* 15 N. Y. Supp. 509, 39 N. Y. S. R. 879. See *ante,* § 567, *et seq.*

Sale of mortgaged premises en masse does not render the sale void, but, at most, is only ground for setting it aside on proper application. *Bozarth* v. *Largent,* 128 Ill. 95, 21 N. E. 218.

Sale in foreclosure of several lots in one parcel will be set aside where the judgment did not direct the reference to sell in that manner, and it is shown that the property would have produced more had the lots been sold separately. *Larkin* v. *Brouty,* 15 N. Y. Supp. 509, 39 N. Y. S. R. 879.

[76] As to hour of day of sale. See *ante,* § 553.

Unsuitableness of the hour at

responsible to the court in the action;[77] and also in those cases where a foreclosure and sale is made under a mortgage without the consent of the assignee of the mortgage.[78]

It has been said that a deed executed by a master, where the property was sold after he filed his report, is void, and of course will be set aside upon proper showing of the facts to the court.[79] The supreme court of Nebraska, in the case of Symms v. Nixon,[80] say that a modified decree of fore-

which the sale of lands under a power in a deed of trust was begun and accomplished is a circumstance calculated to cast suspicion on the correctness of the sale, and is sufficient to warrant the court in setting the sale aside, when to that is added great inadequacy of price. *Fowler* v. *Taylor,* 19 D. C. 456, 19 Wash. L. Rep. 131.

Sale under a deed of trust at 11 a. m. will be set aside where the usual hour for such sales is in the afternoon and the property brought but little more than one-fourth its value; especially is this the case where a person interested in the sale informed the sheriff that he wished to be represented at the sale, and was unable, in the exercise of due diligence, to reach the place of sale in time, but arrived an hour afterwards. *Holdsworth* v. *Shannon,* 113 Mo. 508, 21 S. W. 85, 89.

[77] Unwarranted interference with bidders by county attorney in foreclosure sale of land will be grounds for setting same aside, where he ceased to bid by reason thereof, and the land was sold at a sum materially below its value and below the amount that would have been bid. *Aldrich* v. *Lewis,* 28 Neb. 502, 44 N. W. 735.

[78] As to who may foreclose see full discussion, *ante,* §§ 91, 92, 94.

In Minnesota a foreclosure of and sale under a mortgage, made by the mortgagee, who had assigned the mortgage, without the consent of the assignee, although the record title had not been transferred, will be set aside at the suit of the assignee, promptly brought upon discovering the facts, as against judgment creditors of the mortgagor who have redeemed and who had notice of the assignment at the time of redeeming, although the judgment was docketed before the assignment was recorded. See *Cutler* v. *Clementson,* 67 Fed. 409.

In Missouri a sale will be set aside when made by the trustee under a power in a trust deed, without authority from the owner of the debt to commence the proceeding, and without notice to a junior mortgagee whom the trustee had agreed to notify, and when it was known both to the trustee and the purchaser that the owner of the land was negotiating a loan to pay off both debts. *Cassady* v. *Wallace,* 102 Mo. 575, 15 S. W. 138.

[79] *McBride* v. *Gwynn,* 33 Fed. 402.

[80] 29 Neb. 404, 45 N. W. 680.

closure, including property not described in the original decree, without any notice of the petition for the modified decree being given to the adverse party, is a nullity in so far as it changes the original decree; and a sale thereunder will be set aside. And the supreme court of Missouri, in the case of Findley v. Findley,[81] where a conveyance to the defendant had been set aside because fraudulent and void against creditors, a trust deed given by such defendant after the acquisition of title under foreclosure of a smaller trust deed and the trustee's sale were held fraudulent, and the enforcement of the mortgage perpetually enjoined, and the plaintiff was allowed to redeem by paying the debts secured by the original mortgage.

§ 628. What insufficient grounds for setting sale aside.—A sale under a decree of foreclosure of a mortgage will be set aside in those cases where there has been an abuse of discretion by the officer making the sale; but not unless substantial injury to the mortgagor or his assignee is made to clearly appear.[82] It has been said that a sale under a trust deed will not be set aside because advertised while the debtor was absent from the city, unless it was done with a fraudulent purpose;[83] and a sale will not be set aside because of an agreement between two persons, who attended for the purpose of bidding for the property, to purchase the same together, where the sale is made to them jointly;[84] nor because the court appointed a guardian *ad litem* for some of the minor defendants, and upon such guardian's answer in denial defaulted such minors and rendered a decree against them without evidence;[85] nor because there was collusion between the owners of the equity of redemption and the purchaser to

[81] 93 Mo. 493, 6 S. W. 369.

[82] See *Nix* v. *Williams*, 110 Ind. 234, 11 N. E. 36. See *ante*, § 618.

[83] *Routt* v. *Milner*, 59 Mo. App. 50.

[84] *Coudert* v. *DeLogerot*, 30 N. Y. Supp. 114, 62 N. Y. S. R. 26.

[85] *Cosby* v. *Powers*, 137 Ind. 694, 37 N. E. 321.

obtain the estate relieved of the claims of the plaintiff, where there is no allegation that the mortgagee was in collusion with the purchaser and the owners;[86] nor because there were few bidders;[87] nor because the sale was not made at the front door leading to the court room, where the trust deed provided for a sale "at the front door of the court house,"[88] and there are three front doors, the sale having been made in front of one of them in full view of all the others;[89] nor because the sale is made upon credit, or part credit, when it should have been for cash;[90] nor because the debtor was ill at the time the sale was made, and died soon thereafter;[91] nor because of inaccuracies of recital in the published notice, where such inaccuracies are in no way prejudicial to the

[86] *Austin* v. *Hatch,* 159 Mass. 198, 34 N. E. 95.

[87] *Anderson* v. *White,* 2 App. Cas. D. C. 408, 22 Wash. L. Rep. 159. See *post,* § 639.

[88] See *ante,* §§ 554, 555.

[89] *Martin* v. *Barth,* 4 Colo. App. 346, 36 Pac. 72; *Maloney* v. *Webb,* 112 Mo. 575, 20 S. W. 683.

The supreme court of Missouri say, in the case of *Maloney* v. *Webb,* 112 Mo. 575, 20 S. W. 683, that a sale under a deed of trust will not be set aside upon the ground that it was not made at the court house door, that it was not an open public sale as provided by the deed of trust, and that the property was not struck off to the highest bidder, where it appears that it was made in the vestibule in front of the court house door, at the usual hour and in the usual manner of public sales at that place, and that the property was not then struck off to the highest bidder on account of the interposition of plaintiff, who seeks to have the sale set aside, in order that he might make his bid good.

[90] See *ante,* §§ 556–561.

Thus it has been said that the fact that a trustee, who is also the mortgagee, in a trust deed authorizing a cash sale, or his agent, gives credit, or has an understanding with the bidder that credit will be given him on part of his bid, while the sale is ostensibly a cash one, to induce the bidder to bid the full amount of the debt secured, will not avoid the sale because in favor of the mortgagor or those claiming under him. *Chase* v. *Cleburne First Nat. Bank,* 1 Tex. Civ. App. 595, 20 S. W. 1027.

And it is held that it is not ground for setting aside a mortgage foreclosure sale of land advertised to be sold for cash, that the sheriff accepted a certified check, instead of requiring a payment to be made in cash, where such check has since been paid. *Sheldon* v. *Puessner,* 52 Kan. 593, 35 Pac. 204.

[91] *Bowles* v. *Braur,* 89 Va. 466, 16 S. E. 356, 16 Va. L. J. 659.

parties or the purchaser;[92] nor because of inadequacy of price;[93] nor because of the offer of an increase of price alone;[94] nor because of the insanity of the mortgagor subsequent to the execution of the mortgage and at the date of the sale;[95] nor because there is at the time of the sale a depression in business, or financial stringency, affecting the price of

[92] *Nebraska Loan & Trust Co.* v. *Hamer,* 40 Neb. 281, 58 N. W. 695; *Colony* v. *Villingsley,* 2 Neb. (Unof.) 670, 89 N. W. 744; *Mead* v. *Hoover,* 63 Neb. 419, 88 N. W. 655. See *Anglo-Californian Bank Limited* v. *Cerf,* 142 Cal. 303, 75 Pac. 902.

[93] *Martin* v. *Barth,* 4 Colo. App. 346, 36 Pac. 72; *Equitable Trust Co.* v. *Thorpe,* 73 Iowa, 297, 34 N. W. 867; *Anderson* v. *White,* 2 App. Cas. D. C. 408, 22 Wash. L. Rep. 159.

The supreme court of *Colorado,* in the case of *Martin* v. *Barth, supra,* say that sale of property under a trust deed will not be set aside on the ground of insufficiency of the selling price where such price is entirely adequate if the property does not contain coal, and it is entirely a matter of conjecture whether or not it does, resting upon the fact that coal has been found on other land in that neighborhood.

The supreme court of *Iowa,* says, in the case of *Equitable Trust Company* v. *Thorpe, supra,* that where property is sold on foreclosure subject to redemption, it is not to be expected that there will be competition at the sale, and the sale will not be set aside upon an allegation that the price upon which it was bid off was grossly inadequate.

The court of appeals of the *District of Columbia,* have held that a sale on foreclosure of a trust deed, of property stated to be worth from $30,000 to $35,000, will not be set aside as made for an inadequate price, when the property brought $20,100. *Anderson* v. *White,* 2 App. Cas. D. C. 408, 22 Wash. L. Rep. 159.

See *post,* § 640.

[94] See *ante,* § 626.

The supreme court of Michigan, in the case of *Page* v. *Kress,* 80 Mich. 85, 20 Am. St. Rep. 504, 44 N. W. 1052, say that a resale of mortgaged property will not be ordered upon offer of an increase of price alone, when the property has not been sold at a sacrifice; and the fact that a person is willing to give $1,000 for property worth $900 is not a sufficient ground for granting a resale.

[95] *Laughlin* v. *Hibben,* 129 Ind. 5, 27 N. E. 753; *Prevost* v. *Roediger,* 10 N. Y. Supp. 812, 32 N. Y. S. R. 1101.

Insanity of the mortgagor subsequent to the making of a mortgage and failure to appoint a guardian for him, are insufficient to set aside a judgment of foreclosure, when there is no defense to the mortgage and no tender of payment; especially is this the case where there has been a subsequent judgment of possession and the purchaser bought in good faith. *Laughlin* v. *Hibben,* 129 Ind. 5, 27 N. E. 753.

lands;[96] nor because the times are hard and there is a scarcity of money, or that the property would sell for more at a later period;[97] nor because of the misfortune of the mortgagor, such as a visit of the grasshopper plague,[98] or the inability of the mortgagor to obtain money due and payable;[99] nor because of the failure of the master in foreclosure to file a duplicate certificate of purchase for record as required by statute;[1] nor because sold for a larger sum than the amount due on the mortgage;[2] nor on the ground that the person appointed to make the sale was styled in the decree "commissioner," instead of "master," when the authorities and duties prescribed in the appointment are appropriate to the function given;[3] nor because the person bidding in the property is not the one reported to have bought it;[4] nor because of a perversion of the power in the instrument to improper purposes;[5] nor

The supreme court of New York, in the case of *Prevost* v. *Roediger,* 32 N. Y. S. R. 1101, 10 N. Y. Supp. 812, say that a sale of property upon mortgage foreclosure will not be set aside because of insanity of the mortgagor at the date of the sale, where the affidavits fail to show with any definite particularity when the insanity commenced, and the mortgagor ably conducted his business for two years after the sale.

[96] *Nebraska Loan & Trust Co.* v. *Hamer,* 40 Neb. 281, 58 N. W. 695.

[97] *Anderson* v. *White,* 2 App. Cas. D. C. 408, 22 Wash. L. Rep. 159.

[98] *Palmer* v. *McCormick,* 30 Fed. 82.

[99] *Anderson* v. *White,* 2 App. Cas. D. C. 408, 22 Wash. L. Rep. 159.

[1] This objection is not available to a defendant as grounds of objection to the sale, as the design of the statute is to notify persons who are interested in, but not connected with, the proceedings as parties. *McPherson* v. *Wood,* 52 Ill. App. 170.

[2] It is said by the supreme court of California, in the case of *Savings & Loan Soc.* v. *Burnett,* 106 Cal. 514, 39 Pac. 922, that a sale under a power in a deed of trust for a larger sum than the amount due, is valid in the absence of the proof of fraud, or that the property or rights of the grantor or his assignee are injuriously affected, or that bidders were deterred from attending the sale.

[3] *Mann* v. *Jennings,* 25 Fla. 730, 6 So. 771.

[4] Particularly when it is shown that the latter actually became the purchaser, or was substituted for the bidder by the defendant's procurement. *Mann* v. *Jennings,* 25 Fla. 730, 6 So. 771.

[5] Perversion of power.—Thus it has been said by the supreme court of the state of Rhode Island, in the case of *Holland* v. *Citizens' Savings*

because a resident defendant was served only by publication, which did not state the character of the action, in the absence of any allegation that such defendant was not also personally served with legal process;[6] nor because there has been a subsequent settlement;[7] nor because there has been a taxation of excessive costs;[8] nor because of the refusal of the plaintiff after the sale to fix a sum at which redemption would be allowed;[9] nor because of a defect in the order of sale;[10] nor because of the pendency of a motion to vacate the decree at the time the sale was made;[11] nor because constructive service only was made upon one who was not a necessary or indispensable party;[12] nor because a copy of the decree did not accompany the order of sale;[13] nor because the order of sale was issued without the seal of the court;[14] nor because the order of sale was returned more than sixty days after the date it bore.[15]

Failure to serve notice of sale on defendant's attorney,

Bank, 16 R. I. 734, 19 Atl. 654, 8 L.R.A. 533, that a sale under a power in a mortgage will not be enjoined and set aside on the ground of a perversion of the power to improper purposes, where the mortgagee is acting within the letter of his power, unless the perversion is very clearly shown.

[6] *Cosby* v. *Powers*, 137 Ind. 694, 37 N. E. 321.

[7] The supreme court of Iowa say in the case of *Jacobs* v. *Snyder*, 82 Iowa, 754, 48 N. W. 806, that a decree of foreclosure and a sale of land thereunder will not be set aside when it appears that a subsequent settlement was had between the parties of all the matters alleged as reasons for setting aside the decree and sale, and there is no proof of abuse of fiduciary relations, or of fraud.

[8] The remedy of the defendant is by motion to retax costs, in such a case. *Smith* v. *Foxworthy*, 39 Neb. 214, 57 N. W. 994.

[9] *Hibernia Savings & Loan Society* v. *Behnke*, 121 Cal. 339, 53 Pac. 812.

[10] *Johnston* v. *Colby*, 52 Neb. 327, 72 N. W. 313; *Lamson* v. *Bohrer*, 63 Neb. 105, 88 N. W. 161.

[11] *Hoyt* v. *Little*, 55 Neb. 71, 75 N. W. 56.

[12] *Nelson* v. *Nebraska Loan & Trust Co.* 62 Neb. 549, 87 N. W. 320.

[13] *Tootle, Lemon & Co.* v. *Willy*, 1 Neb. (Unof.) 711, 96 N. W. 342.

[14] *Passumpsic Savings Bank* v. *Maulick*, 60 Neb. 469, 83 Am. St. Rep. 539, 83 N. W. 672.

[15] *Young* v. *Wood*, 63 Neb. 291, 88 N. W. 528; *Cross* v. *Leidich*, 63 Neb. 420, 88 N. W. 667.

after notice of appearance has been served by him, is not ground for setting aside a sale, where the referee caused the notice to be published as required by the Code.[16]

The supreme court of Illinois, in the case of Ritchie v. Judd,[17] say that a sale under a power contained in a mortgage will not be set aside because its holder was one of the firm of real estate brokers who had agreed with the mortgagor to sell for him at private sale, when the purchaser had no notice of such relations.

It seems that where one desirous of acquiring title to land purchases a supposed lien upon a portion of the property already decreed to be sold to enforce a trust deed, his subsequent purchase of the entire tract under the decree will not, on that account, be set aside.[18] And it is said that where, pending an action to establish an equitable lien on land, certain notes secured by mortgages on part of the land are transferred by the defendants to the plaintiff, which the latter agrees to collect and apply, the fact that the agreement is not filed nor the suit dismissed until a sale of the land under the mortgage will not render the sale invalid as against the owners of the land, who bought subject to and agreed to assume the mortgage.[19]

The New Jersey court of chancery, in the case of New York Life Insurance Company v. Murphy,[20] hold that a foreclosure sale of three separate parcels will not be set aside because a ten-foot strip forming one of them was first sold under a second mortgage, and notice then given that the purchaser of the second under the first mortgage might have it at the price brought, and the third strip was sold separately, where the bidders are not shown to have bid less than they would

[16] *Collins* v. *McArthur,* 32 Misc. 538, 67 N. Y. Supp. 460.

[17] 137 Ill. 453, 27 N. E. 682.

[18] *Speck* v. *Pullman Palace Car Co.* 121 Ill. 33, 12 N. E. 213.

[19] *Sawyer* v. *Campbell,* 130 Ill. 186, 22 N. E. 458.

[20] 25 Atl. 381.

otherwise have done, and there was no request that the third parcel be sold with the others.

It is said, in the case of Johnson v. Richmond Beach Improvement Company,[21] that a sale under foreclosure of a mortgage upon community property is not invalidated because service upon the wife was made by delivering a copy to her husband, as the husband is the manager or trustee of the property representing both himself and the wife.[22]

[21] 63 Fed. 493.

[22] In this case the husband and wife lived in the then territory of Washington, where they purchased land, giving a mortgage thereon for a part of the purchase money; thereafter domestic difficulties arose, and they separated and left the state. Thereafter the husband returned to Washington, now become a state, and was served with process, both for himself and his wife, in foreclosure proceedings. The wife did not appear in the case, and the property was decreed sold. After the sale of the property a divorce was granted, on the application of the husband, by a Dakota court. The former wife thereafter applied to redeem the property from the foreclosure sale on the ground of her community interest in the property, setting up the claim that she was not bound by the foreclosure decree, because the service of process was not a legal service, as the place at which the service was made was not her actual place of abode at the time. The court say: "On the face of the record, the service was regular and legal, and the court appeared to have acquired jurisdiction of all the parties defendant; and, to upset that judicial sale, it is necessary for the court to admit evidence alienate to impeach the validity of the record of a court of general and superior jurisdiction. The court is not inclined to permit that to be done, unless the equity of the plaintiff is so strong, and her legal right to do this is so clear, as to admit of no doubt. All the people have an interest in preserving the veracity of public records, and upholding titles acquired by judicial sales. It is subversive of justice to permit titles in which no defect can be discovered by an inspection of the record to be ripped up and invalidated by proceedings commenced long subsequent. It is my opinion that the sheriff's return of service, as to the fact of the place where service was made being the usual place of abode of the defendant is not conclusive on the parties. That is a matter of which he cannot have such personal knowledge as to be able to give such evidence in his certificate that it ought to be regarded as conclusive; but I think the intent of the law is fulfilled when the return of the sheriff is so far true that the place at which service was made upon the absent defendant is the legal place of abode, and that is the case here. The person to whom the papers were delivered for this complainant was her husband. He was the

§ 629. Same—Sale under agreement.—It has been held by the supreme court of Iowa,[23] that a sale of mortgaged premises upon a decree of a court not having jurisdiction to make such sale, consented to by all the parties, and in effect a sale under the agreement, will not be set aside because of a notice that the court had no power to issue executions for the sale of real estate, and that it is the purpose of the party giving it at once to levy on the property, in consequence of which a person who had agreed to advance moneys to some of the bondholders to buy in the property withdrew from his arrangement.

§ 630. Same—Defective notice.—A sale on mortgage foreclosure will not be set aside merely because of defective notice of sale.[24] Thus it has been held by the supreme court of Nebraska,[25] that a foreclosure sale will not be vacated for a mere inaccuracy of the recitals in the published notice, which were in no way prejudicial to the parties or the purchaser.[26] The supreme court of Maryland in the case of Chilton v. Brooks,[27] say that the non-observance of a custom among auctioneers to place notices upon the doors or in the

person to whom the title to this property had been conveyed, and in whose name it stood upon the record. He was vested by the law of Washington territory with the control and management of the community property. He had a right to represent, not only himself, but his wife and the community, in the management of that property; and parties having a lien upon the property, and a right to bring a foreclosure suit, could not be prevented from exercising that right by the absence of the wife from the territory, or by concealment, so that personal service could not be made on her." The court says that until the legal disruption of the family the home of her husband was her legal place of abode, because a wife's legal home is with her husband, and for that reason the service there was lawful, and gave the court jurisdiction to render the decree of foreclosure.

[23] *International Trust Co.* v. *Keokuk Electric Street R. Co.* 90 Iowa 90, 57 N. W. 712.

[24] See *State Realty & Mortgage Co.* v. *Villaume,* 121 App. Div. 793, 106 N. Y. Supp. 698.

[25] *Nebraska Loan & Trust Co.* v. *Harner,* 40 Neb. 281, 58 N. W. 695.

[26] See *May* v. *Hatcher,* 130 Cal. 627, 63 Pac. 33.

[27] 16 Atl. 273. See 71 Md. 445, 18 Atl. 868.

windows of houses for sale, stating the time and place of sale, is not sufficient to justify a court in setting aside a sale made under a power in a mortgage.[28] The supreme court of Kansas, in the case of Green v. Carson,[29] say that a foreclosure sale of lands will not be set aside at the instance of the mortgagor, where the notice of the sale was correctly published for the requisite time, except that in two successive issues the figure "9," representing the day of the month when the sale would occur, was turned upside down, where the alteration was caused or procured to be made by the mortgagor for the purpose of avoiding the sale. It is said in the case of Ritchie v. Judd,[30] that a sale under a power of sale given by a mortgage, which provides for notice by publication, will not be set aside because of an arrangement to prevent the mortgagor from having notice of the sale, when the notice required by the mortgage was given and the purchaser was not a party or privy to such arrangement.

§ 631. Same—Auctioneer's statement.—The court of appeals for the District of Columbia, in the case of Anderson v. White,[31] say that a statement by the auctioneer upon a sale on foreclosure of a trust deed, of the value of the improvements on the lot since the mortgage was given as $3,000, instead of $8,000, is not ground for setting aside the sale, where it was made under an honest mistake, and the representatives of the mortgagor present made no attempt to correct it, and it is not probable that proposed purchasers were influenced thereby.

The supreme court of Nebraska, in the case of Norton v. Taylor,[32] say that the doctrine of *caveat emptor* applies to a foreclosure sale, notwithstanding the fact that the purchaser is told by the sheriff and clerk that if he buys the land he will get a clear and perfect title thereto free from liens, and such

[28] See *post*, § 944.
[29] 50 Kan. 625, 32 Pac. 380.
[30] 137 Ill. 453, 27 N. E. 682.
[31] 2 App. Cas. D. C. 408, 22 Wash. L. Rep. 159.
[32] 35 Neb. 466, 53 N. W. 481, 18 L.R.A. 88, 37 Am. St. Rep. 441.

statements are untrue, as it is his duty to examine the time, and not rely upon their statements. Such facts are not ground, therefore, upon which to base a motion to vacate and set aside the sale.

§ 632. Same—Defective title and prior incumbrance.—The fact that the title is defective cannot be taken advantage of by the mortgagor to have the sale set aside [33] and a resale ordered. Thus it has been held by the supreme judicial court of Kentucky that a writ of *habere facias* cannot be resisted by a mortgagor after a judgment of foreclosure and sale has been ordered and the land sold, on the grounds that a third party holds a lien on the land which is superior to the lien of the mortgage.[34] And the supreme court of Illinois, in the case of Ritchie v. Judd,[35] say that a mortgagor who has refused to produce the evidence necessary to show his title to be paramount to an outstanding claim of title cannot have a sale under the mortgage set aside because, on account of such outstanding claim, the property did not sell for as much as a perfect title should have brought.

In the case of Norton v. Taylor,[36] it is said that the purchaser at a mortgage foreclosure sale will not be relieved from completing his purchase on the ground of defective title or because of prior incumbrances, when the true condition of the title is fully set out in the pleadings and the record of the proceedings under which the sale was made, as he is chargeable with notice of such material facts as the record discloses.

§ 633. Same—In case of homestead.—The question of the liability of a homestead to sale on mortgage foreclosure

[33] But see *Koechl* v. *Gate Development Co.* 133 N. Y. Supp. 763.

[34] *Milliken* v. *Piles*, 24 S. W. 604, 15 Ky. L. Rep. 584.

[35] 137 Ill. 453, 27 N. E. 682.

[36] 35 Neb. 466, 53 N. W. 481, 18 L.R.A. 88, 37 Am. St. Rep. 441.

has already been fully discussed.[37] It only remains to speak regarding the setting aside of sales had under decrees of foreclosure of mortgages where the homestead is included among the mortgaged property. The supreme court of Iowa, in the case of Blake v. McCash,[38] say that a decree of foreclosure and sale of a homestead will not be set aside for uncertainty of description, and on the plea that the court reformed the instrument without authority, where the answer admits that the mortgage covers the homestead, and the mortgage describes the land as lots 21 and 22 in a specified block in a given city, although there was no lot 22 in the sub-division of such block including lot 21 as originally recorded, but it was subsequently put in by pencil by the deputy county auditor. But the Texas court of civil appeals, in the case of Williams v. Lumpkin,[39] say that a mortgagor who, after executing a mortgage upon several pieces of property, including his homestead, obtains from the mortgagee a release of the homestead, is not guilty of culpable negligence in failing to appear and answer and set up the release in an action by the administrator of the mortgagee's estate to foreclose the mortgage, where the citation does not describe the land so as to advise him that a foreclosure of the mortgage upon the homestead is sought, and he fails to defend because he has no defense in regard to the land, and believes the release of the homestead to have been written on the back of the mortgage, and is sick at the time the foreclosure suit was brought.

§ 634. Same—In case of non-resident defendant.—It is said that in the case of a non-resident defendant a decree of foreclosure and sale is not invalidated by a mistake as to their residence, in the proceedings for service of process by publication, where reasonable diligence and good faith have

[37] See *ante*, § 603.

[38] 91 Iowa, 544, 60 N. W. 127.

[39] 26 S. W. 103, writ of error denied in 86 Tex. 641, 26 S. W. 493.

been exercised.[40] And by the supreme court of Illinois, in the case of Connely v. Rue,[41] it is said that a decree of foreclosure cannot be impeached because the affidavit as to the nonresidence of certain of the defendants, being attached to the bill, was not filed by a separate file mark and separately registered in the face of the clerk's certificate of mailing of the notice of publication made by him, and the adjudication of the court of the filing of an affidavit of publication thereunder.

§ 635. Same—In case of railroad company.—In the case of a foreclosure of a mortgage on railroad property, one who purchases the property in trust for the bondholders cannot rid himself of the trust position without the consent of such bondholders, although they fail to comply with the arrangements under which the sale was made, such sale may be set aside and a new sale ordered free from any trust.[42] But the supreme court of the United States say that holders of second mortgage bonds cannot avoid a sale under the first mortgage on the ground that it was announced improperly that bonds of a certain issue would be received in payment, where they did not bid at the sale or in any way manifest a willingness to free the property from the first mortgage debt.[43]

§ 636. Same—In cases of usury.—The effect of usury on a mortgage, and the defense of usury, have already been fully discussed.[44] The supreme court of Minnesota, in the case of Scott v. Austin,[45] say the fact that a mortgage void for usury has been foreclosed by sale under a power, the purchaser having notice of the usury, does not prevent the mortgagor from avoiding the sale and the mortgage, by an action for that purpose. And it is said that an assignee of the decree in fore-

[40] *Connely* v. *Rue,* 148 Ill. 207, 35 N. E. 824.

[41] 148 Ill. 207, 35 N. E. 824.

[42] *Indiana I. & I. R. Co.* v. *Swannell,* 54 Ill. App. 260.

[43] *Cunningham* v. *Macon B. R. Co.* 156 U. S. 400, 39 L. ed. 471, 61 Am. & Eng. R. Cas. 661, 15 Sup. Ct Rep. 361.

[44] See *ante,* § 409.

[45] 36 Minn. 460, 464, 32 N. W. 89, 864.

closure, taking with knowledge of the facts, is chargeable to the same extent that his assignor would be; and execution of the decree may be restrained after assignment thereof.[46]

§ 637. Irregularity in conduct of sale.—Any irregularity by the referee in the conduct of a mortgage sale under a decree of foreclosure, will be a sufficient ground for setting it aside.[47] Where the officer making the sale sells upon terms other than those authorized by the decree, the sale will be irregular, and for that reason may be set aside on the application of any injured party.[48] A sale will also be set aside where its terms are very different from the usual terms of statutory sales, or are unjust and oppressive towards the mortgagor, as where the officer making the sale requires full payment and performance by the purchaser within an hour's time after the sale, or requires that the payment shall be made in specie.[49]

The parties interested in the property to be sold under a mortgage foreclosure, have the right to expect that it will be offered and sold in the usual manner, and in a way that will produce a fair competition among the bidders. If the property consists of several parcels, which, under the rule, ought to be sold separately, and they are sold together, the sale may be set aside on the application of any person aggrieved.[50] In California, in a motion to set aside a foreclosure sale for failure to sell in separate parcels, it must be

[46] *Rose* v. *Birkholm* (N. J. Ch.) 9 Atl. 746.

[47] See *Forman* v. *Hunt*, 3 Dana (Ky.) 614.

[48] *Hotchkiss* v. *Clifton Air Cure*, 4 Keyes (N. Y.) 170; *Van Loben Sels* v. *Bunnell*, 131 Cal. 489, 63 Pac. 773.

[49] *Goldsmith* v. *Osborne*, 1 Edw. Ch. (N. Y.) 560, 562; *Lents* v. *Craig*, 13 How. (N. Y.) Pr. 72, 2 Abb. (N. Y.) Pr. 294.

[50] *Cunningham* v. *Cassidy*, 17 N. Y. 276; *American Ins. Co.* v. *Oakley*, 9 Paige Ch. (N. Y.) 259, 38 Am. Dec. 561; *Merchants' Ins. Co. of New York City* v. *Hinman*, 3 Abb. (N. Y.) Pr. 455; *Griffith* v. *Hadley*, 10 Bosw. (N. Y.) 587; *Wolcott* v. *Schenck*, 23 How. (N. Y.) Pr. 385; *Breese* v. *Busby*, 13 How. (N. Y.) Pr. 485; *Quaw* v. *Lameraux*, 36 Wis. 626; *Thomas* v. *Fewster*, 95 Md. 446, 52 Atl. 750;

made clearly to appear that the land consisted of separate "known lots or parcels."[51]

It is thought that where there are irregularities in a foreclosure sale, the proper remedy is by appeal from the order of confirmation.[52] The supreme court of Washington, in Parker v. D'Acres,[53] say that in a case where there are no such errors in a foreclosure sale as would oust the court of jurisdiction, an order confirming the sale concludes inquiry into irregularities attending it. It is thought that irregularities in a foreclosure judgment and sale are waived by a defendant who, after full notice of them, surrenders possession of the premises, for a valuable consideration, to the purchaser at the sale.[54] And the fact that a sheriff who had erroneously sold mortgaged premises as an entirety, contrary to the order of the court, only made a deed for half of it, which he was ordered to sell separately, will not sustain the sale, for the reason that the irregularity will be presumed to have deterred bidders.[55]

The supreme court of Nebraska, in the case of Miller v. Lanham,[56] say that a mortgage-foreclosure sale will not be set aside for irregularities or errors not prejudicial to the complaining party, or on the motion of the mortgagor on the ground that the purchaser has not paid off claims adjudged to be prior liens on the property. And it is thought that a judgment confirming a foreclosure sale of lands is rendered merely irregular, and not void, by the fact that the mortgagor's heirs were not made parties to the action, or notified of the commissioner's report, nor of the confirmation thereof; and the

Bernhard v. *Hovey, as rec'r, etc.* 9 Kan. App. 25, 57 Pac. 245. See *State Bank of Deep River* v. *Brown,* 128 Iowa, 665, 105 N. W. 49. But see *Vingut* v. *Ketcham,* 102 App. Div. 403, 92 N. Y. Supp. 605. See *ante,* chapter XXIII.

[51] *Connick* v. *Hill,* 127 Cal. 162, 59 Pac. 832; *Meux* v. *Trezevant,* 132 Cal. 487, 64 Pac. 848.

[52] *Trillig* v. *Schumitsch,* 67 Wis. 186, 30 N. W. 222.

[53] 1 Wash St. 190, 24 Pac. 192.

[54] *Trilling* v. *Schumitsch,* 67 Wis. 186, 30 N. W. 222.

[55] *Meriwether* v. *Craig,* 118 Ind. 301, 20 N. E. 769.

[56] 35 Neb. 886, 53 N. W. 1010.

proper remedy is a motion in the cause to have the judgment vacated, although it be a final judgment.[57]

The supreme court of New York, in the case of Cole v. Kelly,[58] say that a general judgment of foreclosure in favor of a second mortgagee, entered upon findings ordering the complaint dismissed as to a purchaser at foreclosure sale under the first mortgage, which cut off the rights of the second mortgagee, although irregular, will not be set aside at the instance of the purchaser, if it has been amended *nunc pro tunc* so as to protect his rights.

It has been held, and the decision is thought to be sound in principle, that a deed executed by a master, where the property was sold after he filed his report, is void.[59] And it is said that a mortgagor cannot be presumed to have waived defects in the sale of the mortgaged property on foreclosure, at which sale he was not present, where he had no knowledge of the irregularity until a short time before commencing the suit to set aside the sale, and the sheriff had withheld the return.[60]

§ 638. Same—In sale under power.—In the case of a sale under a power in a trust deed long acquiescence in the trustee's sale, where no hour was specified in the notice of sale, cures the defect even if such designation was required by statute, and therefore avoids the irregularity.[61] It is said that a purchaser at a trustee's sale is conclusively charged with notice of irregularities by the trustee in executing the power of sale.[62] The supreme court of Missouri, in the case of Long v. Long,[63] say that an irregular sale under a deed of trust operates as an equitable assignment of the deed

[57] *Everett* v. *Reynolds,* 114 N. C. 366, 19 S. E. 233.

[58] 54 Hun (N. Y.) 638, 8 N. Y. Supp. 131, 28 N. Y. S. R. 370.

[59] *McBride* v. *Gwynn,* 33 Fed. 402.

[60] *Meriwether* v. *Craig,* 118 Ind. 301, 20 N. E. 769.

[61] *Meier* v. *Meier,* 105 Mo. 411, 16 S. W. 223.

[62] *Stephens* v. *Clay,* 17 Colo. 489, 31 Am. St. Rep. 328, 30 Pac. 43.

[63] 28 S. W. 69.

and the notes secured thereby. It is said that a purchaser at a sale under a trust deed providing that the surplus shall be payable to the mortgagor is charged with notice of want of authority in the trustee to agree that the surplus shall be retained by such purchaser and applied on a debt due him from the mortgagor.[64] And it is thought that a grantor in a trust deed, who was present at a sale thereunder, and advised at the time of all the facts, cannot have the sale set aside on an application made nine years and three months after he was put out of possession in legal proceedings following the sale, where in the meantime the property has greatly increased in value and the rights of purchasers and mortgagees have intervened, where the only ground of attacking the sale is a mere irregularity.[65]

It is said by the supreme court of Missouri, in the case of Davis v. Hess,[66] that a resale made by the sheriff under a trust deed authorizing him to sell in case of the trustee's refusal to act, will not be set aside because he made proclamation that the price must be paid in thirty minutes after the first sale, on the ground that his conduct was oppressive, there being no claim that the bidder at the first sale, which was for cash, could have procured the money, had a longer time been given.

§ 639. Not set aside because of few bidders.—It seems that the facts, that the day on which a sale was advertised to take place was rainy and inclement, and that parties who would have bid on the premises, or a portion thereof, were consequently kept away and that only a few bidders were present, do not constitute an adequate cause for setting the sale aside.[67]

[64] *Gair* v. *Tuttle*, 19 Fed. 198.

[65] *Irish* v. *Antioch College*, 126 Ill. 474, 9 Am. St. Rep. 638, 18 N. E. 708.

[66] 103 Mo. 31, 15 S. W. 324.

[67] *Fairfax* v. *Muse*, 4 Munf. (Va.) 124.

But, in the case of Roberts v. Roberts,[68] it was held where the day on which a sale was advertised to take place was so inclement as to deter bidders from attending, and there was but one bidder present, who lived at the place of sale and to whom the premises were sold, that the sale should be set aside without inquiring into the sufficiency of the price for which the land was sold.

And it was held in Campbell v. Swan,[69] where no bidders were present at the sale, except the auctioneer, who bid in the properety on behalf of the mortgagee, that the sale was void. The court held that "sales at public auction are regulated by certain well-known rules, which are necessary to create competition and enhance bids for the property. No one would regard a sale at auction as a fair sale, if the auctioneer should cry off the property to himself. It is going far enough to allow the attorney to become the auctioneer when his client is a bidder at the sale. But if the sale was unobjectionable for the reason that the attorney cried off the property to his client, who was not present, then I think it should be held void, upon the ground that it was not a sale of the premises at public auction within the meaning of the statute. It might have been good if the plaintiff had been present to bid in the property; but it does not satisfactorily appear, nor is it found by the referee, that any one was present when the attorney offered the property for sale and struck it off to himself on behalf of his client who was absent. There can be no legal auction if no one is present but the auctioneer, and the sale should be postponed."

In a case where there were but two persons who actually made bids present at a sale on foreclosure under a trust deed, it was held that this was not cause for relief from the sale.[70] In the case of Chilton v. Brooks,[71] in the court of appeals of Maryland, one of the exceptions to the ratification of the sale

[68] 13 Gratt. (Va.) 639, 70 Am. Dec. 435.

[69] 48 Barb. (N. Y.) 109.

[70] *Anderson* v. *White*, 2 App. Cas. D. C. 408, 22 Wash. L. Rep. 159.

[71] 16 Atl. 273.

was to the effect that the day on which the sale was made was one of the coldest and most disagreeable of the season, in consequence of which there was no attendance of bidders and no competition.[72]

[72] This allegation as to the state of the weather on that day was fully sustained by the proof. It was one of the days of the notorious March "blizzard," when the cold was so exceptionally cold in that latitude as to make it dangerous for persons to be exposed to it. The parties immediately interested and who attended could not conduct the sale out of doors. They had to enter the house, where there was no fire, and the business was hurried through in the briefest possible time, on account of the intense cold. The courts say: "We think no disinterested and prudent trustee, mindful of his duty to protect the interests of all parties concerned, would have allowed the sale to take place on such a day and under such circumstances. The house, though actually just outside the then city limits, was, practically, a city house on a fashionable avenue leading to the park,—was a valuable and handsome one, recently built,—and we can conceive of no good reason why there was no competition for it, except that the extreme inclemency of the weather prevented bidders from attending the sale. This condition of the weather, in connection with the fact that the house was bid in by the mortgagees at $1,000 or more below the market value, affords sufficient ground for setting the sale aside no matter how derelict the mortgagor may have been in complying with the conditions of the mortgage. While it is well settled that mere inadequacy of price, by itself, is not sufficient to set aside a sale, unless it be so gross and inordinate as to indicate want of reasonable judgment and discretion or misconduct or fraud in the trustee, or some mistake or unfairness for which the purchaser is responsible, yet, where it appears that there is any other just cause to doubt the propriety of the sale, it is always a consideration very proper to be viewed by the court in connection with it, that the sale has been made at a reduced price. Such is the rule applicable to sales made by trustees under decrees in equity, and there are strong reasons for applying it with more strictness in cases of sales under mortgages executed in compliance with the provisions of the Code (Md. Code. § 64). This law grants exceptional privileges to mortgagees. They, or their assignees, can sell at once upon default without the delay of first obtaining a decree for that purpose; and, what is more important, they can become purchasers at their own sales without having their title impeached upon that ground. Md. Code, art. 64, § 13. In this case the appellees availed themselves of this privilege. They were, therefore, bound to act with strict impartiality in regard to the sale. Being both vendors and purchasers, there was greater reason for diligence and effort on their part to obtain the best price, 'and the court is

§ 640. Inadequacy of price—Setting aside sale for.—The general rule is that mere inadequacy of price brought by mortgaged premises on sale under a decree of foreclosure, is not sufficient ground for setting aside the sale and ordering a resale, in the absence of any showing of fraud, collusion, unfairness, or oppression,—unless so gross as necessarily to raise the inference of fraud or imposition;[73] or in the

called upon to exercise more care and strictness in passing upon the sale thus made. *Loeber* v. *Eckes,* 55 Md. 3; *Horsey* v. *Hough,* 38 Md. 130; *Hubbard* v. *Jarrell,* 23 Md. 66. For the reasons stated, the order ratifying the sale must be reversed, the sale set aside."

[73] *Harlin* v. *Nation,* 126 Mo. 97, 27 S. W. 330; *O'Donnell* v. *Lindsay,* 39 N. Y. Supr. Ct. (7 J. & S.) 523, 532. See *Howell* v. *Mills,* 53 N. Y 322; *King* v *Morris,* 2 Abb. (N. Y.) Pr. 296, 298; *Kellogg* v. *Howell,* 62 Barb. (N. Y.) 280; *Lefevre* v. *Laraway,* 22 Barb. (N. Y.) 167; *Francis* v. *Church,* Clarke Ch. (N. Y.) 475, 478; *Gardiner* v. *Schermerhorn,* Clarke Ch. (N. Y.) 101; *Mott* v. *Walkley,* 3 Edw. Ch. (N. Y.) 590; *Woodhull* v. *Osborne,* 2 Edw. Ch. (N. Y.) 614; *Gould* v. *Gager,* 24 How. (N. Y.) Pr. 440, 18 Abb. (N. Y.) Pr. 32; *Murdock* v. *Empie,* 19 How. (N. Y.) Pr. 79, 9 Abb. (N. Y.) Pr. 283; *In re Rider,* 23 Hun (N. Y.) 91; *Livingston* v. *Byrne,* 11 Johns. (N. Y.) 555; *American Ins. Co.* v. *Oakley,* 9 Paige Ch. (N. Y.) 259, 38 Am. Dec. 561; *Duncan* v. *Dodd,* 2 Paige Ch. (N. Y.) 99; *March* v. *Ludlum,* 3 Sandf. Ch. (N. Y.) 35; *Tripp* v. *Cook,* 26 Wend. (N. Y.) 143; *Collier* v. *Whipple,* 13 Wend. (N. Y.) 224; *Central Pac. R. R. Co.* v. *Creed,* 70 Cal. 497; *Garrett* v. *Moss,* 20 Ill. 549; *Wing* v. *Hayford,* 124 Mass. 249; *King* v. *Bronson,* 122 Mass. 122; *Lalor* v. *McCarthy,* 24 Minn. 417; *Kline* v. *Vogel,* 11 Mo. App. 211; *Wetzler* v. *Schaumann,* 24 N. J. Eq. (9 C. E. Gr.) 60; *Henderson* v. *Lowry,* 5 Yerg. (Tenn.) 240; *Klein* v. *Glass,* 53 Tex. 37; *Hill* v. *Hoover,* 5 Wis. 354; *Strong* v. *Catton,* 1 Wis. 471; *Dryden* v. *Stephens,* 19 W. Va. 1; *West* v. *Davis,* 4 McL. C. C. 241; *Hughes* v. *Riggs,* 84 Md. 502, 36 Atl. 269; *Hunt* v. *Whitehead,* 19 App. D. C. 116; *Trenery* v. *American Mortgage Co.* 11 S. D. 506, 78 N. W. 991; *McLain Land & Investment Co.* v. *Swofford Bros. Dry Goods Co.* 11 Okla. 429, 68 Pac. 502; *Conclin* v. *Grand Central Savings & Building Ass'c.* 144 Ky. 237, 138 S. W. 312; *Housman* v. *Wright,* 50 App. Div. 606, 64 N. Y. Supp. 71; *State Realty & Mortgage Co.* v. *Villaume,* 121 App. Div. 793, 106 N. Y. Supp. 698; *Connick* v. *Hill,* 127 Cal. 162, 59 Pac. 832. See *May* v. *Hatcher,* 130 Cal. 627, 63 Pac. 33; *Nitro-Phosphate Syndicate Limited, of London* v. *Johnson,* 100 Va. 774, 42 S. E. 995; *Ex parte Cooley,* 69 S. C. 143, 48 S. E. 92; *James* v. *Webb,* 71 S. W. 526; *McDonnell* v. *De Soto Savings & Building Ass'c.* 175 Mo. 250, 97 Am. St. Rep. 592, 75 S. W. 438; *Rudd* v. *Turner,* 142 Ky. 2, 133 S. W. 993;

absence of evidence tending to show bad faith, unfairness in the conduct of the sale, the deterring of bidders, an undue advantage taken of the ignorance or weakness of the persons whose property rights are affected by the sale, or other circumstances tainting the transaction with fraud, and entitling the parties injuriously affected to equitable relief.[74]

Bank of Pine Bluff v. *Levi*, 90 Ark. 166, 118 S. W. 250; *Windes* v. *Russell*, 150 Ala. 625, 43 So. 788. See also *Hunter* v. *Mellen*, 127 Ala. 343, 28 So. 468.

[74] *Hudgens* v. *Morrow*, 47 Ark. 515, 2 S. W. 104; *Neel* v. *Carson*, 47 Ark. 421, 2 S. W. 107; *Fry* v. *Street*, 44 Ark. 502; *Glide* v. *Dwyer*, 83 Cal. 477, 23 Pac. 706; *Central Pac. R. Co.* v. *Creed*, 70 Cal. 497, 11 Pac. 772; *Bowman* v. *Ash*, 36 Ill. App. 115; *Equitable Trust Co.* v. *Sharpe*, 73 Iowa, 297, 34 N. W. 867; *Fitzgerald* v. *Kelso*, 71 Iowa, 731, 29 N. W. 943; *Sigerson* v. *Sigerson*, 71 Iowa, 476, 32 N. W. 462; *Tootle* v. *Taylor*, 64 Iowa, 629, 21 N. W. 115; *Fowler* v. *Kruntz*, 54 Kan. 622, 38 Pac. 808; *Babcock* v. *Canfield*, 36 Kan. 437, 13 Pac. 787. *Capital Bank of Topeka* v. *Huntoon*, 35 Kan. 577, 11 Pac. 369; *Barlow* v. *McClintock* (Ky.) 11 S. W. 29, 10 Ky. L. Rep. 894; *Harris* v. *Gunnell*, (Ky.) 9 S. W. 376; *Black* v. *Steele* (Ky.) 6 S. W. 23; *Bean* v. *Hoffendorfer*, 84 Ky. 685, 2 S. W. 556; *Garritee* v. *Popplein*, 73 Md. 322, 20 Atl. 1070; *Marsh* v. *Sheriff* (Md.) 14 Atl. 664; *Prestman* v. *Mason*, 68 Md. 78, 11 Atl. 764; *Austin* v. *Hatch*, 159 Mass. 198, 34 N. E. 95; *Clarke* v. *Simmons*, 150 Mass. 357, 23 N. E. 108; *King* v. *Bronson*, 122 Mass. 122; *Farmers' Bank of Grass Lake* v. *Quick*, 71 Mich. 534, 15 Am. St. Rep. 280, 39 N. W. 752; *Brown* v. *Brown*, 64 Mich. 75, 31 N. W. 34 affirmed, 64 Mich. 82, 32 N. W. 663; *Johnson* v. *Cocks*, 37 Minn. 530, 35 N. W. 436; *Coolbaugh* v. *Roemer*, 30 Minn. 424, 21 N. W. 472; *Harlin* v. *Nation*, 126 Mo. 97, 27 S. W. 330; *Maloney* v. *Webb*, 112 Mo. 575, 20 S. W. 683; *Routt* v. *Milner*, 57 Mo. App. 50; *Klein* v. *Vogel*, 11 Mo. App. 211; *Miller* v. *Lanham*, 35 Neb. 886, 53 N. W. 1010; *New York Life Ins. Co.* v. *Murphy* (N. J. Ch.) 25 Atl. 381; *Coudert* v. *De Logerot*, 30 N. Y. Supp. 141, 62 N. Y. S. R. 26; *McEwen* v. *Butts*, 20 N. Y. Supp. 503, 48 N. Y. S. R. 312; *Provost* v. *Roediger*, 10 N. Y. Supp. 81, 32 N. Y. S. R. 1101; *Weaver* v. *Lyon* (Pa.) 5 Atl. 782, *Evans* v. *Maury*, 112 Pa. St. 300, 3 Atl. 850; *Klein* v. *Glass*, 54 Tex. 37; *Lallace* v. *Fisher*, 29 W. Va. 512, 2 S. E. 775; *Maxwell* v. *Newton*, 65 Wis. 261, 27 N. W. 32; *Graffam* v. *Burgess*, 117 U. S. 180, 29 L. ed. 839, 6 Sup. Ct. Rep. 686, 18 Fed. 251, 10 Id. 216; *Smith* v. *Black*, 115 U. S. 308, 29 L. Ed. 398, 6 Sup. Ct. Rep. 50; *Wheeler* v. *McBlair*, 5 App. Cas. D. C. 375, 27 Wash. L. Rep. 153; *Fidelity Trust and Safety Vault Co.* v. *Mobile St. R. Co.* 54 Fed. 26; *Davis* v. *McGee*, 28 Fed. 867; *In re Ewing*, 16 Fed. 753;

Nor will a sale be set aside and a resale ordered upon the mere expression of opinion that the property on a resale

In re Third National Bank, 4 Fed. 775. See *post*, § 640.

Gross inadequacy is said to be sufficient grounds for setting aside a sale made under a decree of foreclosure and sale or other *quasi* judicial sale. See *In re Palmer*, 13 Fed. 870; *In re Lloyd*, 11 Fed. 586; *Blackburn* v. *Salem R. Co.* 3 Fed. 689.

Particularly is this the case where the inadequacy in price is accompanied by fraud, oppression, or other unfairness in the conduct of the sale. See *Devine* v. *Harkness*, 117 Ill. 145, 7 N. E. 54; *Fitzgerald* v. *Kelso*, 71 Iowa, 731, 29 N. W. 943; *Weir* v. *Travelers' Ins. Co.* 32 Kan. 325, 4 Pac. 267; *O'Fallon* v. *Klopton*, 89 Mo. 284, 1 S. W. 302; *Hubbard* v. *Taylor*, 49 Wis. 68, 4 N. W. 1066; *Kemp* v. *Hein*, 48 Wis. 32, 3 N. W. 831; *Graffam* v. *Burgess*, 117 U. S. 180, 29 L. ed. 839, 6 Sup. Ct. Rep. 686, 18 Fed. 251, 10 *Id.* 216; *United States* v. *Vestal*, 12 Fed. 59.

Slight additional circumstances are required to set aside a sale where there is gross inadequacy of price. *Davis* v. *McGee*, 28 Fed. 867. In this case Mr. Justice Brewer, who presided over the United States circuit court for the eastern district of Missouri at the time this decision was rendered, in the course of his opinion says: "It is conceded that mere inadequacy of price at a judicial sale, openly and fairly conducted, is not ground for setting aside such sale, unless it be so gross as to shock the conscience. It is contended, however, that where there is a great inadequacy trifling irregularities affecting the conduct of the parties to the suit are sufficient to justify a court of equity in taking possession of the matter and setting aside the sale. I have no doubt that that is true; and that if the conduct of the plaintiff in the suit or the purchaser at the sale, is, even in perhaps minor matters, such as to be oppressive, such as to prevent a further price being realized, such as to mislead the defendant, or anything of that kind, the sale ought not to stand, and the court will seize hold of these and set it aside.

In California a foreclosure sale will not be set aside for mere inadequacy in the price for which the property was sold. *Central P. R. Co.* v. *Creed*, 70 Cal. 497, 11 Pac. 772. And the fact that the mortgagee purchased the property (See *ante*, § 609) at much less than its actual value is not of itself sufficient to show fraud and justify setting the sale aside. *Glide* v. *Dwyer*, 83 Cal. 477, 23 Pac. 706.

In Kansas, in a case where the sale upon foreclosure was fairly and regularly conducted, and the land sold to a *bona fide* purchaser, the court held, on an application to set aside such sale, upon the facts, that the inadequacy of the price, and the unexplained failure of the agent of the mortgagee to bid at the sale, were insufficient to defeat the title of the purchaser. *Babcock* v. *Canfield*, 36 Kan. 437, 13 Pac. 787.

would bring a much higher price;[75] it must be shown affirmatively that it will sell for a larger price.[76] A resale will not be ordered upon a mere guaranty of an advance price;[77]

In Kentucky a sale on foreclosure will not be set aside where it was properly advertised, and a large number of persons were present at the sale and it appears that the property brought a fair price. *Barlow* v. *McClintock,* 11 S. W. 29, 10 Ky. L. Rep. 894.

In Maryland a foreclosure sale will not be set aside for mere inadequacy of price, in favor of defendants who failed to avail themselves of an order extending the time for the payment of the mortgage debt, and also of an order giving them the benefit of a resale on the payment of a specified sum into court. *Garitee* v. *Popplein,* 73 Md. 322, 20 Atl. 1070.

In Minnesota it is held that, where there is neither irregularity in the sale, nor fraud on the part of the mortgagee, and especially where there is a right of redemption from the sale, mere inadequacy of price is not of itself ground for setting aside a sale under the power in a mortgage. *Johnson* v. *Cocks,* 37 Minn. 530, 35 N. W. 436.

In New Jersey a foreclosure sale will not be disturbed for inadequacy of price because an advance offer of $1,000 over the price of $19,475 is made, where the only bidder who has been produced was authorized to only pay $20,000, and the property was well advertised and sold under favorable circumstances. *New York Life Ins. Co.* v. *Murphy,* 51 N. J. Eq. 630, 25 Atl. 381.

In New York a foreclosure sale to a *bona fide* purchaser will not be set aside for mere inadequacy of price, in a suit brought to set aside the sale for fraud, proof of which has failed. *McEwan* v. *Butts,* 48 N. Y. S. R. 312, 20 N. Y. Supp. 503. And the same court say, in the case of *Coudert* v. *De Logerot,* 62 N. Y. S. R. 26, 30 N. Y. Supp. 114, that a foreclosure sale of real property will not be set aside upon the ground of the inadequacy of the purchase price of $437,000, where the largest amount, which as shown by the moving papers, anyone has offered to bid at a resale is $450,000. The court say, in the course of the opinion, that a sale of property under foreclosure will not be set aside upon evidence of the refusal by the mortgagor of an offer largely in excess of the bid, and of an opinion previously expressed by the attorney for the mortgagor and mortgagee that the property was worth an amount largely in excess of the sum bid, the purchaser being neither the mortgagor nor the mortgagee.

[75] *Fidelity Trust & S. V. Co.* v. *Mobile Street R. Co.* 54 Fed. 26.

[76] *Farmers' Bank of Grass Lake* v. *Quick,* 71 Mich. 534, 15 Am. St. Rep. 280, 39 N. W. 752. See also *Merrill, as ex'r. etc.* v. *Ladendorf,* 123 Wis. 140, 101 N. W. 385.

[77] *Harris* v. *Gunnell* (Ky.) 9 S. W. 376.

As to what advance sufficient to justify setting aside sale and ordering a resale. See *ante,* § 626.

or upon a mere statement founded only upon information that some of the bondholders deterred other proposed buyers, not named, from bidding, by creating an impression that they were going to bid a much larger sum for the property, where in fact they only clothed their committee with a discretion to buy the property at any price limited only by such sum.[78] Neither will a resale be ordered upon a mere conjecture or surmise that if the property had been offered for sale at another season it would have brought a better price, when it is not shown that any person with capital or means was prevented from attending.[79]

It was held by the supreme court of Illinois, in the case of Cleaver v. Green,[80] that it is not to be expected that property will bring as much at a forced sale as if sold privately by judicious advertising and management, and the fact that it does not, is not a sufficient reason for setting a sale aside, where there is no unfairness or fraud, and where there is no such inadequacy of price as to raise a presumption of fraud.

In the case of O'Donnell v. Lindsay,[81] it is said that "to set a sale aside, there must, in addition to inadequacy of consideration, be some other excuse, such as surprise, ignorance, mistake or inadvertence. It will be seen, however, from the cases that a great inadequacy has refined the ingenuity of the learned judges in extracting from the facts of the cases sufficient to justify annulling the sale." [82]

[78] *Fidelity Trust & S. V. Co.* v. *Mobile Street R. Co.* 54 Fed. 26.

[79] *Garitee* v. *Popplein,* 73 Md. 322, 20 Atl. 1070.

[80] 107 Ill. 67.

[81] 39 N. Y. Supr. Ct. (7 J. & S.) 523, 532.

[82] See *King* v. *Platt,* 37 N. Y. 155; *McCotter* v. *Jay,* 30 N. Y. 80; *O'Donnell* v. *Lindsay,* 39 N. Y. Supr. Ct. (7 J. & S.) 523, 533; *Dwight's Case,* 15 Abb. (N. Y.) Pr. 259; *King* v. *Morris,* 2 Abb. (N. Y.) Pr. 296; *Lefevre* v. *Laraway,* 22 Barb. (N. Y.) 167; *Griffith* v. *Hadley,* 10 Bosw. (N. Y.) 588; *Francis* v. *Church,* Clarke Ch. (N. Y.) 475; *Gardiner* v. *Schermerhorn,* Clarke Ch. (N. Y.) 105; *Whitbeck* v. *Rowe,* 25 How. (N. Y.) Pr. 403; *Murdock* v. *Empie,* 19 How. (N. Y.) Pr. 79; *Soule* v. *Ludlow,* 3 Hun (N. Y.) 503; *Howell* v. *Baker,* 4 Johns. Ch. (N. Y.) 118; *Lansing* v. *McPherson,* 3 Johns. Ch. (N. Y.) 426; *Williamson* v. *Dale,*

A sale under a judgment in foreclosure proceedings may be set aside when the price bid for the property is so inadequate as to work injustice to the parties, although the proceedings have been regular and the sale fairly made,[83] and an order setting aside such sale is binding upon all the parties, including the bidder, although it was made without notice to him.[84]

A sale under a mortgage foreclosure will be set aside for inadequacy of price brought where there have been irregu-

3 Johns. Ch. (N. Y.) 292; *Osgood* v. *Franklin*, 2 Johns. Ch. (N. Y.) 23, 7 Am. Dec. 513; *Jencks* v. *Alexander*, 11 Paige Ch. (N. Y.) 619; *May* v. *May*, 11 Paige Ch. (N. Y.) 203; *Billington* v. *Forbes*, 10 Paige Ch. (N. Y.) 487; *Brown* v. *Frost*, 10 Paige Ch. (N. Y.) 244; *American Ins. Co.* v. *Oakley*, 9 Paige Ch. (N. Y.) 259, 38 Am. Dec. 561; *Requa* v. *Rea*, 2 Paige Ch. (N. Y.) 340; *Duncan* v. *Dodd*, 2 Paige Ch. (N. Y.) 99; *Hoppock* v. *Conklin*, 4 Sandf. Ch. (N. Y.) 582; *White* v. *Coulter*, 3 T. & C. (N. Y.) 608; *Mulks* v. *Allen*, 12 Wend. (N. Y.) 253; *Ontario Bank* v. *Lansing*, 2 Wend. (N. Y.) 261; *Littell* v. *Grady*, 38 Ark. 584; *Webber* v. *Curtiss*, 104 Ill. 309; *Montague* v. *Dawes*, 96 Mass. (14 Allen) 369; *Vail* v. *Jacobs*, 62 Mo. 130; *Delaware, L. & W. R. Co.* v. *Scranton*, 34 N. J. Eq. (8 Stew.) 429, 432; *Kloepping* v. *Stellmacher*, 21 N. J. Eq. (6 C. E. Gr.) 328; *Marlatt* v. *Warwick*, 18 N. J. Eq. (3 C. E. Gr.) 108; *Smith* v. *Duncan*, 16 N. J. Eq. (1 C. E. Gr.) 240; *Eberhart* v. *Gilchrist*, 11 N. J. Eq. (3 Stockt.) 167; *Howell* v. *Hester*, 4 N. J. Eq. (3 H. W. Gr.) 266; *Mercereau* v. *Prest*, 3 N. J. Eq. (2 H. W. Gr.) 460; *Seaman* v. *Riggins*, 2 N. J. Eq. (1 H. W. Gr.) 214, 34 Am. Dec. 200; *Crane* v. *Conklin*, 1 N. J. Eq. (Saxt.) 346, 22 Am. Dec. 519; *Simmons' Ex'rs* v. *Vandergift*, 1 N. J. Eq. (Saxt.) 55; *Bank of New Brunswick* v. *Hassert*, 1 N. J. Eq. (Saxt.) 1; *Peacock* v. *Evans*, 16 Ves. 512; *How* v. *Weldon*, 2 Ves. Sr. 516; *Polhemus* v. *Princilla*, 61 Atl. 263 (N. J. Eq.), See *Commercial Bank* v. *Catto*, 13 App. Div. 608, 43 N. Y. Supp. 777; *Pruden* v. *Rutler*, 34 Misc. 117, 68 N. Y. Supp. 737; *Ballentyne* v. *Smith*, 205 U. S. 285, 27 S. Ct. 527; *Gleason* v. *Kentucky Title Co.* 78 S. W. 170; *Kirby* v. *Ramsey*, 9 S. D. 197, 68 N. W. 328; *Hunt* v. *Whitehead*, 19 App. D. C. 116; *Macfarlane* v. *Macfarlane*, 50 Fla. 570, 39 So. 995; *Wolfert* v. *Milford Savings Bank*, 5 Kan. App. 222, 47 Pac. 175; *Hoffman* v. *McCracken*, 168 Mo. 337, 67 S. W. 878; *Nichols* v. *Flagg*, 24 R. I. 30, 51 Atl. 1039; *John Paul Lumber Co.* v. *Neumeister*, 106 Wis. 243, 82 N. W. 144.

[83] *State ex rel. Kunz* v. *Campbell*, 5 S. D. 636, 60 N. W. 32; *Williams* v. *Taylor*, 63 Neb. 717, 89 N. W. 261; *Donaho* v. *Bales*, 59 S. W. 409 (Tenn.)

[84] *State ex rel. Kunz* v. *Campbell*, 5 S. D. 636, 60 N. W. 32.

larities materially affecting the interest of the parties, or any fraud, or undue advantage, or the price is so grossly inadequate as to shock the conscience.[85] But in some states a resale on foreclosure will be ordered for mere inadequacy in price, upon the objecting party paying the cost and expenses of the sale already made.[86]

Sales under a decree in a mortgage foreclosure have been set aside in the following cases: Where the evidence showed an uncertainty as to whether proper notices of sale were ever made;[87] or where the property was struck off to the plaintiff on the first bid offered, for a grossly inadequate price, and the sale was immediately confirmed without notice to the owner of the equity of redemption, who appeared immediately after the sale was made and confirmed, and stated in the presence of plaintiff's counsel that he would bid a specified amount sufficient to secure the plaintiff, and was not told that the sale had been confirmed;[88] where the property was sold for an inadequate price, and the plaintiff's attorney had been the attorney for a defendant holding a life estate, and had told her husband that he could represent her and her infant children, who were entitled in remainder, and had stated that the first bid would be enough to pay the mortgage debt, and that there would be no deficiency judgment entered, and the holder of such judgment bid in the property for the plaintiff;[89] where the plaintiff's attorney, anticipating that an engagement would prevent his attendance, instructed a deputy

[85] *Ballentyne* v. *Smith*, 205 U. S. 285, 51 L. ed. 803, 27 S. Ct. 527. The New York court of appeals say that a foreclosure sale in bulk for $1,000, of corporate property worth $60,000, consisting of a large number of articles, when the property was not present or visible to the persons attending the sale, in the absence of any of the officers of the mortgagor corporation, will be set aside either in a court of law or equity. *Casserly* v. *Witherbee*, 119 N. Y. 522, 30 N. Y. S. R. 92, 23 N. E. 1000.

[86] *Brown* v. *Farley* (N. J. Ch.) 4 Atl. 79. See *post*, § 651.

[87] *Harris* v. *Gunnell* (Ky.) 9 S. W. 376.

[88] *Fowler* v. *Kruntz*, 54 Kan. 622, 38 Pac. 808.

[89] *Bonnett* v. *Brown*, 59 Hun (N. Y.) 619 mem., 36 N. Y. S. R. 320, 13 N. Y. Supp. 395.

sheriff to bid the amount of the judgment, but the latter neglected to do so, and the property was sold for less than one-third of the judgment. In a case where the defendant failed to attend the sale because he relied upon the promise of the plaintiff's attorney to bid the full amount of the judgment, so that there would be no deficiency; and the purchaser knew of the intention to bid that amount; an order to show cause the next day why the sale should not be set aside, has been held to have been obtained on the day of sale.[90]

The New Jersey court of chancery, in the case of Schulling v. Lintner,[91] say that in a case where the petitioner, understanding little English, lived upon the mortgaged property, and process was served upon her, but she depended upon notice of sale being posted on the house, and the property, worth $2,000, was sold as an entirety for $1,300, she is entitled to be relieved from the sale.

§ 641. Same—In case of sale under a power.—Mere inadequacy of price will not invalidate a sale at auction under a power contained in a mortgage, unless it is so gross as to indicate bad faith or a want of reasonable judgment and discretion in the mortgagee or trustee.[92] A sale for one-half the estimated value of the mortgaged premises is not such inadequacy;[93] particularly where there is no allegation that an adjournment of the sale would have resulted in the realization of a higher price.[94]

§ 642. Same—When objection to be taken.—An objection to the validity of a mortgage sale for inadequacy of

[90] *Haynes* v. *Backman* (Cal.) 31 Pac. 745.

[91] 43 N. J. Eq. (16 Stew.) 444, 11 Atl. 153.

[92] *Bowman* v. *Ash*, 36 Ill. App. 115; *Austin* v. *Hatch*, 159 Mass. 198, 34 N. W. 95; *Clark* v. *Simmons*, 150 Mass. 357, 23 N. E. 108; *Maloney* v. *Webb*, 112 Mo. 575, 20 S. W. 683; *Lallace* v. *Fisher*, 29 W. Va. 512, 2 S. E. 775.

[93] *Austin* v. *Hatch*, 159 Mass. 198, 34 N. E. 95; *Maloney* v. *Webb*, 112 Mo. 575, 20 S. W. 683; *Lallace* v. *Fisher*, 29 W. Va. 512, 2 S. E. 775.

[94] *Austin* v. *Hatch*, 159 Mass. 198, 34 N. E. 95.

price can only be heard on exceptions thereto, and will not support a bill in equity to set it aside, after its ratification by the court.[95] It is a well settled rule of procedure in all courts that objections to a sale under a decree of foreclosure because of inadequacy of the price brought must be promptly made; they are regarded as waived by delay.[96] Thus it is said in Provost v. Roedeger,[97] that inadequacy of price paid on a foreclosure sale is not established by the fact that four years afterwards the purchaser sold the lands for considerable more than he paid for them, where the interest on the purchase money, and taxes on the property after the purchase would, with the bid, nearly or quite reach that sum. And it is said, in the case of Wheeler v. McBlair,[98] that a mortgage sale will not be set aside for inadequacy of price when not complained of for more than ten years and no excuse is given for the laches.

§ 643. Motion to set sale aside for inadequacy of price.—In an application to set aside a sale of mortgaged premises and for a resale, on the ground of inadequacy of consideration, the moving party should show the true market value of the property and not its speculative value.[99] A motion to set aside a sale made in a mortgage foreclosure is addressed to the sound discretion of the court, and in the absence of evidence of an abuse of such discretion, the order granted on the application will not be appealable;[1] and it has been said that where an order is made in a foreclosure suit setting

[95] *Marsh* v. *Sheriff* (Md.) 14 Atl. 664.

[96] *Marsh* v. *Sheriff* (Md.) 14 Atl. 664. See *Provost* v. *Roedeger*, 10 N. Y. Supp. 812, 32 N. Y. S. R. 1101; *Wheeler* v. *McBlair*, 5 App. Cas. D. C. 375, 23 Wash. L. R. 153. See *post*, § 649.

[97] 10 N. Y. Supp. 812, 32 N. Y. S. R. 1101.

[98] 5 App. Cas. D. C. 375, 23 Wash. L. Rep. 153.

[99] *Barnes* v. *Stoughton*, 2 T. & C. (N. Y.) 675. See *White* v. *Coulter*, 3 T. & C. (N. Y.) 608, 1 Hun (N. Y.) 357.

[1] *Buffalo Savings Bank* v. *Newton*, 23 N. Y. 160; *Wakeman* v. *Price*, 3 N. Y. 334; *Hazleton* v. *Wakeman*, 3 How. (N. Y.) Pr. 357; *White* v. *Coulter*, 1 Hun (N. Y.) 357. See *post*, § 654.

aside a sale, and directing a reference to ascertain the equities of the parties, reserving to either party the right to move for confirmation on the coming in of the report, such order is not appealable.[2]

§ 644. Accident and surprise grounds for setting sale aside.—Surprise is one of the grounds upon which courts will interfere and order a resale, if a party has suffered loss in consequence of the property having been sold at a sacrifice;[3] as a general rule, where the surprise is due to the person's own negligense, and is of such a character that it could have been avoided by the exercise of ordinary prudence, the court will not interfere; neither will it interfere where the surprise was not caused by the misconduct or inadvertence of the complainant or of a third person, but was due to the negligence and inattention of the party complaining.[4]

Thus, the supreme court of California, in the case of Central Pacific Railroad Company v. Creed,[5] denied a motion to set aside a sale on the ground of surprise where the plaintiff seeking to set it aside knew of the time and place of the sale, but neglected to give any instructions in reference thereto until the preceding day, when it telegraphed its agent and wrote the sheriff, offering to purchase the property for the amount of the judgment and costs, and instructed them to bid that amount; but neither telegram nor letter was received by

[2] *Dows* v. *Congdon,* 28 N. Y. 122. The court held that "it neither, in effect, determines the action in which it was made, nor prevents a judgment from which an appeal might be taken. It is substantially an order for resale on the ground of mistake and surprise. Such an order, when it involves no strict legal right, is within the discretionary power of the court." See *Bergen* v. *Sneddeker,* 8 Abb. (N. Y.) N. C. 50.

[3] *Parkhurst* v. *Cory,* 11 N. J. Eq. (3 Stockt.) 233. See *Kennedy* v. *Bridgman, 27* Misc. 585, 58 N. Y. Supp. 253.

[4] *Parkhurst* v. *Cory,* 11 N. J. Eq. (3 Stockt.) 233. See *Francis* v. *Church,* Clarke Ch. (N. Y.) 475, 478; *Brown* v. *Frost,* 10 Paige Ch. (N. Y.) 243; *Housman* v. *Wright,* 50 App. Div. 606, 64 N. Y. Supp. 71. See *Crawford* v. *Foreman,* 127 Iowa, 661, 103 N. W. 1000.

[5] 70 Cal. 497, 11 Pac. 772.

the parties until after the sale, which was made for a less price than offered by the plaintiff, and plaintiff received the purchase money and kept it for five months.

Accident is also one of the causes for ordering a resale. A sale of mortgaged premises will be set aside and a resale ordered, where the owner of the equity of redemption appealed in good faith from the judgment of foreclosure and sale, but owing to the imperfect justification of his sureties in the undertaking given on appeal, the sale was not stayed, and the plaintiff proceeded and sold the premises without notifying the owner, or returning the undertaking, bidding off the property himself for much less than its real value, and entering a judgment for deficiency against the owner.[6]

The court will interfere to set aside a judicial sale for inadequacy of price where there was accident or surprise upon one side and advantage taken of it on the other, and where, unless the court affords relief, the loss will be irreparable.[7] Thus, where the owner of the premises covered by the mortgage was a non-resident of the state, and was ignorant of the proceedings to foreclose such mortgage until after the sale of the premises under the decree, and the agent to whom he had confided the care of the property had become insane, in consequence of which the premises were sold at a price far below their value, the sale was set aside and a resale ordered.[8]

The defendant in a foreclosure is not required to exercise more than ordinary prudence and diligence in protecting his interests at the sale; and if he uses as much diligence as is reasonably practicable under all the circumstances, he will be excusable. Thus, where a defendant intends to be present at the sale and is prepared to bid for his protection, but is prevented through unforeseen circumstances from attending,

[6] *Gould* v. *Libby*, 24 How. (N. Y.) Pr. 440.

[7] *Gould* v. *Gager*, 18 Abb. (N. Y.) Pr. 32.

[8] *Thompson* v. *Mount*, 1 Barb. Ch. (N. Y.) 607.

and the property is sold to the complainants for less than its value, the sale will be vacated.[9]

§ 645. Fraud and misconduct.—A sale under a decree of foreclosure will be set aside and a resale ordered, where there has been fraud or misconduct on the part of the purchaser or of any person connected with or directing the sale, or where any party in interest has been misled or surprised by the misconduct of the purchaser or of the person directing the sale.[10] But where a sale is set aside on account of the mere constructive fraud of the purchaser, both he and the mortgagor are entitled to be re-instated in the same position they occupied before the sale.[11]

What amounts to fraud or misconduct is to be determined by the facts in each particular case;[12] but it is thought the simple fact that a mortgagee purchased the mortgaged property at forclosure at much less than its actual value, is not of itself sufficient to show fraud.[13] Also that a foreclosure sale cannot be set aside for an incorrect appraisement unless for fraud, unfairness, or mistake other than a mere erroneous opinion as to the value of the property.[14]

It was held in the case of King v. Platt,[15] that while the law secures to the creditor his just demand and sequestrates

[9] *Hoppock* v. *Conklin,* 4 Sandf. Ch. (N. Y.) 582, 586.

[10] *Gardiner* v. *Schermerhorn,* Clarke Ch. (N. Y.) 101. See *Veit* v. *Meyer,* 105 Wis. 530, 81 N. W. 653; *Las Vegas Railway & Power Co.* v. *Trust Co. of St. Louis County,* 15 N. M. 634, 110 Pac. 856. See also *Kebabian* v. *Shinkle,* 26 R. I. 505, 59 Atl. 743; *Butters* v. *Butters,* 153 Mich. 153, 117 N. W. 203. But see *Lacey* v. *Lacey,* 39 So. 922 (Ala.).

Alleging fraud, see *Alabama & Vicksburg Railway Co.* v. *Thomas,* 86 Miss. 27, 38 So. 770.

[11] *Trotter* v. *White,* 26 Miss. 88. See *Hewitt* v. *Price,* 204 Mo. 31, 120 Am. St. Rep. 681, 102 S. W. 647.

[12] See *Hughes* v. *Waples-Platter Grocer Co.* 25 Tex. Civ. App. 212, 60 S. W. 981; *McMillan* v. *Hunnicutt,* 109 Ga. 699, 35 S. E. 102; *Owens* v. *Hornthal,* 156 N. C. 19, 72 S. E. 5.

[13] *Glide* v. *Dwyer,* 83 Cal. 477, 23 Pac. 706.

[14] *Harris* v. *Gunnell* (Ky.) 9 S. W. 376. See *ante,* §§ 539, 540, 541.

[15] 37 N. Y. 155, 160.

the property of the debtor to satisfy it, still it sedulously guards his interests in all the various steps taken leading to a sale of the property, and it will not tolerate the slightest undue advantage over him even by pursuing the strictest form of the law; and that, occupying the position of advantage, it behooves the complaianants to pursue their remedy with scrupulous care lest they should inflict an injury on one who is comparatively powerless; and further, that "a court of equity justly scrutinizes the conduct of a party placed by the law in a position where he possesses the power to sacrifice the interests of another in a manner which may defy detection, and stands ready to afford relief on very slight evidence of unfair dealing, whether it is made necessary by moral turpitude or only by a mistaken estimate of others' rights."

Where a purchaser at a foreclosure sale, by misrepresentation and deception, misleads the owner, and assuming to act for him, obtains an adjournment of the sale, inducing the parties to remain away therefrom, and he thereby becomes the purchaser at a nominal price, the sale will be set aside at the expense of such purchaser.[16]

The supreme court of Illinois, in the case of Ritchie v. Judd,[17] say that the validity of a mortgage foreclosure sale will not be affected by an agreement between the holder of a mortgage and a third person, that the mortgage shall be foreclosed and that the latter shall bid a certain sum upon the sale, is not imposing any obligation upon the former to strike the property off for that amount, but leaving the sale open to free competition. And the supreme court of Tennessee, in the case of Kansas City Land Company v. Hill,[18] hold that where a person procures a trustee or a creditor to foreclose a trust deed and buys at the sale, made openly and fairly, in strict accordance with the terms of the trust, is not evidence of fraud against the devisee of the grantor, where such pur-

[16] See *Slocum* v. *Slocum*, 3 How. (N. Y.) Pr. 178.

[17] 137 Ill. 453, 27 N. E. 682.

[18] 87 Tenn. 589, 11 S. W. 797, 5 L.R.A. 45.

chaser is ignorant of a will, and believes the land had descended to the heir-at-law, whose vendee proposes to convey to him upon such sale being made by the trustee, and where the sole object in procuring such foreclosure is to exhaust the creditor's remedies against the land, and this, although the vendee of the heir had assumed the payment of the incumbrance.

The burden of proof is on the party moving to set aside the foreclosure to show fraud therein.[19]

§ 646. False statements generally.—Where a plaintiff or his agent, by an oral promise which he refused to keep, induced the defendant to refrain from bidding, and was thereby enabled to purchase the property for a price less than its value, the sale was set aside.[20] And in Murdock v. Empie,[21] where a person who had been the agent of the owner, acting in the interests of the person who afterwards purchased the property, made statements to the junior mortgagees which induced them to remain away from the sale, so that the property sold for less than its value, the sale was set aside.[22]

A sale will generally be set aside if the complainant misleads the defendants by false statements and by promising to have the sale adjourned, and afterwards becomes the purchaser of the property at a price much less than its value.[23] And in Billington v. Forbes,[24] where a co-defendant took an improper advantage of the illness of the mortgagor, which prevented him from attending the sale and obtaining a postponement thereof, and became the purchaser of the mortgaged

[19] *Hewitt* v. *Price,* 204 Mo. 31, 120 Am. St. Rep. 681, 102 S. W. 647; *Owens* v. *Hornthal,* 156 N. C. 19, 72 S. E. 5.

[20] *Banta* v. *Maxwell,* 12 How. (N. Y.) Pr. 479.

[21] 19 How. (N. Y.) Pr. 79 9 Abb. (N. Y.) Pr. 283:

[22] See also *Hunt* v. *Whitehead,* 19 App. D. C. 116.

[23] *Francis* v. *Church,* Clarke Ch. (N. Y.) 475.

[24] 10 Paige Ch. (N. Y.) 487. See *May* v. *May,* 11 Paige Ch. (N. Y.) 201.

premises at less than one-third of their real value, the sale was set aside and a resale ordered.

In another case,[25] where the plaintiff bid off a parcel of land and another parcel was subsequently put up by his direction, and he then canceled his bid on the first parcel directing the two parcels to be sold together, and became the purchaser thereof, the sale was set aside. And in May v. May,[26] where the property was sold for a tenth of its value, bidding having been discouraged by some one, though there was no evidence connecting the purchaser with the fraud, the sale was set aside on the application of a judgment creditor whose lien was foreclosed and barred by the action.

§ 647. Misleading statements and representations by referee or plaintiff.—A sale of mortgaged premises may be set aside where judgment creditors were prevented from attending and bidding at the sale, in consequence of an impression received from the master that the sale was not to take place on the day appointed,[27] although there was no collusion between the officer conducting the sale and the purchaser, provided the judgment creditors will make an advance at the resale upon the bid at which the property was struck off, to an amount sufficient to cover their demands.

And where the premises were sold to the mortgagee at a price greatly below their value, if the mortgagor or those standing in his place were misled by the mortgagee or by a third person even, in reference to the foreclosure of the mortgage, in consequence of which they did not attend the sale, a resale will be ordered.[28] And if the notice of the place where the sale is to be held is so indefinite that the agents of the parties, who are present in the building for the purpose

[25] *Woodruff* v. *Bush*, 8 How. (N. Y.) Pr. 117.

[26] 11 Paige Ch. (N. Y.) 201.

[27] See *Angel* v. *Clark*, 21 App. Div. 339, 47 N. Y. Supp. 731.

[28] *Collier* v. *Whipple*, 13 Wend. (N. Y.) 224.

Tripp v. *Cook*, 26 Wend. (N. Y.) 143; *Eidlitz* v. *Doctor*, 24 Misc. 209, 53 N. Y. Supp. 525.

of attending and bidding at the sale, do not know where it is to be held, and are not aware of its progress, the sale will be set aside.[29]

A sale may be set aside on the ground of surprise and misapprehension created by the conduct of the purchaser or of some person interested in the sale,[30] or by the conduct of the officer who has charge of the sale,[31] or where such officer makes an announcement at the sale which is calculated to deter bidders, and to impair the price that might otherwise be offered. Where the officer making the sale disobeyed his instructions through ignorance of his duty, and sold the property to parties who were acquainted with his instructions, for much less than its real value, the court set the sale aside and refused to indemnify the purchasers.[32]

It is intimated in Gardiner v. Schermerhorn,[33] that where the defendant misunderstands his liability, this will in some instances be a sufficient ground for vacating the sale. This was a case in which the mortgaged premises had been sold under a new court rule, which changed the practice as to the publication of the notice of sale and with which the mortgagee was not familiar.

§ 648. Negligence in objecting, and acquiescence in sale.—Although a sale may be unauthorized or irregular, yet the defendant by failing to object thereto within a reasonable time, may lose his right to have it set aside, acquiescence in the sale operating as an estoppel.[34] Thus, in a case where

[29] *Kellogg* v. *Howell,* 62 Barb. (N. Y.) 280.

[30] *Lefevre* v. *Laraway,* 22 Barb. (N. Y.) 167, 173. See *Gould* v. *Gager,* 18 Abb. (N. Y.) Pr. 32.

[31] *Stahl* v. *Charles,* 5 Abb. (N. Y.) Pr. 348; *Lefevre* v. *Laraway,* 22 Barb. (N. Y.) 167, 173. See also *Lansing* v. *McPherson,* 3 Johns. Ch. (N. Y.) 424; *Brown* v. *Frost,* 10 Paige Ch. (N. Y.) 243; *Tripp* v. *Cook,* 23 Wend. (N. Y.) 143; *Collier* v. *Whipple,* 13 Wend. (N. Y.) 224, 227.

[32] *Requa* v. *Rea,* 2 Paige Ch. (N. Y.) 339.

[33] Clarke Ch. (N. Y.) 101, 104.

[34] See *Cutter* v. *Iowa Water Co.* 96 Fed. 777; *McLain Land & Investment Co.* v. *Swofford Bros. Dry Goods Co.* 11 Okl. 429, 68 Pac. 502; *State Mutual Building & Loan*

the sale of a portion of the premises was not authorized by the judgment, but the owner of the equity of redemption acquiesced therein and neglected to object to the proceedings had for the distribution of the surplus, it was held that such owner was estopped from questioning the validity of the title acquired by the purchaser under such sale.[35]

In a recent California case,[36] it appeared that the party knew of the time and place of the sale, but that he neglected to give any instructions to his agent in reference thereto until the day preceding the sale, when he telegraphed to him and wrote to the officer of the court deputized to make the sale, offering to purchase the property for the amount of the judgment and costs, and instructing them to make a bid to that effect at the sale. Because of atmospheric disturbances neither the telegram nor the letter was received by the parties to whom they were sent until after the sale. The sale was made to the respondent for a less price than that offered by the plaintiff; but the plaintiff accepted the purchase money and kept it for five months, when, without offering to return the money, he moved to set the sale aside on the ground of surprise; the motion was held to have been properly denied.

§ 649. **Objections waived by delay.**—The law presumes all sales valid and effectual.[37] Where a sale made under a judgment of foreclosure is irregular or voidable for any reason, the party aggrieved must move to have the sale set aside within a reasonable time, for it will not be disturbed if he becomes guilty of laches.[38] And where the period pre-

Ass'c v. *O'Callaghan*, 67 N. J. Eq. 103, 57 Atl. 496.

[35] *McBride* v. *Lewisohn*, 17 Hun (N. Y.) 525. See also *Anderson* v. *Dicks*, 55 S. C. 398, 33 S. E. 505.

[36] *Central Pac. R. Co.* v. *Creed*, 70 Cal. 497.

[37] *Rigney* v. *Small*, 60 Ill. 416.

[38] *Depew* v. *Dewey*, 46 How. (N. Y.) Pr. 441; *Rigney* v. *Small*, 60 Ill. 416; *Roberts* v. *Fleming*, 53 Ill. 196; *Hamilton* v. *Lubukee*, 51 Ill. 415, 99 Am. Dec. 562; *Thompson* v. *Browne*, 10 S. D. 344, 73 N. W. 194; *Stephenson* v. *Harris*, 153 Ala. 462, 45 So. 196; *Brown* v. *James*, 24 So. 908 (Miss.). See *Terry* v. *Furth*, 40 Wash. 493, 82 Pac. 882;

scribed by statute, within which an action may be brought in equity to redeem the premises, has been allowed to expire without an application for a resale, the court will have no power to set the sale aside.[39] But mere delay on the part of the plaintiffs in asserting their rights, where the action is commenced within the time limited for the commencement of such actions and where the defendant has not been prejudiced by the delay, will not affect or defeat the plaintiff's right of action.[40]

A delay of four years after the mortgagor had knowledge of the sale, has been held to preclude him from maintaining against subsequent purchasers, a bill to redeem on the alleged ground of a defective notice of the sale and inadequacy of price.[41] Where between seven and eight years had elapsed, the court declined to inquire whether the price bid was inadequate, or whether the premises should have been sold in parcels.[42] And where exceptions to the report of the officer making the sale of the mortgaged premises were taken ten years after the approval and confirmation of the report of sale, they were held to come too late, unless it was made to appear that some positive injury had resulted.[43]

Where a mortgagor informs another person that he has no title to the mortgaged premises and that a foreclosure has been held and the time for redemption has expired, and

Bower v. *Stein*, 165 Fed. 232; *Redmond* v. *Cass*, 226 Ill. 120, 80 N. E. 708; *Innes* v. *Linscheid*, 126 Ill. App. 27; *Muckenfuss* v. *Fishburne*, 68 S. C. 41, 46 S. E. 537; *Coe* v. *Rockman*, 126 Wis. 515, 106 N. W. 290 (Statute).

[39] *Depew* v. *Dewey*, 46 How. (N. Y.) Pr. 441. See also *Salles* v. *Butler*, 27 N. Y. 638; *Wait* v. *Van-Allen*, 22 N. Y. 319; *Humphrey* v. *Chamberlain*, 11 N. Y. 274; *Fry* v. *Bennett*, 16 How. (N. Y.) Pr. 385; *Marston* v. *Johnson*, 13 How. (N. Y.) Pr. 93. See *Hendricks* v. *Calloway*, 211 Mo. 536, 111 S. W. 60; *Alabama & Vicksburg Railway Co.* v. *Thomas*, 86 Miss. 27, 38 So. 770; *Fennyery* v. *Ransom, as adm'x, etc.* 170 Mass. 303, 49 N. E. 620; *Ayers* v. *McRae*, 71 Ark. 209, 72 S. W. 52.

[40] *McMurray* v. *McMurray*, 66 N. Y. 175.

[41] *Hamilton* v. *Lubukec*, 51 Ill. 415, 99 Am. Dec. 562.

[42] *Roberts* v. *Fleming*, 53 Ill. 196.

[43] *Garrett* v. *Moss*, 20 Ill. 549.

thereby induces such other person to buy the certificate of foreclosure sale, he will be estopped from afterwards questioning the regularity of the sale as against such purchaser.[44]

§ 650. Excusable mistakes as grounds for setting sale aside.—The excusable mistake of a party in interest is a ground for vacating a sale and ordering a resale,[45] if such mistake caused the property to bring a less price than it otherwise would.[46] Thus, where the owner of an equity of redemption appealed in good faith from a judgment of foreclosure, but owing to the imperfect justification of the sureties to the undertaking given on the appeal, the sale was not stayed, and the plaintiff proceeded to sell the premises without notifying the owner, or returning the undertaking to him, bidding off the premises himself for one-third less than their real value, and taking a decree against the owner for the deficiency, the sale was set aside and a resale ordered.[47] And it has been held that where a person bid at a sale with the expectation that she was entitled to the proceeds of the sale, being the sole next of kin and heir, when in fact the sale was subject to another claim, she may be allowed to surrender her deed, and have the sale set aside.[48]

And where the proper undertaking to stay proceedings pending an appeal from a judgment of foreclosure, was served and filed some time after the service of the notice of appeal, and was returned on the ground that it was not served in time and was not in due form, and the defendant thereupon made a

[44] *Curyea* v. *Berry*, 84 Ill. 600.

[45] *Ex parte Howlett* v. *Garner*, 50 S. C. 1, 27 S. E. 533.

[46] *Williamson* v. *Dale*, 3 Johns. Ch. (N. Y.) 290. See *Parfitt* v. *Warner*, 13 Abb. (N. Y.) 471; *King* v. *Morris*, 2 Abb. (N. Y.) Pr. 296; *Gould* v. *Gager*, 24 How. (N. Y.) Pr. 440; *Smith* v. *Heermance*, 18 How. (N. Y.) Pr. 261. See also *Marx* v. *Smith*, 111 Mich. 125, 69 N. W. 150.

[47] *Gould* v. *Libby*, 24 How. (N. Y.) Pr. 440, *sub nom. Gould* v. *Gager*, 18 Abb. (N. Y.) Pr. 32. See *post*, § 654.

[48] *Hinton* v. *Leigh*, 102 N. C. 28, 8 S. E. 890.

special motion to stay the proceedings founded on such undertaking, which motion was denied on the ground that it was not necessary, and the plaintiff proceeded to sell the premises, the sale was vacated on terms and the proceedings stayed until decision upon the appeal.[49]

It has been said that where an undertaking given to stay proceedings, pending an appeal from a decree of foreclosure, is in substantial, though not exact, compliance with the requirements of the Code, the plaintiff should move to set it aside; and if, without doing so or giving notice of the defect, he proceeds to sell the premises under the judgment, the sale must be set aside and a resale ordered.[50]

In Williamson v. Dale,[51] where the executors of the mortgagor were innocently misled and induced to believe that the sale of the mortgaged premises would not take place on the day appointed, there being no culpable negligence on their part, the court, under all the circumstances of the case, ordered the sale to be set aside on the ground of surprise, though the sale was perfectly regular and open and no unfair intention was imputed to the mortgagee or his solicitors; but the court added, as a condition, that the defendant should pay to the purchaser all his costs and expenses, and the costs of the application for a resale.

§ 651. Terms imposed.—A sale of mortgaged premises made under the directions of the court in a mortgage foreclosure will be set aside and a resale ordered only upon terms.[52] The proper terms to be imposed depend, of course, upon the circumstances of each particular case.[53] Where the conditions and circumstances are such that the court is com-

[49] *Smith* v. *Heermance,* 18 How. (N. Y.) Pr. 261.

[50] *Parfitt* v. *Warner,* 13 Abb. (N. Y.) Pr. 471. See *post,* § 654.

[51] 3 Johns. Ch. (N. Y.) 290.

[52] *Vingut* v. *Ketcham,* 102 App. Div. 403, 92 N. Y. Supp. 605.

[53] *Francis* v. *Church,* Clarke Ch. (N. Y.) 475. See *German-American Bank of Rochester* v. *Dorthy,* 39 App. Div. 166, 57 N. Y. Supp. 172; *Montclair Building & Loan Ass'c.* v. *Farmer,* 67 Atl. 852 (N. J. Eq.); *Avon-by-the-Sea Land &*

pelled to set a sale aside and to order that the property be resold, the former purchaser must be fully and liberally indemnified for all damages, costs and expenses to which he has been subjected.[54] These include the deposit or percentage paid by him on the sale, the expense of investigating the title, the costs of the motion for repayment, if he is compelled to make a motion,[55] the interest on his deposit and on as much of the purchase money as he has kept on hand ready for payment, together with all the reasonable costs and expenses which he has paid or been subject to in opposing the application for a resale.[56]

But where a purchaser employs counsel and instructs him to insist upon his right to retain an unconscientious advantage obtained by him in the sale and purchase of the premises, through the fraud of some one, he cannot have costs allowed him for an unsuccessful resistance of the motion to set the sale aside.[57]

§ 652. Effect upon purchaser of order setting sale aside.—On becoming a purchaser at a foreclosure sale, a party submits himself to the jurisdiction of the court as to all matters connected with the sale or relating to him in the character of purchaser.[58] And all persons who acquire title from and under him, take it subject to the same jurisdiction.

Improvement Co. v. *Finn*, 56 N. J. Eq. 808, 41 Atl. 360; *Strong* v. *Smith*, 68 N. J. Eq. 650, 64 Atl. 1135; *Veit* v. *Meyer*, 105 Wis. 530, 81 N. W. 653.

[54] *Duncan* v. *Dodd*, 2 Paige Ch. (N. Y.) 99. See *May* v. *May*, 11 Paige Ch. (N. Y.) 201, 204; *Polhemus, as guardian, etc.* v. *Princilla*, 61 Atl. 263 (N. J. Eq.). See *Kennedy* v. *Bridgman*, 27 Misc. 585, 58 N. Y. Supp. 253. See also *Stephens* v. *Humphreys*, 46 N. Y. S. R. 646, 19 N. Y. Supp. 25. But see *Requa* v. *Rea*, 2 Paige Ch. (N. Y.) 339.

[55] *Raynor* v. *Selmes*, 52 N. Y. 579.

[56] *Duncan* v. *Dodd*, 2 Paige Ch. (N. Y.) 99, 102. See *Builders' Mortgage Co.* v. *Berkowitz*, 67 Misc. 595, 123 N. Y. Supp. 355.

[57] *May* v. *May*, 11 Paige Ch. (N. Y.) 201, 204.

[58] *Hale* v. *Clauson*, 60 N. Y. 341; *Cazet* v. *Hubbell*, 36 N. Y. 677; *Miller* v. *Collyer*, 36 Barb. (N. Y.) 250, 254; *In re Davis*, 7 Daly (N. Y.) 1, 8; *Willets* v. *VanAlst*, 26 How. (N. Y.) Pr. 325, 344; *Brasher's Exr's* v. *Cortlandt*, 2 Johns.

A conveyance to a *bona fide* purchaser does not take away or affect the jurisdiction of the court, although it may be a circumstance which will influence the court in the exercise of its discretion in granting an order to set the sale aside; because a grantee takes the place of his grantor and consents to the same jurisdiction, under and subject to which the title is held. He has notice of the source of his grantor's title and knowledge of the power of the courts over a title thus acquired, and takes no better nor more perfect title as against the interference of the court than his grantor had.[59] The supreme court of New York, in the case of Wood v. Kroll,[60] say that in those cases where the judgment of foreclosure is vacated, and the purchaser's title to the premises under the sale annulled, the money received by him from a party in possession should be applied in reduction of the amount due on the mortgage.

An order setting aside a sale made under a decree of foreclosure destroys the title of the purchaser at such sale, and consequently that of his grantees.[61] In all cases where the sale is set aside, the purchaser is entitled to be restored to the same position he occupied before the purchase, and is entitled to be re-imbursed for the amount paid on the purchase,[62] for taxes paid by him,[63] and for all improvements made by him in good faith.[64]

Ch. (N. Y.) 505; *Requa* v. *Rea*, 2 Paige Ch. (N. Y.) 339; *Crane* v. *Stiger*, 2 T. & C. (N. Y.) 577, 579; *Casamojor* v. *Strode*, 1 Sim. & S. 381; *Lansdown* v. *Elderton*, 14 Ves. 512; *State ex rel. Kunz* v. *Campbell*, 5 S. D. 636, 60 N. W. 32.

[59] *Hale* v. *Clauson*, 60 N. Y. 341.

[60] 43 Hun (N. Y.) 328.

[61] *Freeman* v. *Munns*, 15 Abb. Y.) Pr. 468, affirmed 30 How. (N. Y.) Pr. 592; *Insurance Co.* v. *Sampson*, 38 Ohio St. 672; *McBain* v. *McBain*, 15 Ohio St. 337, 86 Am. Dec. 478.

[62] *Trotter* v. *White*, 26 Miss. 88. See *ante*, § 651. But see *Requa* v. *Rea*, 2 Paige Ch. (N. Y.) 339.

[63] *Dalgardno* v. *Barthrop*, 40 Wash. 191, 82 Pac. 285.

[64] *Pearson* v. *Gooch*, 69 N. H. 571, 45 Atl. 406. See *Ex parte Howlett* v. *Garner*, 50 S. C. 1, 27 S. E. 533; *Sloane* v. *Lucas*, 37 Wash. 348, 79 Pac. 949. See also *Cullop* v. *Leonard, as trustee, etc.* 97 Va. 256, 33 S. E. 611.

It has been held, where the purchaser took possession of the property and made improvements thereon, after being informed by the officer making the sale that the facts would be submitted to the court, and without waiting for the confirmation of the report of sale, that he was not entitled to indemnity therefor.[65] If the purchaser enters into possession before the sale is set aside, he will be required to account for the rents and profits by him while in possession, for the benefit of the mortgagor or the owner of the equity of redemption.[66]

In the case of Fort v. Roush,[67] where a portion of the mortgaged premises was purchased by the mortgagee, and the sale as to him was set aside on account of his fraudulent conduct, and the mortgagor sought to charge him with the value of the use and occupation of such part while it was in his possession under such purchase, and also with damages for waste, the supreme court of the United States held that a judgment should be rendered against him only for so much of the sum found to be due for such use and damages as exceeded the amount necessary to satisfy the decree.

Where a person interested in the property is not made a party to the foreclosure, but subsequently to the sale redeems the property, the purchaser will be liable to account for the rents and profits, and he will be under a like obligation in case of the foreclosure of an outstanding incumbrance in another suit, acquiring in such case only the rights of a mortgagee in possession.[68]

§ 653. Setting sale aside for benefit of infants.—Infant owners will be relieved by a resale, where their property has been sacrificed through the misapprehension or neglect of

[65] *Requa* v. *Rea*, 2 Paige Ch. (N. Y.) 339.

[66] *Raun* v. *Reynolds*, 15 Cal. 459, 18 Cal. 275; *Fort* v. *Roush*, 104 U. S. (14 Otto) 142, 26 L. ed. 664.

[67] 104 U. S. (14 Otto) 142, 26 L. ed. 664.

[68] *Walsh* v. *Rutgers Fire Ins. Co.* 13 Abb. (N. Y.) Pr. 33.

their natural or statutory guardian.[69] And where it is apparent that a resale will benefit the infant owners, such order may be made on the motion of the court in its capacity of universal guardian of all infants, and by virtue of its obligation to exercise a general superintendence and protective jurisdiction over their persons and property.[70]

In Duncan v. Dodd,[71] where the property, which was the only estate belonging to two infant children, had been sold under a decree of foreclosure for half its value to satisfy a debt nearly equal to the amount of the bid, a resale was ordered upon security being given that the premises should produce fifty per centum advance upon such resale, and that interest on the whole purchase money should be paid to the purchaser, together with the reasonable costs and expenses which he had incurred in consequence of the purchase.

The supreme court of New York, in the case of Monzani v. Monzani,[72] say that where the father of an infant owner of real property, being also tenant by the curtesy, procures paramount liens upon the property to be assigned to his wife, who forecloses and buys in the property for much less than its value, while the infant, by his father's representations, is induced not to protect his interests, the court will, where interests of third persons have not intervened, adjudge the infant to be the owner of the property subject to the estate by the curtesy and the liens, and will require an accounting for the rents and profits.

Where the property rights of infants are concerned, the courts will exercise a most vigilant care in protecting their interests and will hold their guardians, and all who are engaged in managing or disposing of their property, not only to a rigid adherence to principles of good faith, but to the

[69] *Lefevre* v. *Laraway*, 22 Barb. (N. Y.) 167; *Gardiner* v. *Schermerhorn*, Clarke Ch. (N. Y.) 101.

[70] *Lefevre* v. *Laraway*, 22 Barb. (N. Y.) 167.

[71] 2 Paige Ch. (N. Y.) 99.

[72] 27 Abb. (N. Y.) N. C. 67, 15 N. Y. Supp. 683.

strict performance of every duty; and where there is a collusive arrangement to prevent competition at a judicial sale, such a sale will be injurious to the interests of the infants, and will be a fraud in equity, and relief will be granted against such fraud by ordering a resale.[73]

But it seems that the court will not set aside a judicial sale on the ground that the guardian of the infants who are interested, failed to attend the sale, unless it is shown that in consequence of such non-attendance the property sold at a less price than it would have brought if the guardian had been present; and, where the sale was well attended and fairly conducted, it should not be set aside, even at the instance of the infants, unless it is made to appear that upon the resale, their share of the proceeds, after indemnifying the purchaser at the first sale, will be materially increased.[74]

§ 654. Appeal from order on application for resale.— The granting of an order for a resale of mortgaged premises is a matter resting in the sound discretion of the judge who hears the motion;[75] but it is thought that, notwithstanding this fact, the order granting or denying the motion for a resale is appealable to the general term,[76] though not to the court of appeals.[77] By the section of the New York Code,[78] providing for appeals from orders of a judge to the general term, one of the cases in which an appeal may be taken is where the order involves the merits of the action or some part thereof,

[73] *Howell* v. *Mills*, 53 N. Y. 322.

[74] *Stryker* v. *Storm*, 1 Abb. (N. Y.) Pr. N. S. 424.

[75] See *Howell* v. *Mills*, 53 N. Y. 322, 332. See *ante*, § 619.

[76] See *Fisher* v. *Hersey*, 78 N. Y. 387. But it was held in *Young* v. *Bloomer*, 22 How. (N. Y.) Pr. 383, that where no irregularity is alleged against the judgment or sale such an order is not appealable to the general term.

[77] *Hale* v. *Clauson*, 60 N. Y. 341; *Dows* v. *Congdon*, 28 N. Y. 122; *Briggs* v. *Bergen*, 23 N. Y. 162; *Wakeman* v. *Price*, 3 N. Y. 334; *Bergen* v. *Snedecker*, 8 Abb. (N. Y.) N. C. 50, reversing 18 Hun (N. Y.) 355; *Hazleton* v. *Wakeman*, 3 How. (N. Y.) Pr. 357.

[78] Code Civ. Proc. §§ 1347, 1348.

or affects a substantial right. It is thought that an order granting or refusing a resale affects the substantial rights of the parties to the action, and that any party considering himself aggrieved is entitled to appeal to the general term from such order.[79]

A motion in the supreme court to vacate a sale of real estate made on a mortgage foreclosure, where the sale was regularly made, is addressed to the sound discretion and favor of the court, and the order made on such a motion is not therefore appealable beyond the general term.[80] Where fraud is alleged, upon facts casting such a degree of suspicion upon the fairness of the sale as to render it, in the judgment of the court, expedient to order a resale, although the alleged fraud may not be clearly established, the order of the special term setting aside a sale under such circumstances will be reviewable at general term; but as a rule, when only the rights of the parties to the action are involved, no appeal can be taken from the order granting or denying a motion for a resale.[81] It is well established that orders for resales made upon grounds which are discretionary, will not be reviewable by the court of appeals;[82] but it is thought that where orders grant-

[79] See *Central Nat. Bank* v. *Clark*, 34 N. Y. Supr. Ct. (2 J. & S.) 487; *Dollard* v. *Taylor*, 33 N. Y. Supr. Ct. (1 J. & S.) 496; *People* v. *New York Cent. R. Co.* 29 N. Y. 418, 421; *In re Duff*, 41 How. (N. Y.) Pr. 350, 10 Abb. (N. Y.) N. S. Pr. 416.

[80] *Buffalo Sav. Bank* v. *Newton*, 23 N. Y. 160; *Wakeman* v. *Price*, 3 N. Y. 334; *Hazleton* v. *Wakeman*, 3 How. (N. Y.) Pr. 357; *McReynolds* v. *Munns*, 2 Keyes (N. Y.) 214. See *Peck* v. *New York & N. J. R. Co.* 85 N. Y. 246; *Goodell* v. *Harrington*, 76 N. Y. 547; *Hale* v. *Clauson*, 60 N. Y. 339; *Crane* v. *Stiger*, 58 N. Y. 625; *Dows* v. *Congdon*, 28 N. Y. 122. In *King* v. *Platt*, 2 Abb. App. Dec. (N. Y.) 527, it is said that an appeal may be taken to the court of appeals from an order of the general term, affirming an order of the special term denying a motion to set aside a judicial sale made under a judgment; that such an order is final and affects a substantial right; and that it is an order made upon a summary application in an action after judgment; that such an order is not purely discretionary with the court below in such a sense as to prevent it from being reversed.

[81] *Fisher* v. *Hersey*, 78 N. Y. 387.

[82] *Howell* v. *Mills*, 53 N. Y. 322, 331. See *Dows* v. *Congdon*, 28 N. Y. 122; *Wakeman* v. *Price*, 3 N.

ing or refusing resales involve matters of legal right, they may be reviewed in the court of appeals, the same as if presented upon exceptions.[83]

§ 655. Proceedings on resale.—Where a sale in a mortgage foreclosure is set aside and a resale is ordered, the proceedings upon the resale will be the same as those upon the original sale.[84] The proceedings should be commenced *de novo,* as though the first sale had never taken place.

Y. 334; *Candee* v. *Lord,* 2 N. Y 269, 51 Am. Dec. 294; *Rogers* v. *Holly,* 18 Wend. (N. Y.) 350; *Rowley* v. *VanBenthuysen,* 16 Wend. (N. Y.) 370.

[83] See *Howell* v. *Mills,* 53 N. Y. 322.

[84] 3 Wait's Pr. 378. See *Williamson* v. *Dale,* 3 Johns. Ch. (N. Y.) 290.

CHAPTER XXVII.

CONFIRMING SALE AND ENFORCING PURCHASE.

CONFIRMATION OF SALE—ENFORCING BID AGAINST PURCHASER—DEFECTS IN TITLE—MARKETABLE TITLE—WHEN PURCHASER WILL BE EXCUSED FROM COMPLETING PURCHASE.

§ 656. Every foreclosure sale must be confirmed.
§ 657. Same—When to be made.
§ 658. Same—Ratification by mortgagor.
§ 659. Practice of confirming sales in New York.
§ 660. Notice and application for confirmation.
§ 661. Objections to confirmation of sale.
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§ 663. Setting aside sale on application for confirmation—Discretion of court.
§ 664. Enforcing sale against purchaser.
§ 665. Proceedings where purchaser refuses or neglects to complete his purchase.
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§ 668. Defects of title unknown to purchaser at time of sale.
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§ 670. When purchaser presumed to know condition of title.
§ 671. Irregularities prior to judgment excusing purchaser.
§ 672. Enforcement of purchase where there are lunatic defendants.
§ 673. Enforcement of purchase where there are infant defendants.
§ 674. Formal irregularities no excuse to purchaser.
§ 675. Reference to investigate title.
§ 676. Purchaser entitled to marketable title.
§ 677. Partial failure of title will excuse purchaser.
§ 678. Rights of assignee of purchaser's bid.
§ 679. Right of bidder to have sale completed.

§ 656. Every foreclosure sale must be confirmed.—It is a general rule in this country,[85] as well as in Eng-

[85] See *Wells* v. *Rice*, 34 Ark. 346; *Poole*, 54 Miss. 323; *Gowan* v. *Dills* v. *Jasper*, 33 Ill. 262; *Allen* v. *Jones*, 18 Miss. (10 Smed. & M.)

land,[86] that a sale made under a decree of foreclosure, is not complete until it has been confirmed by the court.[87] At such a sale the bidder merely agrees to purchase the property, provided the sale shall be approved by the court;[88] and until the sale is reported to and confirmed by the court, it will be incomplete, and the bidder will be under no obligation to accept the deed of the officer conducting the sale.[89]

The acceptance of the bid confers no title on the purchaser,[90]—not even an absolute right to have the purchase completed. The bidder is nothing more than a preferred purchaser, or proposer for the purchase, subject to the approval of the court.[91] It seems, however, where the purchaser enters into possession under a deed of the officer making the sale, that continued possession thereunder will be equivalent to a confirmation of the sale by the court.[92]

In Illinois a somewhat different doctrine prevails. It was held in the case of Jackson v. Warren,[93] that on a sale of mortgaged premises under a decree of foreclosure, a valid and binding contract is made when the hammer falls; that

168; *Tooley* v. *Gridley,* 11 Miss. (3 Smed. & M.) 514, 41 Am. Dec. 628; *Hay's Appeal,* 51 Pa. St. 61; *Allen* v. *Elderkin,* 62 Wis. 627; *Welp* v. *Gunther,* 48 Wis. 543; *Woehler* v. *Endter,* 46 Wis. 301.

[86] *Twigg* v. *Fifield,* 13 Ves. 517. *In re Minor,* 11 Ves. 559.

[87] *Gerhardt* v. *Ellis,* 134 Wis. 191, 114 N. W. 495.

Formerly in Wisconsin, however, the purchaser was entitled to possession on producing the deed of the officer making the sale. See *Loomis* v. *Wheeler,* 18 Wis. 524.

[88] *Dills* v. *Jasper,* 33 Ill. 272; *Blossom* v. *Milwaukee & C. R. Co.* 70 U. S. (3 Wall.) 196, 18 L. ed. 43. *Jones* v. *Williams,* 155 N. C. 179, 36 L.R.A.(N.S.) 426, 71 S. E. 222.

[89] See *Dills* v. *Jasper,* 33 Ill. 272; *Martin* v. *Kelly,* 59 Miss. 652.

[90] See *Hatch* v. *Shold,* 62 Neb. 764, 87 N. W. 908.

[91] See *Wells* v. *Rice,* 34 Ark. 346; *Dills* v. *Jasper,* 33 Ill. 262; *Young* v. *Keogh,* 11 Ill. 642; *Mills* v. *Ralston,* 10 Kan. 206; *Busey* v. *Hardin,* 2 B. Mon. (Ky.) 407; *Allen* v. *Poole,* 54 Miss. 323; *Gowan* v. *Jones,* 18 Miss. (10 Smed. & M.) 164; *Tooley* v. *Gridley,* 11 Miss. (3 Smed. & M.) 493, 41 Am. Dec. 628; *Blossom* v. *Milwaukee & C. R. Co.* 70 U. S. (3 Wall.) 196, 18 L. ed. 43.

[92] *Gowan* v. *Jones,* 18 Miss. (10 Smed. & M.) 164.

[93] 32 Ill. 331.

in the absence of fraud, mistake or some irregularity, the bidder is entitled to a deed on the payment of the purchase money; and that a person holding such a deed is *prima facie* the legal owner of the premises. This is also the doctrine and the practice in New York.

It is also a general rule, observed in all the states, that before the court will make an order confirming the sale it must be satisfied that the highest and best price has been obtained;[94] and where the property sold for its fair cash value, the proceedings being regular, and the sale fair and free from fraud, the presumption is that the statute has been complied with.[95] And it is said that those mortgagees who have obtained a regular sale for a fair price of the mortgaged premises under their foreclosure decree, are entitled to a confirmation and satisfaction of their decree, regardless of any equities which a purchaser from the mortgagor may have acquired in the mortgaged premises *pendente lite*.[96] The supreme court of Kansas, in the case of Kline v. Camp,[97] say that where the mortgaged lands are offered for sale on mortgage foreclosure, under an appraisement, and no sale is made because of a want of bidders, whereupon an alias order is procured and a second appraisement improperly obtained, under which the land is sold for less than two-thirds of the first appraisement, which sale is set aside on the ground that the second appraisement was a nullity, and another appraisement ordered, under which the land is sold for more than two-thirds of the last appraisement, the latter sale will be properly confirmed.

§ 657. Same—When to be made.—All sales made under a decree in mortgage foreclosure should be passed upon and either confirmed or set aside at the term of court

[94] *Birbeck Investment, Savings & Loan Co. of America* v. *Gardner*, 55 N. J. Eq. 632, 37 Atl. 767. (Gen. Stat. p. 2111).

[95] *Guarantee Trust & S. D. Co.* v. *Jenkins*, 40 N. J. Eq. (13 Stew.) 451, 2 Atl. 13.

[96] *Pendleton* v. *Spear*, 56 Ark. 194, 19 S. W. 578.

[97] 49 Kan. 114, 30 Pac. 175.

when the sale is made; yet it has been said that an order of confirmation of a foreclosure sale may be made at an adjourned term of the court, and at any reasonable time after the return of the order of sale, even though the return is made before the expiration of the full period permitted for that purpose.[98] And there is a decision by the Ohio Supreme Court holding that a motion to set aside or confirm a sale, made on the last days of the term during which the sale of the land is made, may properly be heard at the following term.[99] But an order confirming a sale of land under a decree of foreclosure, after the sale has been vacated and a resale properly made and confirmed, is void.[1]

In the case of Belter v. Lyon,[2] in opposition to the confirmation of a foreclosure sale, on affidavit that the parties agreed to the sale as a matter of form in order to cure a defective title, which allegations were denied, the court, upon the strength of a letter written before the sale, by an attorney representing both parties, held that a real sale was intended, but that if the plaintiff became purchaser, and within one year the mortgage debt should be paid, the plaintiff should reconvey, and that the defendant was not liable to account for rents.

§ 658. Same—Ratification by mortgagor.—It is thought that the purchaser at a mortgage foreclosure sale may acquire a valid title without formal confirmation by the court by a ratification of the sale and purchase by the mortgagor, in which case the mortgagor will be estopped to claim as against the purchaser. It has been held that a sale of land upon a mortgage foreclosure is ratified by a payment subsequently made by the mortgagor upon the balance of the judgment, and acceptance of a receipt stating that the payment was made

[98] *Nebraska Loan & T. Co.* v. *Hamer*, 40 Neb. 281, 58 N. W. 695.

[99] *Niles* v. *Parker*, 49 Ohio St. 370, 34 N. E. 735. See *ante*, § 619.

[1] *State ex rel. Kunz* v. *Campbell*, 5 S. D. 636, 60 N. W. 32.

[2] 102 N. Y. 725; 7 N. E. 821.

upon the amount remaining unpaid after crediting that realized by the sale.[3] And the supreme court of Minnesota, in the case of Jellison v. Halloran,[4] say that where a grantee from a purchaser at a void foreclosure sale takes and holds possession in good faith, the assent and acquiescence of the mortgagor may be implied from the attendant circumstances; such as the abandonment of the premises by him, and the neglect to assert any claim thereto after notice of the possession of such purchaser.

§ 659. Practice of confirming sales in New York.—Under the present practice in New York, and in some other states, if the proceedings in an action for foreclosure have been regular, the title to the property passes to the purchaser upon the delivery of the usual referee's deed,[5] and the purchaser will be entitled to possession of the premises on the production of such deed.[6] A formal confirmation of the sale is not required,[7] although it may be necessary to have the report confirmed, in order to perfect the title as between the mortgagor and the mortgagee.[8]

§ 660. Notice and application for confirmation.—In some states a confirmation of the sale in mortgage foreclosure proceedings can be regularly made only after notice[9] to the

[3] *Zable* v. *Masonic Sav. Bank* (Ky.) 16 S. W. 588.

[4] 44 Minn. 199, 46 N. W. 332.

[5] *Stimson* v. *Arnold,* 5 Abb. (N. Y.) N. C. 377; *Fort* v. *Burch,* 6 Barb. (N. Y.) 60; *Fuller* v. *Van-Geesen,* 4 Hill (N. Y.) 171, aff'd 1 How. App. Cas. (N. Y.) 240. Compare. *Terpenning* v. *Agricultural Ins. Co.* 14 Hun (N. Y.) 299.

[6] *Mitchell* v. *Bartlett,* 51 N. Y. 447; *Stimson* v. *Arnold,* 5 Abb. (N. Y.) N. C. 377; N. Y. Supreme Court Rule 61; *Brown* v. *Marzyck,* 19 Fla. 840; *Petty* v. *Mays,* 19 Fla. 652. The same doctrine formerly prevailed in Wisconsin. *Loomis* v. *Wheeler,* 18 Wis. 524. See *State ex rel. Wyandotte Lodge, No. 35, I. O. O. F.* v. *Evans,* 176 Mo. 310, 75 S. W. 914.

[7] *Ward* v. *Ward,* 131 Fed. 946.

[8] *Moore* v. *Shaw,* 15 Hun, (N. Y.) 428.

[9] See *Springer* v. *Law,* 185 Ill. 542, 76 Am. St. Rep. 57, 57 N. E. 435.

Irregularity in posting notice will

parties adversely interested, in order that they may show cause against it.[10] On an application for the confirmation of a referee's report of sale, the court should be satisfied that the sale was made in accordance with the requirements of the decree of foreclosure.[11] Where it appears from an examination of the report of the sale, that the proceedings of the officer making it were in all respects in conformity with the judgment and the provisions of the statute, and no extrinsic circumstances of equity appear, it is the duty of the court to confirm the sale.[12] The usual order *nisi,* providing that the sale stand confirmed, unless cause for setting it aside be shown within a specified time, is a sufficient order of confirmation;[13] and where there is no fraud or collusion, it cannot be attacked collaterally,[14] although it may be appealed from.[15]

§ 661. Objections to confirmation of sale.—A foreclosure sale will not become absolute, so long as objections duly taken to the report of the referee, or other officer making the sale, are on file and undisposed of.[16] Objection to con-

not defeat confirmation. *Farnsworth* v. *Hoover,* 66 Ark. 367, 50 S. W. 865.

[10] *Branch Bank* v. *Hunt,* 8 Ala. 876.

[11] *Moore* v. *Titman,* 33 Ill. 358, 366. See *Hill* v. *Pettit,* 66 S. W. 190.

Where a departure from the terms of the decree works no injustice to the parties, the sale will be confirmed nevertheless. *Old Colony Trust Co.* v. *Great White Spirit Co.* 181 Mass. 413, 63 N. E. 945.

[12] *New England Mortgage Security Co.* v. *Smith,* 25 Kan. 622, 624. See *Moore* v. *Pye,* 10 Kan. 246; *White-crow* v. *Whitewing,* 3 Kan. 276; *Challiss* v. *Wise,* 2 Kan. 193; *Koehler* v. *Ball,* 2 Kan. 160, 83 Am. Dec. 451.

Passumpsic Savings Bank v. *Maulick,* 60 Neb. 469, 83 Am. St. Rep. 539, 83 N. W. 672; *National Bank of Commerce* v. *Kinkead,* 61 Neb. 264, 85 N. W. 70. See *Worth* v. *Newlin,* 36 Atl. 30 (N. J. Eq.); *Adams Express Co.* v. *Hoey,* 48 Atl. 823 (N. J. Eq.)

[13] *Torrans* v. *Hicks,* 32 Mich. 307. See *Forest Lake Cemetery of Prince George's County* v. *Baker,* 113 Md. 529, 77 Atl. 853.

[14] *Torrans* v. *Hicks,* 32 Mich. 307; *McKeighan* v. *Hopkins,* 14 Neb. 361; *Carter* v. *Hyatt,* 76 Kan. 304, 91 Pac. 61; *Childs* v. *Ferguson,* 181 Fed. 795.

[15] *Koehler* v. *Ball,* 2 Kan. 160, 83 Am. Dec. 451; *Detroit F. & M. Ins. Co.* v. *Renz,* 33 Mich. 298.

[16] *Howard* v. *Bond,* 42 Mich. 131.

firmation however may be waived.[17] Jurisdiction to confirm a sale necessarily carries with it jurisdiction to overrule objections.[18]

Objections to the confirmation of a foreclosure sale must be made before confirmation.[19] And they must specifically point out the defects complained of.[20] Such irregularities as an error in the description in the report of sale,[21] or an irregularity in posting the notice where such defect was not prejudical to the interests of the parties,[22] or in fact any clerical errors, where the sale is otherwise in conformity with the decree,[23] will not be available as objections to the confirmation of the sale. The death of the purchaser before confirmation is not a material objection.[24] And the fact that a copy of the decree was not attached to the order of sale,[25] or that one of the parties to the sale violated an injunction regarding the property,[26] or that the sheriffs return was not made within sixty days,[27] are insufficient grounds for objection to the confirmation of the sale.

It is well settled that a sale will not be refused confirmation on the ground of inadequacy of price alone.[28] In Nebraska,

[17] *Muscatine Mortgage & Trust Co.* v. *McGaughey,* 58 Neb. 709, 79 N. W. 730.

[18] *Hutchinson* v. *Smidt,* 4 Neb. (Unof.) 850, 96 N. W. 601.

[19] *Gillespie* v. *Morsman,* 2 Neb. (Unof.) 162, 95 N. W. 1127.

[20] *Keene Five Cent Savings Bank* v. *Johnson,* 1 Neb. (Unof.) 69, 95 N. W. 504.

[21] *Stephenson* v. *Allison,* 123 Ala. 439, 26 So. 290.

[22] *Farnsworth* v. *Hoover,* 66 Ark. 367, 50 S. W. 865; *Strand* v. *Griffith,* 63 Wash. 334, 115 Pac. 512.

[23] *Passumpsic Savings Bank* v. *Maulick,* 60 Neb. 469, 83 Am. St. Rep. 539, 83 N. W. 672; *Primrose* v. *Wright,* 102 Md. 105, 62 Atl. 238.

[24] *Cronkhite* v. *Buchanan,* 59 Kan. 541, 68 Am. St. Rep. 379, 53 Pac. 863.

[25] *Gallentine* v. *Cummings,* 4 Neb. (Unof.) 690, 96 N. W. 178.

[26] *Union Savings Bank* v. *Lincoln Normal University,* 4 Neb. (Unof.) 70, 93 N. W. 408.

[27] *Philadelphia Mortgage & Trust Co.* v. *Buckstaff Bros. Mfg. Co.* 61 Neb. 54, 84 N. W. 416; *Philadelphia Mortgage & Trust Co.* v. *Hutchins,* 61 Neb. 2; *Amoskeag Savings Bank* v. *Robbins,* 53 Neb. 776, *Hartsuff* v. *Huss,* 2 Neb. (Unof.) 145, 95 N. W. 1070.

[28] *Springer* v. *Law,* 185 Ill. 542, 76 Am. St. Rep. 57, 57 N. E. 435; *Griswold* v. *Bardon,* 146 Wis. 35, 130 N. W. 952. See *Hoock* v. *Slo-*

where an appraisal is necessary before sale, mere difference of opinion as to the appraised value of the real estate,[29] or the fact that the appraisers were mistaken as to the value of the property,[30] or in fact any irregularity in the appraisement which is not prejudicial to the complaining party,[31] is not a valid objection to a confirmation of the sale. And it is held that an objection that prior liens were not deducted from the appraisement is untenable.[32]

Clerical errors in the report of the sale or order of ratification may be corrected,[33] or the return may be amended [34] on petition. But it has been held that where the plaintiff in an action to foreclose a mortgage purchases at the sale, a mistake made by the sheriff in entering of record the amount of his bid binds the purchaser, and he cannot be heard to deny the correctness of the record to the prejudice of a redeming junior lienholder.[35] Where exceptions are filed to the report of the sale made by the referee under a decree of foreclosure, it is not good practice in directing the correction of such report, to order that on filing the corrected report the said

man, 155 Mich. 1, 118 N. W. 489. See also *Zinkeisen* v. *Lewis,* 71 Kan. 837, 83 Pac. 28.

However in New Jersey it is held that the only office of a written objection to the confirmation of a sheriff's sale in foreclosure under the Act of March 12, 1880 (P. L. p. 255), and court rule 205, is to urge the overthrow of a sale upon the sole ground that the property did not bring the highest and best price that could be obtained for it in cash. *Oakley* v. *Shaw,* 69 Atl. 462 (N. J. Eq.)

[29] *Goldsmith* v. *Wright,* 62 Neb. 763, 87 N. W. 908; *Murphy* v. *Gunn,* 54 Neb. 670, 74 N. W. 1065.

[30] *Williams* v. *Taylor,* 63 Neb. 717, 89 N. W. 261; *Waite* v. *Malchow,* 63 Neb. 650, 88 N. W. 863; *Cole* v. *Willard,* 62 Neb. 839.

[31] *Union Savings Bank* v. *Lincoln Normal University,* 4 Neb. (Unof.) 70, 93 N. W. 408.

[32] *Nebraska Land, Stock-Growing & Investment Co.* v. *Cutting,* 51 Neb. 647, 71 N. W. 312; *Wood* v. *Clark,* 58 Neb. 115, 78 N. W. 396; *Green* v. *Paul,* 60 Neb. 7, 82 N. W. 98.

[33] *Walsh* v. *Colby,* 153 Mich. 602, 126 Am. St. Rep. 546, 117 N. W. 207; *Primrose* v. *Wright,* 102 Md. 105, 62 Atl. 238.

[34] *Diamond State Loan Asso.* v. *Collins,* 4 Pennewill (Del.) 77, 60 Atl. 861.

[35] *Morrison* v. *Spencer,* 72 Iowa, 445, 34 N. W. 200.

sale be in all respects confirmed; yet such an order of confirmation will not render the proceedings void.[36]

§ 662. Effect of confirmation of sale—Lapse of time equivalent to confirmation.—The report of a sale made under a decree of foreclosure in New York, may be confirmed by the court at special term.[37] A referee's report of sale becomes the act of the court when confirmed.[38] It seems that the confirmation of a sale made under a foreclosure, cures all irregularities in the proceedings to obtain the decree of sale, and in the conduct of the sale itself;[39] but it will not make good a defect arising from a want of jurisdiction of the court, either of the cause of action or of any of the parties interested; and in every instance such an accident or mistake as would generally invalidate a contract, will be a sufficient ground for setting a sale aside even after confirmation.[40]

It has been suggested that the lapse of a long period of time will be equivalent to a confirmation by the court of a sale made under a decree of foreclosure, where the purchaser has entered into possession of the property under the deed of

[36] *Ruggles* v. *National Bank of Centreville,* 43 Mich. 192.

[37] See *Swarthout* v. *Curtis,* 4 N. Y. 415, 45 Am. Dec. 345, 5 How. (N. Y.) Pr. 198.

[38] *McGowan* v. *Newman,* 4 Abb. (N. Y.) N. C. 80.

[39] *Wardrobe* v. *Leonard,* 78 Neb. 531, 126 Am. St. Rep. 619, 111 N. W. 134; *Terry* v. *Furth,* 40 Wash. 493, 82 Pac. 882; *Carpenter* v. *Zarbuck,* 74 Ark. 474, 86 S. W. 299; *Paule* v. *Scofield,* 80 Neb. 100, 113 N. W. 993; *Johnson* v. *Bartlett,* 50 Wash. 114, 96 Pac. 833; *Price* v. *Citizens' State Bank of Mediapolis,* 23 Okla. 723, 102 Pac. 800; *Ekblad, as adm'r. etc.* v. *Hanson,* 85 Kan. 541, 117 Pac. 1028; *Strand* v. *Griffith,* 63 Wash. 344, 115 Pac. 512.

The supreme court of the state of Nebraska, in the case of *Hooper* v. *Castetter* (45 Neb. 67, 63 N. W. 135) say that a purchaser of property at a mortgage foreclosure sale, who, after its confirmation, accepts a conveyance of such property, executed in pursuance of the sale, its confirmation, and the order of the court, and who obtains an order for a writ of possession therefor, thereby waives all errors and irregularities which may have occurred in making such sale, and all objections and exceptions to the order of confirmation.

[40] See *Dills* v. *Jasper,* 33 Ill. 262. See also *Jenkins Land & Live Stock Co.* v. *Attwood,* 80 Neb. 806, 115 N. W. 305.

the officer making the sale;[41] so that even in those states where confirmation by the court is required to complete the sale, if a deed is executed and delivered without confirmation, and the purchaser enters into possession, long continued possession under such deed will render the title valid. The confirmation of a sale of mortgaged premises on which there are growing crops, relates back to the date of the sale and entitles the purchaser to control the crops from that time, if no equities intervene, and if due notice has been given to interested parties.[42]

The mortgagor, though deprived of his title to the land sold, will be protected in his interests therein to the extent of requiring the price for which the land was sold, after paying the costs of the action and sale, to be applied in discharge of the mortgage debt. And in those cases where a mortgagor ratifies a sale of a part of the mortgaged premises by the mortgagee, he is entitled to have the purchase price applied upon the mortgage debt, although the mortgagee claims that the conveyance is defective.[43]

§ 663. Setting aside sale on application for confirmation—Discretion of court.—It is discretionary with the court whether a sale of mortgaged premises under a decree of foreclosure shall be set aside or confirmed;[44] and this power will be exercised as the circumstances of the case and the interests of the parties may demand.[45] Where an appli-

[41] See *Gowan* v. *Jones*, 18 Miss. (10 Smed. & M.) 164. See also *Hyde* v. *Heaton*, 43 Wash. 433, 86 Pac. 664; *Powell* v. *Pierce*, 134 N. W. 447. (Mich.)

[42] *Ruggles* v. *First Nat. Bank of Centreville*, 43 Mich. 192.

[43] *Lyon* v. *Dees*, 101 Ala. 700, 14 So. 564.

[44] *Goodell* v. *Harrington*, 76 N. Y. 547; *Hale* v. *Clawson*, 60 N. Y. 339; *Crane* v. *Stiger*, 58 N. Y. 625; *Buffalo Savings Bank* v. *Newton*, 23 N. Y. 160. See *ante*, chap. xxvi. *Griswold* v. *Bardon*, 146 Wis. 35, 130 N. W. 952. See *Koop* v. *Burris*, 95 Wis. 301, 70 N. W. 473.

[45] For circumstances justifying the denial or setting aside of confirmation see *Guthrie, as adm'r. etc.* v. *Guthrie*, 4 Neb. (Unof.) 365, 93 N. W. 1131; *Kremer, as ex'r. etc.* v. *Thwaits*, 105 Wis. 534, 81 N. W. 654; *Cooper* v. *Ryan*, 73 Ark.

cation is made for the confirmation of a sale, it must appear to the satisfaction of the court that the sale was conducted in accordance with the requirements of the decree,[46] and that due notice of the sale was given.[47] It must also appear that notice of the application for confirmation has been given to all parties who have appeared in the action, in order that they may have an opportunity to oppose it.[48]

It has been held under the Kansas statute, that upon an application for the confirmation of a sale in foreclosure proceedings, if it appears that the proceedings of the officer have, in all respects, been in conformity with the decree of the court and the provisions of the statute, and that there are no extrinsic circumstances of an equitable character requiring the interference of the court, the sale should be confirmed;[49] and that the court has no right against sound discretion to release the purchaser from his bid or to permit a tender to be made by the mortgagor after the sale.[50]

§ 664. Enforcing sale against purchaser.—A bid by the purchaser of land sold under a decree in foreclosure is

37, 83 S. W. 328; *Slack* v. *Cooper,* 219 Ill. 138, 76 N. E. 84; *Baldwin* v. *Burt,* 54 Neb. 287, 74 N. W. 594; *Clement* v. *Ireland,* 129 N. C. 220, 39 S. E. 838; *Stark Bros.* v. *Royce,* 44 Wash. 287, 87 Pac. 340; *Tierney* v. *Oleson,* 90 Neb. 177, 133 N. W. 191. See also *Hill* v. *Pettit,* 66 S. W. 190. (Ky.)

In the following cases the facts were considered insufficient to pre-
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vent confirmation. *Stirling* v. *McLane,* 103 Md. 47, 63 Atl. 205; *Murphy* v. *Gunn,* 54 Neb. 670, 74 N. W. 1065; *McCarty* v. *Hamburger, as ex'r, etc.* 112 Md. 40, 75 Atl. 964; *Davis* v. *Simon,* 55 So. 548 (Fla.) See *Meux* v. *Trezevant,* 132 Cal. 487, 64 Pac. 848; *Aukam* v. *Zantzinger,* 98 Md. 380, 56 Atl. 820; *Nye* v. *Rogers,* 55 Neb. 353, 75 N. W. 854. See also *Keeble* v. *McLemore,* 64 S. W. 305 (Tenn. Ch. App.)

[46] *Moore* v. *Titman,* 33 Ill. 358, 366.

[47] *Perrien* v. *Fetters,* 35 Mich. 233.

[48] *Branch Bank* v. *Hunt,* 8 Ala. 876; *Williamson* v. *Berry,* 49 U. S. (8 How.) 495, 546, 12 L. ed. 1170.

[49] *New England Mortgage Security Co.* v. *Smith,* 25 Kan. 622; *Moore* v. *Pye,* 10 Kan. 246, 250; *Challiss* v. *Wise,* 2 Kan. 193.

[50] *New England Mortgage Security Co.* v. *Smith,* 25 Kan. 622.

a contract which becomes binding upon the bidder after acceptance by the court, and cannot be withdrawn or changed except under such circumstances as would justify the rescission or reformation of other contracts.[51] Where there is no defect in the title to property sold under a decree of foreclosure, if the purchaser refuses or neglects to pay the purchase money and to take the title, or otherwise to comply with the terms of sale, he may be compelled to do so by an order of the court, for the purchaser at a foreclosure sale becomes a *quasi* party to the suit, and subjects himself to the jurisdiction of the court, so far as the completion of the sale is concerned,[52] and refusal to obey such order will subject the purchaser to punishment for contempt.[53]

A mortgagee who purchased land at his own sale under license of the court, is chargeable with his bid where a resale is afterwards had, by consent of the parties, without the court's license, for a less amount.[54]

The supreme court of Maryland, in the case of Bowdoin v. Hammond,[55] held that a mortgagee who purchases the mortgaged property at a foreclosure sale is not required, where the

[51] *Nebraska Loan and T. Co.* v. *Hamer,* 40 Neb. 281, 58 N. W. 695. See *Continental Insurance Co.* v. *Reeve,* 135 App. Div. 737, 119 N. Y. Supp. 901.

[52] *Cazet* v. *Hubbell,* 36 N. Y. 677. See *Miller* v. *Collyer,* 36 Barb. (N. Y.) 250; *Graham* v. *Bleakie,* 2 Daly (N. Y.) 55; *Brasher* v. *Cortlandt,* 2 Johns. Ch. (N. Y.) 505; *Requa* v. *Rea,* 2 Paige Ch. (N. Y.) 339; *Coulter* v. *Henderson,* 27 Miss. 685, 689; *Ogilvie* v. *Richardson,* 14 Wis. 157; *Wood* v. *Mann,* 3 Sumn. C. C. 318; *Casamajor* v. *Strole,* 1 Sim. & S. 381; *Lansdown* v. *Elderton,* 14 Ves. 512; *Boorum* v. *Tucker,* 51 N. J. Eq. (6 Dick.) 135, 26 Atl. 456.

Release of a purchaser upon foreclosure sale, of one division of a railroad from his bid, which he made with reasonable hope of completion, and failed to complete only from lack of funds, is no reason for releasing an organization committee from a bid upon the other division, which they had failed to complete merely because they concluded the price was high, where unsecured creditors will derive an advantage from the contract to purchase deliberately made by such company. *Central Trust Co.* v. *Cincinnati, J. & M. R. Co.* 58 Fed. 500.

[53] *Burton* v. *Linn,* 21 App. Div. 609, 47 N. Y. Supp. 835.

[54] *Whitehead* v. *Whitehurst,* 108 N. C. 458, 13 S. E. 166.

[55] 79 Md. 173, 28 Atl. 769.

property is destroyed by fire after the sale, before its ratification by the court, to pay the full amount of his bid upon allowing the sale to be ratified without having it diminished by the damage done by the fire, the amount of which is paid by the insurance company, where the property is insured for the express purpose of indemnifying the mortgagee against loss.

In a case where the judgment of sale was in the ordinary form, making no reference, however, to contingent outstanding interests, but a notice thereof was given at the sale, which was made subject to such interests, it was held that an order compelling the purchaser to complete such purchase was proper; that an amendment of the judgment was not necessary, inasmuch as it furnished adequate authority for the sale of the property covered by the mortgage; and that no wrong was done to the purchaser in compelling him to pay for exactly what he brought.[56]

The fact that the party making the purchase acted merely as the agent of another person, will not relieve him from liability, if he made the bid in his own name.[57] By becoming a purchaser at a foreclosure sale, the bidder subjects himself to the jurisdiction of the court and may be compelled to comply with the conditions of the sale;[58] and neither mere lapse of time nor the death of one of the parties will be a bar to such relief, if the purchaser has taken possession of the premises.[59]

[56] *Cromwell* v. *Hull,* 97 N. Y. 209.

[57] *Ogilvie* v. *Richardson,* 14 Wis. 157.

[58] *Andrews* v. *O'Mahoney,* 112 N. Y. 567, 572, 20 N. E. 374.

See *Cazet* v. *Hubbell,* 36 N. Y. 677, 680; *Miller* v. *Collyer,* 36 Barb. (N. Y.) 253; *Hegeman* v. *Johnson,* 35 Barb. (N. Y.) 200; *Matter of Davis,* 7 Daly (N. Y.) 7, 8; *Willets* v. *Van Alst,* 26 How. (N. Y.) Pr. 325.

A purchaser at a foreclosure sale subjects himself to the jurisdiction of the court in the foreclosure suit, and may be compelled to comply with the conditions of sale; neither mere lapse of time nor the death of one of the parties, is a bar to such relief, where the purchaser has gone into possession. *Cazet* v. *Hubbell,* 36 N. Y. 677.

[59] *Cazet* v. *Hubbell,* 36 N. Y. 677. See *Mecrhants' Bank* v. *Thomson,* 55 N. Y. 7.

In some states, before a party purchasing at a foreclosure sale can be required to complete his purchase, he must be accepted as a purchaser by the court and the sale must be confirmed.[60]

The proper tribunal to enforce the purchaser's undertaking to complete his purchase, is the court which made the decree of sale.[61] The application for that purpose may be made by motion. Where the purchaser neglects to comply with the terms of the sale within a reasonable time, the court will not give him the benefit of his purchase if a resale will be more beneficial to the parties;[62] neither will the court compel him to take the title where the parties to the action have delayed the completion of the sale so long that he will lose the benefit of his purchase.[63]

§ 665. Proceedings where purchaser refuses or neglects to complete his purchase.—Where the purchaser at a mortgage foreclosure sale neglects or refuses to complete his contract according to the terms of sale, a resale may be ordered, in which case such purchaser will be liable for the costs of such resale, and for the deficiency, if any.[64] Where a resale is ordered on refusal of the purchaser to complete his contract because of irregularities in the foreclosure, he will

[60] *Schaefer* v. *O'Brien,* 49 Md. 253.

[61] See *Wood* v. *Mann,* 3 Sumn. C. C. 318.

[62] *Jackson* v. *Edwards,* 7 Paige Ch. (N. Y.) 386.

[63] *Jackson* v. *Edwards,* 7 Paige Ch. (N. Y.) 386. See *Merchants' Bank* v. *Thomson,* 55 N. Y. 7.

[64] *Riggs* v. *Purcell,* 74 N. Y. 370; *Miller* v. *Collyer,* 36 Barb. (N. Y.) 250; *Graham* v. *Bleakie,* 2 Daly (N. Y.) 55; *Wood* v. *Mann,* 3 Sumn. C. C. 318; *Whitehead* v. *Whitehurst,* 108 N. C. 458, 13 S. E. 166. See *Rowley* v. *Feldman,* 74 App. Div. 492, 77 N. Y. Supp. 453; *State Bank* v. *Wilchinsky,* 128 App. Div. 485, 112 N. Y. Supp. 1002; *Dunlap* v. *Mulry,* 40 Misc. 131, 81 N. Y. Supp. 260; *Smith* v. *Cunningham,* 69 N. J. Eq. 622, 61 Atl. 561. See also *Phelan, as rec'r, etc.* v. *Downs,* 59 App. Div. 282, 69 N. Y. Supp. 375; *Egan* v. *Buellesbach,* 116 App. Div. 306, 101 N. Y. Supp. 476; *Richardson* v. *Searles,* 37 Misc. 33, 74 N. Y. Supp. 771. But see *Leslie* v. *Saratoga Brewing Co.* 59 App. Div. 400, 69 N. Y. Supp. 581; *Nesbit* v. *Knowlton Hall Co.* 45 Misc. 510, 92 N. Y. Supp. 761; *State Bank of Deep River* v. *Brown,* 128 Iowa, 665, 105 N. W. 49.

not be charged with the expenses of correcting such irregularities.[65]

A resale ordered in such a case should be upon the same terms upon which the first sale was made; and where the terms of the resale differ materially from those of the first sale, the purchaser at the first sale will be relieved from all liability for any deficiency on the second sale.[66] A purchaser who neglects to complete his contract, or who wrongfully refuses to do so, will be chargeable with the taxes imposed subsequently to his refusal to complete the purchase and before the resale, such taxes being within the spirit and the letter of the contract which throws upon such purchaser the "difference in costs and expenses on the resale," because such additional taxes are legitimately a part of the difference between the sums realized.[67]

The supreme court of Utah, in the case of Kershaw v. Dyer,[68] say that on failure of a bidder at a foreclosure sale to comply with his bid on one of two lots offered for sale, the court may order a sale of the other lot, without either confirming the first sale or ordering a resale of the first lot at the risk of the delinquent bidder.

§ 666. Enforcing sale by attachment against purchaser.—Where the purchaser is responsible the court may summarily order him to complete his purchase; and on his neglect or refusal so to do, it may issue an attachment against his person on motion in the action in which the decree of sale was granted.[69] This is the proper practice

[65] *Knight* v. *Moloney*, 4 Hun (N. Y.) 33.

[66] *Riggs* v. *Pursell*, 74 N. Y. 370; *Baecht* v. *Hevesy*, 115 App. Div. 509, 101 N. Y. Supp. 413.

[67] *Ruhe* v. *Law*, 8 Hun (N. Y.) 251. See also *Chase* v. *Chase*, 15 Abb. (N. Y.) N. C. 91.

[68] 6 Utah, 239, 24 Pac. 621.

[69] *Merchants' Bank* v. *Thomson*, 55 N. Y. 7; *Cazet* v. *Hubbell*, 36 N. Y. 677; *Miller* v. *Collyer*, 36 Barb. (N. Y.) 250; *Graham* v. *Bleakie*, 2 Daly (N. Y.) 55; *Brasher* v. *Cortlandt*, 2 Johns. Ch. (N. Y.) 505; *Requa* v. *Rea*, 2 Paige Ch. (N. Y.) 339; *Anderson* v. *Foulke*, 2 Harr. & G. (Md.) 346; *Richardson* v.

where there is reason to believe that the purchaser is acting in collusion with the mortgagor to hinder or prevent the sale.[70]

The fact that the plaintiff is entitled to have the property resold on failure of the purchaser to complete the purchase, or that he may bring an action against the purchaser for damages, will not deprive the court of the right to enforce the performance of the terms of sale by attachment; and while there is an option as to remedy, such option lies with the court or with the mortgagee, and not with the purchaser.[71] And it has ever been held, where the purchaser has made the cash payment required and given a bond or other security for the deferred payments, and the sale has been confirmed by the court, that upon the failure of the purchaser to pay the bond, he may be required to show cause why the land should not be resold for the payment of the purchase money; and upon the return of such order a decree may be made for the sale of the land.[72]

§ 667. When bidder will be excused from completing his purchase.—It is a well established rule that a purchaser at a foreclosure sale will not be compelled to accept a doubtful title,[73] nor will he be compelled to accept a mere

Jones, 3 Gill. & J. (Md.) 163, 22 Am. Dec. 393; *Wood* v. *Mann,* 3 Sumn. C. C. 318; *Lansdown* v. *Elderton,* 14 Ves. 512; *Savile* v. *Savile,* 1 P. Wms. 745.

[70] *Graham* v. *Bleakie,* 2 Daly (N. Y.) 55, 60.

[71] *Wood* v. *Mann,* 3 Sumn. C. C. 318. See *Cazet* v. *Hubbell,* 36 N. Y. 677; *Dunlop* v. *Mulry,* 40 Misc. 131, 81 N. Y. Supp. 260.

[72] *Clarkson* v. *Read,* 15 Gratt. (Va.) 288. But see *Richardson* v. *Jones,* 3 Gill. & J. (Md.) 163, 22 Am. Dec. 393, decided in 1831, where it was held that when a bond has been given and the sale confirmed, the purchaser and his sureties cannot be compelled to pay the bond in a summary way under an order by the court of chancery. The court held the bond to be a legal contract to be enforced in an action at law.

[73] *Scripture* v. *Morris,* 38 App. Div. 377, 56 N. Y. Supp. 476.

See *Beckenbaugh* v. *Nally,* 32 Hun (N. Y.) 160; *Piser* v. *Lockwood,* 30 Hun (N. Y.) 6; *Lockman* v. *Reilley,* 29 Hun (N. Y.) 434; *Morris* v. *Mowatt,* 2 Paige Ch. (N. Y.) 586, 22 Am. Dec. 661;

equitable estate.[74] The court will not compel him to take a title which may expose him to a suit either at law or in equity.[75] A marketable title must be offered to him.[76] Consequently, if there is a defect in the title which cannot be remedied, or if there is a well-founded doubt as to the validity of the title, the court will not require a purchaser to complete his purchase.[77] But if the defects in the title can be corrected, and the purchaser is tendered a confirmatory deed which remedies such defects, he cannot refuse to accept the title.[78]

The purchaser at a foreclosure sale cannot be compelled to complete his purchase, if the court had no jurisdiction of the subject matter of the action, or the proceedings are for any reason void, or a necessary defendant has not been properly served with the summons.[79] Where by the terms of

Turner v. *Clay,* 3 Bibb. (Ky.) 52; *Perkins* v. *Wright,* 3 Harr. & McH. (Md.) 326; *Butler* v. *O'Hear,* 1 Desaus. (S. C.) Eq. 382, 1 Am. Dec. 671; *Thompson* v. *Tod,* 1 Pet. C. C. 380; *Stapylton* v. *Scott,* 16 Ves. 272; *Shapland* v. *Smith,* 1 Bro. C. C. 75; *Cooper* v. *Denne,* 1 Ves. Jr. 565, 4 Bro. C. C. 80; *Lowes* v. *Lush,* 14 Ves. 547; *Franklin* v. *Brownlow,* 14 Ves. 550.

[74] *Abel* v. *Heathcote,* 2 Ves. Jr. 98.

[75] *Morris* v. *Mowatt,* 2 Paige Ch. (N. Y.) 586, 22 Am. Dec. 661; *Cooper* v. *Dennie,* 1 Ves. Jr. 565, 4 Bro. C. C. 80, 86.

[76] See *post,* § 676.

[77] *Seymour* v. *DeLancy,* Hopk. Ch. (N. Y.) 436, 16 Am. Dec. 552; *Morris* v. *Mowatt,* 2 Paige Ch. (N. Y.) 586, 22 Am. Dec. 661; *Jackson* v. *Edwards,* 22 Wend. (N. Y.) 498, 509. See *Graham* v. *Bleakie,* 2 Daly (N. Y.) 55; *Banister* v. *Way,* Dick. 686; *Harding* v. *Harding,* 4 Myl. & C. 514; *Saunders* v. *Grey,* 4 Myl. & C. 515; *Tanner* v. *Radford,* 4 Myl. & C. 518; *Hodder* v. *Ruffin,* 1 Ves. & B. 544.

Ray v. *Adams,* 44 App. Div. 173, 60 N. Y. Supp. 663; *Timmermann* v. *Cohn,* 97 N. E. 589 (N. Y.) See *Moir, as trustee, etc.* v. *Flood,* 66 App. Div. 544, 73 N. Y. Supp. 364; *Mason* v. *Scott,* 50 App. Div. 463, 64 N. Y. Supp. 68. See *post,* § 676.

[78] *Graham* v. *Bleakie,* 2 Daly (N. Y.) 55. See also *Murphy* v. *Smith,* 61 App. Div. 574, 70 N. Y. Supp. 786; *Platt, as trustee, etc.* v. *Finck,* 60 App. Div. 312, 70 N. Y. Supp. 74.

[79] *Verdin* v. *Slocum,* 71 N. Y. 345, reversing 9 Hun (N. Y.) 150; *Cook* v. *Farren,* 34 Barb. (N. Y.) 95, 21 How. (N. Y.) Pr. 286, 12 Abb. (N. Y.) Pr. 359. See *Alexander* v. *Greenwood,* 24 Cal. 505; *McKernan* v. *Neff,* 43 Ind. 503; *Ely* v. *Mathews,* 58 Misc. 365, 110 N. Y. Supp. 1102; *Empire City Savings Bank* v. *Silleck,* 98 App. Div. 139, 90 N. Y. Supp. 561. See also *Hodges* v. *Walker, as trustee,* 76 App. Div. 305, 78 N. Y. Supp. 447.

a sale under a decree of foreclosure the property was to be sold free from all incumbrances, and all taxes and assessments were to be paid out of the purchase money, but it afterwards appeared that an assessment for a large amount against the property for opening and macademizing an avenue through the premises had not in fact been confirmed by the city at the time of the sale, although the work had been completed more than three years before the sale; it was held that the purchasers at the sale, who had bid off the property under the belief that such assessment had been confirmed, and that they would receive their lots discharged of the expenses thereof, were not bound to take the property subject to the assessment for such improvements.[80]

And it has been held that where land is sold by a referee under a decree of foreclosure, the court will not require the purchaser to complete the purchase unless he will obtain such an interest in the premises and in the buildings thereon, as he had a right to expect from the terms of the sale.[81] But where he has full knowledge of the condition of the premises he will be bound by his purchase.[82]

It is said to be the correct practice in Illinois for the officer exposing the property for sale to report the largest bid to the court for its approval, and that although the bid may have been accepted by the officer making the sale, yet a resale of the property and the approval by the court of such resale will operate as a rejection of the first bid, and end the liability of the bidder.[83]

A purchaser at a foreclosure sale under a mortgage will be relieved from the purchase, where the title decreed to be sold does not correspond with the title as stated in the mortgage and pleadings.[84] And a New York court has held that a

[80] *Post* v. *Leet,* 8 Paige Ch. (N. Y.) 337.

[81] *Seaman* v. *Hicks,* 8 Paige Ch. (N. Y.) 655.

[82] *Kingsland, as trustee, etc.* v. *Fuller,* 157 N. Y. 507, 52 N. E. 562.

[83] *Dills* v. *Jasper,* 33 Ill. 262.

[84] *Mitchell* v. *Kinnard* (Ky.) 29 S. W. 309.

purchaser at a mortgage foreclosure sale will not be required to complete the purchase, where the title of the mortgagor came through the will of a descendant who devised the land in remainder and one of whose executors conveyed to the mortgagor, and neither the remainderman nor the heirs were made parties to the foreclosure suit, and it is doubtful whether the mortgagor ever had title.[85]

The supreme court of New York, in the case of Crocker v. Gallner,[86] say that a purchaser at foreclosure sale will not be compelled to complete his purchase, although a good title can be given, at the instance of the owner of the equity of redemption, where, pending a motion to compel completion of the purchase, the mortgage was brought by one who had commenced suit and filed a *lis pendens* to enforce a contract made by such owner restrictive of the use of the mortgaged premises, and the motion was thereupon withdrawn so far as the plaintiffs were concerned. And the same court, in the case of Bradley v. Leahy,[87] say that where the terms of sale under foreclosure of a second mortgage state that the sale is made subject to the first mortgage, when in fact the first mortgage has already been foreclosed and a decree of sale entered, the purchaser will not be compelled to complete the purchase, although the attorney and auctioneer testify that at the time of the sale a statement was made by the auctioneer that a prior mortgage was then in process of foreclosure, which statement the purchaser stated that he did not hear. But in the case of O'Connor v. Felix,[88] it is held that a purchaser at a foreclosure sale will not be relieved of his bid on the ground that the mortgagor has served on him an affidavit that he was not served with summons, where the referee who

[85] *Phillips* v. *Wilcox* (N. Y. Super. Ct.) 12 Misc. (N. Y.) 382, 33 N. Y. Supp. 561, 67 N. Y. S. R. 350.

[86] 47 N. Y. S. R. 887, 20 N. Y. Supp. 17; appeal dismissed in 135 N. Y. 662, 32 N. E. 114, 4 Silv. N. Y. 650, 48 N. Y. S. R. 569.

[87] 54 Hun (N. Y.) 390, 7 N. Y. Supp. 461, 27 N. Y. S. R. 321.

[88] 87 Hun (N. Y.) 179, 33 N. Y. Supp. 1074, 67 N. Y. S. R. 777.

was appointed to take the testimony finds that he was served, because the only way in which the question of service may be attacked is by a direct motion in the action, on which the same result must follow.

§ 668. Defects of title unknown to purchaser at time of sale.—When there is a defect in the title to the premises, which is unknown to the purchaser at the time of the sale, he will not ordinarily be compelled to complete the purchase.[89] An outstanding inchoate right of dower in the premises is such a defect as will excuse a purchaser from completing the sale.[90] So also is a prior mortgage or other lien or charge upon the premises.[91] When a purchaser is discharged from all liability to complete his purchase, because of defects in the title of which he had no knowledge at the time of the sale, he will be entitled to be re-imbursed for all proper disbursements connected with his purchase, which include the deposit made by him at the time of his purchase, with interest from the time it was made, and the expenses of examining the title, together with the costs of the motion for repayment, if he was put to such costs.[92]

This payment is to be made out of the funds of the case, if there are any.[93] If there are no funds of the case in court, the plaintiff will be ordered to pay the purchaser the amount of such disbursements;[94] he may also recover the amount thereof in a direct suit or upon a resale.[95] It has been said that this

[89] *Fryer* v. *Rockefeller*, 63 N. Y. 268; *Merchants' Bank* v. *Thomson*, 55 N. Y. 7.

[90] *Simar* v. *Canaday*, 53 N. Y. 298, 13 Am. Rep. 523; *Mills* v. *VanVoorhies*, 20 N. Y. 412; *Shiveley's Admrs.* v. *Jones*, 6 B. Mon. (Ky.) 274; *Fitts* v. *Hoitt*, 17 N. H. 530.

[91] *Hirsch* v. *Livingstone*, 3 Hun (N. Y.) 9, 48 How. (N. Y.) Pr. 243; *Seaman* v. *Hicks*, 8 Paige Ch. (N. Y.) 655.

[92] *Raynor* v. *Selmes*, 52 N. Y. 579; *Morris* v. *Mowatt*, 2 Paige Ch. (N. Y.) 586, 593, 22 Am. Dec. 661.

[93] *Reynolds* v. *Blake*, 2 Sim. & S. 117; *Attorney-General* v. *Newark*, 8 Sim. 71.

[94] *Smith* v. *Nelson*, 2 Sim. & S. 557.

[95] *Berry* v. *Johnson*, 2 Younge & Coll 564.

doctrine rests upon the ground suggested by Lord Elden in Lechmere v. Brasier,[96] that the suitor must pay for the mistakes of the court.[97] But when a defect in the proceedings results from the plaintiff's negligence in omitting to make all persons interested in the mortgaged property parties to the suit, such expenses cannot be deducted from the surplus money arising from a second sale, but must be paid by the party at fault.[98]

The supreme court of New York, in the case of Van Rensselaer v. Bull,[99] hold that a purchaser at a mortgage foreclosure sale in which the mortgage, judgment, and terms of sale read aloud before the sale described a tract of land, together with the interest of the mortgagor in the bed of a creek forming one of the boundaries of such tract, is not entitled to be relieved of his purchase because of a defect in the title to what was the bed of such creek at the time the mortgage was executed and has since become made land. And the same court, in the later case of Mutual Life Insurance Company v. Voorhis,[1] say that upon foreclosure the mortgagee of upland does not obtain title to land under water in front of the upland, granted to the mortgagor by the state after the execution of the mortgage, and not included in the description of the mortgage.[2]

§ 669. **Defects of title existing prior to the mortgage under foreclosure.**—A purchaser at a sale under a decree of foreclosure will not be relieved from his bid on account of defects in the title to the property, of which he had notice at the time of such sale;[3] and the court will not permit him

[96] 2 Jac. & W. 287.

[97] See *Raynor* v. *Selmes*, 52 N. Y. 579.

[98] *Raynor* v. *Selmes*, 52 N. Y. 579, reversing 7 Lans. 440.

[99] 17 Supp. 117, 43 N. Y. S. R. 340.

[1] 71 Hun (N. Y.) 117, 24 N. Y. Supp. 529, 53 N. Y. S. R. 874.

[2] See *ante*, § 291.

[3] *O'Sullivan* v. *Buckner*, 107 Md. 33, 68 Atl. 356.

to abandon his bid, if the title of which he had knowledge is delivered to him.

In the case of Riggs v. Pursell,[4] the court held that if "every minute and critical objection to a judicial sale is suffered to prevail, it will be attended with much inconvenience and embarrassment. A purchaser claiming to be discharged from his contract, should, therefore, make out a fair and plain case for relief, and it is not every defect in the subject sold, or variation from the description, that will avail him. He will not be suffered to speculate at such sales and, if he happens to make a bad bargain, to repudiate it or abandon his purchase on some nice but immaterial objection. If he gets substantially what he bargains for, he must complete the purchase and take his deed; and in some cases the court will compel him to take a compensation for any deficiency; the court will weigh the object and inducements of the purchaser, and looking to the merits and substantial justice of each case, if the sale be fair, relieve or not from the purchase according as the character of the transaction and circumstances may appear to require." [5]

It is said by the supreme court of South Carolina, in the case of Carolina Savings Bank v. McMahon,[6] that the purchaser on a foreclosure sale is not relieved from his duty to complete his purchase by defects in the probate of a deed constituting part of the chain of title, where the original conveyance, with proof of the handwriting of the grantor and subscribing witnesses, and that they are all dead, is tendered him before his rejection of the title.

§ 670. When purchaser presumed to know condition of title.—A purchaser buys the title of the mortgagor as it existed at the time of the execution of the mortgage, and nothing more; and, since the foreclosure cuts off only the

[4] 66 N. Y. 193.

[5] See *King* v. *Bardeau*, 6 Johns. Ch. (N. Y.) 38, 10 Am. Dec. 312; *Weems* v. *Brewer*, 2 Harr. & G. (Md.) 390.

[6] 37 S. C. 309. 16 S. E. 31

equity of redemption, the purchaser acquires only the title of the mortgagee and the mortgagor at the time of the execution of the mortgage.[7] The purchaser takes the risk as to all claims affecting the title to the property which existed prior to the execution of the mortgage under foreclosure.[8]

Where a mortgage purports to cover an estate in fee, while in fact it covers only a leasehold interest, and the judgment, following the terms of the mortgage, erroneously directs a sale of the fee title, the purchaser will be held bound by such sale, if he had notice of the leasehold title of the mortgagor at the time of the sale, because the sale under the judgment of foreclosure can transfer only the title which the mortgagor had.[9]

The purchaser at a foreclosure sale is presumed to know the condition of the title on which he bids. Where a mortgage, which contains no covenant of warranty, is foreclosed, and the relation of mortgagor and mortgagee is extinguished by a sale of the mortgaged premises, the mortgagor will be under no obligation to protect the title of the purchaser; nor will he be precluded from subsequently acquiring an outstanding or paramount title.[10] The purchaser is chargeable with notice of all the defects and irregularities in the foreclosure proceedings which appear of record,[11] and is bound to take notice of the fact that a junior mortgagee, or other subsequent lienholders of record, was not made a party to the foreclosure, and that for that reason he has a right to redeem from the sale.[12]

[7] See *post*, §§ 682, 683.

[8] See *Riggs* v. *Pursell*, 66 N. Y. 193; *Fryer* v. *Rockefeller*, 63 N. Y. 268, affirming 4 Hun (N. Y.) 800; *Holden* v. *Sackett*, 12 Abb. (N. Y.) Pr. 473; *Strong* v. *Waddell*, 56 Ala. 471; *Boggs* v. *Fowler*, 16 Cal. 559, 76 Am. Dec. 561; *Osterberg* v. *Union Trust Co.* 93 U. S. (3 Otto) 424, 23 L. ed. 964. See N. Y. Code Civ. Proc. § 1632.

[9] *Graham* v. *Bleakie*, 2 Daly (N. Y.) 55.

[10] *Jackson* v. *Littell*, 56 N. Y. 108.

[11] See *Griffin* v. *Durfee*, 29 Ind. App. 211, 64 N. E. 237.

[12] *McKernan* v. *Neff*, 43 Ind. 503. See *Piel* v. *Brayer*, 30 Ind. 333, 95 Am. Dec. 699; *Alexander* v. *Greenwood*, 24 Cal. 505; *Horr* v. *Herrington*, 22 Okla. 590, 20 L.R.A.(N.S.) 47, 98 Pac. 443.

And where a purchaser at a sale under a decree of foreclosure has paid the purchase money and the sale has been confirmed, he cannot call upon the mortgagee, in the absence of any express covenants by him, to return the money received in satisfaction of the mortgage debt, or any part of it, on the ground that the title to the property was defective, and that he has been forced to pay a large sum of money to perfect it; his only remedy will be on the covenants in the several conveyances preceding the conveyance to the mortgagee.[13]

It has been held that a purchaser at a mortgage foreclosure sale cannot refuse to complete his purchase on account of defective title or prior incumbrances, where the true condition of the title is fully set out in the pleadings and the record of the proceedings under which the sale is made, as he is chargeable with notice of the material facts contained therein.[14] He is also bound by a condition that the title shall commence with a certain conveyance, and that the prior title, whether appearing in any abstracted document or not, shall not be required to be investigated or objected to, upon an application for the return of his deposit, although he has discovered *aliunde* that there is a question whether the grantor in such conveyance had more than a life estate.[15] It was held in the case of Calder v. Jenkins,[16] that a purchaser at a sale under foreclosure of a prior mortgage in which the wife of the mortgagor did not join is not relieved from liability to complete his purchase by the fact that the deed of the referee upon a sale under a second mortgage, in which she did join, is not recorded, where the sale was confirmed upon a report of sale stating all the facts.

§ 671. Irregularities prior to judgment excusing purchaser.—When all persons having any claim upon the

[13] *McMurray* v. *Brassfield*, 10 Heisk. (Tenn.) 529.

[14] *Hooper* v. *Castetter*, 45 Neb. 67, 63 N. W. 135.

[15] *Re Marsh*, 64 L. J. Ch. (N. S.) 255.

[16] 16 N. Y. Supp. 797, 42 N. Y. S. R. 38.

property are made parties to the action and the court has jurisdiction of the case, the purchaser will be required to take the title, even though the court may have made an erroneous decision upon the merits, for the reason that no one except the parties to the action could, in such a case, question the purchaser's title, and they are bound by the judgment.[17] Where a purchaser at a sale under a decree of foreclosure is himself a party to the action, he cannot question the regularity of the decree. If such a decree is irregular, so that the purchaser cannot obtain a good title to the premises, his most direct remedy will be an application to the court on motion to have the decree set aside.[18]

After the confirmation of the sale, errors in the decree or in the proceedings under it, will afford no ground for relief.[19] But where the court had no jurisdiction of the action, the purchaser may have relief, even after confirmation, because of the defect arising out of such want of jurisdiction.[20] After a decree and sale in a mortgage foreclosure, the validity of the mortgage cannot be questioned,[21] for where the decree is valid and the sale of the land and the execution of the deed are regular, the purchaser at a foreclosure sale acquires a good title to the premises, although, as against the mortgagor, the decree under which the sale was made may be erroneous.[22]

Where the order of sale under a decree of foreclosure was issued without authority, this irregularity will not affect the title of a purchaser without notice thereof, if he has paid the purchase money and received his deed.[23]

[17] *DeForest* v. *Farley,* 62 N. Y. 628; *Blakeley* v. *Calder,* 15 N. Y. 617; *Gaskin* v. *Anderson,* 55 Barb. (N. Y.) 259, 7 Abb. (N. Y.) N. S. 1; *Graham* v. *Bleakie,* 2 Daly (N. Y.) 55; *Ogden* v. *Walters,* 12 Kan. 282; *Mills* v. *Ralston,* 10 Kan. 206.

[18] *Concklin* v. *Hall,* 2 Barb. Ch. (N. Y.) 136.

[19] *Daniel* v. *Leitch,* 13 Gratt. (Va.) 195; *Worsham* v. *Hardaway's Adm'r,* 5 Gratt. (Va.) 60; *Threlkelds* v. *Campbell,* 2 Gratt. (Va.) 198, 44 Am. Dec. 384.

[20] *Boggs* v. *Hargrave,* 16 Cal. 559, 76 Am. Dec. 561.

[21] *Gest* v. *Flock,* 2 N. J. Eq. (1 H. W. Gr.) 108. See *Welche* v. *Schoenberg,* 45 Misc. 126, 91 N. Y. Supp. 880.

[22] *Splahn* v. *Gillespie,* 48 Ind. 397.

[23] *Splahn* v. *Gillespie,* 48 Ind 397.

§ 672. Enforcement of purchase where there are lunatic defendants.—A decree of foreclosure, renderd upon the personal service of the summons in the action upon persons alleged to be insane,[24] but against whom no proceedings have been instituted to ascertain their mental condition, is neither erroneous nor irregular,[25] and a purchaser at a sale made pursuant to such a decree will not be excused from taking the title,[26] because an obligation entered into by an insane person to secure borrowed money of which he has had the benefit is valid, when the mortgagee acted in good faith and without knowledge or information of the mental condition of the mortgagor.[27]

Thus, it was held in Prentiss v. Cornell,[28] that a purchaser at a foreclosure sale will be compelled to accept the title, although two of the defendants were lunatics for whom no committees had been appointed, if it does not appear from the record that they are lunatics. The court said: "Assuming that these defendants were *non sui juris* at the commencement of this action, they were, nevertheless, liable to be sued. The mental incapacity, or incompetency, of parties presents no interference with the enforcement of legal liabilities. The institution of legal proceedings against lunatics is not inhibited. They may be sued and actions may be maintained against them, and whether their insanity will constitute a defense depends on the circumstances of the case." [29] The question relates solely to the jurisdiction of the court and to

[24] It would seem that the same principle applies also to those cases where persons have been adjudged to be lunatics. See *Sternberg* v. *Schoolcraft*, 2 Barb. (N. Y.) 153; *Robertson* v. *Lain*, 19 Wend. (N. Y.) 649.

[25] *Crippen* v. *Culver*, 13 Barb (N. Y.) 424; *Sternbergh* v. *Schoolcraft*, 2 Barb. (N. Y.) 153.

[26] *Prentiss* v. *Cornell*, 96 N. Y. 665, aff'g 31 Hun (N. Y.) 167.

[27] *Mutual Life Ins. Co.* v. *Hunt*, 79 N. Y. 541, aff'g 14 Hun (N. Y.) 169. Legal obligations may be enforced against lunatics and idiots whether their mental capacity has been judicially determined or not. *Sanford* v. *Sanford*, 62 N. Y. 553.

[28] 31 Hun (N. Y.) 167.

[29] *Sanford* v. *Sanford*, 62 N. Y. 553; *Mutual Life Ins. Co.* v. *Hunt*, 14 Hun (N. Y.) 169, aff'd 79 N. Y. 541.

the regularity of the proceedings. The personal service of the summons and complaint conferred jurisdiction of these persons and the judgment rendered was held to be not even erroneous.[30]

§ 673. Enforcement of purchase where there are infant defendants.—Where, in an action brought to foreclose a mortgage, an infant defendant was not served with the summons, but a *guardian ad litem,* whom his mother procured to be appointed for him, appeared in the action and put in an answer, and the purchaser at the sale refused to complete his purchase because the infant defendant had not been served, the court held that there was too much doubt about the validity of the proceedings to warrant an order compelling the purchaser to accept the referee's deed.[31]

In an action brought in New York to foreclose a mortgage, one of the defendants who owned an interest in the premises, was an infant under the age of fourteen years, residing with his mother in New Jersey. The summons was not served upon him, either personally or by publication, but was personally served upon his mother in New York. The mother, after such service and upon her own application, was appointed *guardian ad litem* by order of the court, with authority to appear and defend. The infant and the mother both appeared and put in a general answer. Upon application to compel a purchaser at the sale made under the judgment and decree to complete his purchase, it was held that the court had no jurisdiction over the infant defendant to appoint a *guardian ad litem,* as such infant had not been made a party to the action, that an appearance by the guardian was not an appearance by the infant, that the judgment therefore was not binding upon him, that the sale under such judgment did not

[30] *Crippen* v. *Culver,* 13 Barb. (N. Y.) 428; *Sternbergh* v. *Schoolcraft,* 2 Barb. (N. Y.) 153.

[31] *Ingersoll* v. *Mangam,* 24 Hun (N. Y.) 202, aff'd 84 N. Y. 622.

convey a good title, and that the application to compel the purchaser to complete his purchase was properly denied.[32]

§ 674. Formal irregularities no excuse to purchaser.— In a mortgage foreclosure mere formal irregularities, which cannot result in injury to the purchaser, do not constitute sufficient defects to justify him in refusing to complete the sale. Should he refuse to accept the title for such reasons, so that a resale is ordered, he will be charged with the expenses thereof and the deficiency, if any.[33] Thus, on a mortgage foreclosure, in which both the purchaser at the sale and his wife were parties, and the wife being an infant, appeared by an attorney, and the purchaser, after having paid the ten per centum required at the time of making his bid, refused to complete his contract on the ground that the interest of his wife in the premises was not foreclosed, it was held that as the effect of the conveyance to him would be to give the wife the same interest which would have been foreclosed had she properly appeared in the action, he was not injured by the irregularity complained of and was bound to complete the purchase.[34]

Where there are mere formal irregularities in a foreclosure, they will be deemed to be waived by a defendant who, with full notice thereof, surrenders possession of the premises to the purchaser at the sale for a valuable consideration.[35] Where irregularities occur, the proper remedy is by an appeal from the order of confirmation. Where a sale under a mortgage foreclosure is irregular, because made during a term of the county court instead of the circuit court, as required by law, it does not operate as an assignment of the mortgage

[32] *Ingersoll* v. *Mangam*, 84 N. Y. 622; N. Y. Code Civ. Proc. § 416.

[33] *Knight* v. *Moloney*, 4 Hun (N. Y.) 33.

[34] *Knight* v. *Moloney*, 4 Hun (N. Y.) 33.

[35] *Trilling* v. *Schumitsch*, 67 Wis. 186.

debt itself to the purchaser, so that he can both hold the land and collect the residue of the debt from the mortgagor.[36]

§ 675. Reference to investigate title.—Upon the return of an order requiring a purchaser at a sale in a mortgage foreclosure to show cause why he should not complete the purchase, the court may appoint a referee to ascertain whether a marketable title is offered; and if it appears from the referee's report that such a title is not offered, or is of doubtful validity, the court will not compel him to complete the purchase.[37] A purchaser will not be compelled to take a title where the proceedings are for any reason void, as where the court has not had jurisdiction of the action, or where a party in interest has not been served with the summons,[38] or a subsequent incumbrancer has not been made a party to the suit.[39]

Where the defects in the title to the premises sold can be corrected, and releases are procured within a reasonable time, or other things are done to remedy the defects in the title, the purchaser cannot refuse to complete his purchase.[40] It has been said that while a purchaser, who has discovered a defect in his title at the proper time, may be relieved from his purchase by asking a rescission of the sale, yet he cannot, while retaining his bid, ask to have his title perfected by the application of the proceeds of the sale to the claims of incumbrancers not parties to the action.[41]

§ 676. Purchaser entitled to marketable title.—A purchaser of land under a decree of foreclosure is entitled to a

[36] *Wells* v. *Lincoln County*, 80 Mo. 424.

[37] *Graham* v. *Bleakie*, 2 Daly (N. Y.) 55, 58; *Ormsby* v. *Terry*, 6 Bush (Ky.) 553; *Banister* v. *Way*, Dick. 686; *Saunders* v. *Grey*, 4 Myl. & C. 515; *Tanner* v. *Rapford*, 4 Myl. & C. 518; *Harding* v. *Harding*, 4 Myl. & C. 514; *Hodder* v. *Ruffin*, 1 Ves. & B. 544.

[38] *Cook* v. *Farren*, 34 Barb. (N. Y.) 95, 12 Abb. (N. Y.) Pr. 359, 21 How. (N. Y.) Pr. 286.

[39] *Verdin* v. *Slocum*, 71 N. Y. 345, reversing 9 Hun (N. Y.) 150.

[40] *Graham* v. *Bleakie*, 2 Daly (N. Y.) 55. See *Coffin* v. *Cooper*, 14 Ves. 205.

[41] *Duvall* v. *Speed*, 1 Md. Ch. Dec. 229, 235.

marketable title,[42] and cannot be compelled to accept a deed which gives him only a doubtful title, or leaves him to the hazards of a contest with other parties which may seriously affect the value of the property.[43] A title open to reasonable doubt is not a marketable title.[44] If the defect is patent in the record of title, the purchaser may rest thereon, otherwise he must give evidence to show that it is unmarketable.[45]

A purchaser will not be compelled to accept a title which is so doubtful that it may expose him to litigation, even though such title may be considered good by the court. And if there is a reasonable chance that some third person may raise a question as to the title of the estate after the completion of the contract, the court will not compel a bidder to complete his purchase.[46]

It has been said that a title may be doubtful, that is to say, unmarketable, because of the uncertainty of some matter of fact appearing in the course of the examination of it; and that if, after all reasonable proofs have been produced, the

[42] *Fleming* v. *Burnham,* 100 N. Y. 1; *Dana* v. *Jones,* 91 App. Div. 495, 86 N. Y. Supp. 1000. See *Ely* v. *Mathews,* 58 Misc. 365, 110 N. Y. Supp. 1102. Lord Eldon held in an early case, that a purchaser is entitled to demand not merely a marketable title, but one which he can take with reasonable certainty. *Lowes* v. *Lush,* 14 Ves. 547.

[43] *Jordan* v. *Poillon,* 77 N. Y. 518. See *Montz* v. *Schwabacher,* 119 Ky. 256, 83 S. W. 569.

[44] *Fleming* v. *Burnham,* 100 N. Y. 1, 10; *People* v. *Board of Stock Brokers,* 92 N. Y. 98; *Jordan* v. *Poillon,* 77 N. Y. 518. See *College Point Savings Bank* v. *Vollmer,* 44 App. Div. 619, 60 N. Y. Supp. 389.

Andrews, J., says in *Fleming* v. *Burnham,* that it would be specially unjust to compel a purchaser to take a title, the validity of which depends upon a question of fact, when the facts presented upon the investigation might be changed by a new inquiry, or are open to opposing inferences.

[45] *Title Guarantee & Trust Co.* v. *Fallon,* 101 App. Div. 187, 91 N. Y. Supp. 497.

[46] *Post* v. *Bernheimer,* 31 Hun (N. Y.) 247. See *Shriver* v. *Shriver,* 86 N. Y. 575; *Lockman* v. *Reilley,* 29 Hun (N. Y.) 434; *Richmond* v. *Gray,* 85 Mass. (3 Allen) 25; *Garnett* v. *Macon,* 6 Call (Va.) 368; *Christian* v. *Cabell,* 22 Gratt. (Va.) 82; *Emery* v. *Grocock,* 6 Madd. 54; *Smith* v. *Death,* 5 Madd. 371; *Lowes* v. *Lush,* 14 Ves. 547; *Huber, as ex'r etc.* v. *Case,* 93 App. Div. 479, 87 N. Y. Supp. 663; *Matter of Brennan* v. *Storm,* 21 App. Div. 236, 47 N. Y. Supp. 661.

court does not feel called upon to instruct the jury to find against the title, there is not a reasonable doubt as to its validity.[47] A mere possibility that the purchaser may be disturbed on account of some alleged defect in the title, is not a sufficient objection.[48]

A purchaser must be content with such title as the proceedings show that he will get.[49] Thus it is held that a purchaser at a sale upon foreclosure of a mortgage is entitled to be relieved from his purchase when the grantees of the mortgaged premises holding under unrecorded deeds, and their tenant in possession at the commencement of the foreclosure action, were not made parties thereto.[50] Where there is an error in a deed and mortgage in describing the starting point, it is such a misdescription as renders the title unmarketable, and entitles the purchaser at the foreclosure sale to be relieved from his purchase.[51]

[47] *Shriver* v. *Shriver,* 86 N. Y. 575, 584; *Emery* v. *Grocock,* 6 Madd. 54.

[48] *Post* v. *Bernheimer,* 31 Hun (N. Y.) 247; *Hayes* v. *Harmony Grove Cemetery,* 108 Mass. 400. See *Ebert, as ex'x etc.* v. *Hanneman,* 69 Misc. 223, 125 N. Y. Supp. 237.

[49] *Boorum* v. *Tucker,* 51 N. J. Eq. (6 Dick.) 135, 26 Atl. 456.

Nebraska rule—The doctrine of caveat emptor.—The Nebraska supreme court holds that the doctrine of *caveat emptor* applies to a foreclosure sale, even though the purchaser is informed by the sheriff and the clerk of the court that if he buys the land he will get a clear and perfect title thereto free from all liens, although such statements are untrue. This is based on the ground that it is the duty of the intending purchaser to examine the title, and not to rely upon the statements of others, even though they be officers of the court. Consequently such misstatements by these officers is not ground for a motion to vacate and set aside the sale. *Norton* v. *Taylor,* 35 Neb. 466, 53 N. W. 418, 18 L.R.A. 88, 37 Am. St. Rep. 441. And a purchaser at a mortgage foreclosure sale will not be relieved from his bid on the ground of defective title, or because of prior incumbrances, in those cases where the true condition of the title is fully set out on pleadings and the record of the proceedings under which the sale is made, for the reason that he is chargeable with notice of all such material facts as the record discloses. *Id.*

[50] *Welsh* v. *Schoen,* 59 Hun (N. Y.) 356, 36 N. Y. S. R. 538, 13 Supp. 71.

[51] *Fitzpatrick* v. *Sweency,* 56 Hun

§ 677. Partial failure of title will excuse purchaser.—Where a purchaser does not obtain the same premises which he had reason to believe he would under the terms of the sale, he will not be required to complete his purchase.[52] Thus, in Beckenbaugh v. Nally,[53] a purchaser was relieved from his bid, where the terms of sale stated that the premises would be sold "subject to the lease of the present upland of said property, to expire May 1, 1884," and at the time of the sale a brick building, claimed to be worth $5,000, was standing upon the upland, and by the terms of his lease the tenant was entitled to remove the building, of which right no notice was given at the time of the sale.

Where several parcels of real estate are sold upon foreclosure as an entirety, for an entire sum of money, and the purchaser obtains title to only a part of the parcels sold, the rule of *caveat emptor* is applicable, and no correct rule can be prescribed for the measure of the purchaser's damages, if such partial failure of title affords him any cause of action against the mortgagor or judgment defendant.[54]

§ 678. Rights of assignee of purchaser's bid.—A purchaser at a foreclosure sale may make a valid transfer of his bid to a third person before the execution of a deed of the premises; and, upon the application of the assignee, the court may direct the officer making the sale to execute a conveyance immediately to such assignee, subject to the equitable rights or liens of other persons, as against the original purchaser, which became vested prior to such assignment.[55]

(N. Y.) 159, 9 N. Y. Supp. 219, 3 N. Y. S. R. 525, aff'd in 121 N. Y. 707 mem.

[52] *Riggs* v. *Pursell*, 66 N. Y. 193; *Beckenbaugh* v. *Nally*, 32 Hun (N. Y.) 160.

[53] 32 Hun (N. Y.) 160.

[54] *Parker* v. *Rodman*, 84 Ind. 256.

[55] *Proctor* v. *Farnam*, 5 Paige Ch. (N. Y.) 614. See *McClure* v. *Englehardt*, 17 Ill. 47; *Splahn* v. *Gillespie*, 48 Ind. 397; *Ehleringer* v. *Moriarty*, 10 Iowa, 78; *Wood* v. *Mann*, 3 Sumn. C. C. 318; *Vale* v.

If there is more than one assignee of the bid, upon motion in the action in which the sale was made, the court will decide between them which is entitled to the deed of conveyance.[56] But where the purchaser declines to take the title and requests the master to transfer his bid to the complainant, who had agreed to take his place, it has been held that the master should resell the property, and not allow the complainant to take it at the purchaser's bid and receive a deed.[57]

If such purchaser, or his assignee, go into possession of the mortgaged premises with the assent of the mortgagor, under the rights supposed to have been acquired under the foreclosure sale, and, for any reason, the sale is found to be invalid, he will be deemed a mortgagee in possession.[58]

The supreme court of New York, in the case of Flint v. George,[59] say that one to whom a purchaser at foreclosure sale assigns his bid after making a payment of ten per cent. upon which the sale was conditioned, and who refuses to complete the sale, upon which the property is resold for sufficient to satisfy the claim without such ten per cent., has no title to the payment which he can assign, as against one to whom the original purchaser assigned his interest in the payment, after the sale.

§ 679. Right of bidder to have sale completed.—Where a sale is made by a referee in a manner not authorized by the judgment, parties who in good faith have bid off the property upon the terms offered by the referee, and who

Davenport, 6 Ves. 615; *Rigby* v. *McNamara,* 6 Ves. 515.

Where a purchaser under a decree of foreclosure agreed to sell the property purchased to a third person and died before doing so, his heirs being abroad, the court ordered a conveyance to the substituted purchaser, and the payment of the money into court. *Pearce* v. *Pearce,* 7 Sim. 138.

[56] *Proctor* v. *Farnam,* 5 Paige Ch. (N. Y.) 614.

[57] *Thompson* v. *Dimond,* 3 Edw. Ch. (N. Y.) 298.

[58] *Rogers* v. *Benton,* 39 Minn. 39, 38 N. W. 765, 12 Am. St. Rep. 613.

[59] 8 N. Y. Supp. 221, 28 N. Y. S. R. 629.

have made a payment accordingly, cannot be compelled to pay any sum in addition to the amount of such bid, upon the ground that such sum is required to make the bid correspond with the terms, upon which alone the referee was authorized to make the sale.[60] And it has been held, that where a referee, under a decree of foreclosure, with the consent of the parties in interest, sells the property on credit in order to obtain a larger price therefor, the purchaser will have the right to insist upon the terms of his purchase, and cannot be compelled to pay cash.[61] Where a referee sells the premises upon terms not authorized by the decree, the remedy of parties aggrieved will be by motion to vacate the sale and for a resale.[62]

Where by reason of delay, arising from an imperfect title, the circumstances of the transaction and of the parties have materially changed, the purchaser will not be required to complete his purchase.[63] If a defective title causes delay in completing a sale, the purchaser will not be required to pay interest upon the purchase money until the title is perfected.[64] If, however, he accepts the rents and profits of the premises from the day of sale, he will be chargeable with interest on the purchase money. But in such cases, it is at the option of the purchaser whether to take the rents and profits and pay interest, or to relinquish the rents and profits and to be exempt from the payment of interest.[65]

An appeal from an order refusing a resale of the premises will not interfere with the right of the purchaser to have the sale completed. And the appellant will not be entitled to an order staying the purchaser from completing his purchase and taking possession of the property, without giving secur-

[60] *Hotchkiss* v. *Clifton Air Cure*, 4 Keyes (N. Y.) 170.

[61] *Rhodes* v. *Dutcher*, 6 Hun (N. Y.) 453.

[62] *Hotchkiss* v. *Clifton Air Cure*, 4 Keyes, (N. Y.) 170.

[63] *Merchants' Bank* v. *Thomson*, 55 N. Y. 7; *Taylor* v. *Longworth*, 39 U. S. (14 Pet.) 172, 10 L. ed. 405.

[64] *Merchants' Bank* v. *Thomson*, 55 N. Y. 7.

[65] *Merchants' Bank* v. *Thomson*, 55 N. Y. 17; *Diar* v. *Glover*, Hoff. Ch. (N. Y.) 71. See *Worrall* v. *Munn*, 53 N. Y. 185.

ity for the payment of the rents and profits of the premises in the meantime, and requiring that no waste shall be committed.[66]

An application by a purchaser at a foreclosure sale to be relieved from his purchase, must be made within a reasonable time, and when so made, the application will ordinarily be granted, if the purchaser parted with his money under a mistaken notion of the law, although he may have had full knowledge of the facts.[67]

It has been said by the supreme court of Arizona, in the case of Bryan v. Kales,[68] that the title of a purchaser at a sale of land under a mortgage cannot be attacked in a collateral proceeding upon the ground that the sale was had upon a judgment obtained by the mortgagee against himself as administrator of the mortgagor, and consequently void upon its face, where the mortgagee and administrator, though of the same name, are not shown to be the same person, since the presumption of identity of person from identity of names is overcome by the presumption of the validity of a judgment.[69]

[66] *American Insurance Co.* v. *Oakley,* 9 Paige Ch. (N. Y.) 496, 38 Am. Dec. 561.

[67] *Barnard* v. *Wilson,* 66 Cal. 251.

[68] 31 Pac. 517. See also *Bryon* v. *Brasius* (Ariz.) 31 Pac. 519.

[69] In this case it was strongly urged by counsel for the appellant that the fact of the identity does not appear upon the face of the record of the court, inasmuch as it should be presumed alone from the similarity of names, applying the rule of evidence that identity of names is *prima facie* evidence of identity of person. On this point the court say:

"An examination of the authorities will show that this rule of evidence is not one of universal application; that it grew out of the general presumption in favor of the validity of contract, the regularity of land titles and the integrity of records; that wherever its effect would be to negative these general presumptions, the reason of the rule ceases to exist, the rule itself becomes inoperative; that hence it can have no application to a case like the one at bar, if, indeed, it applies at all to a judgment of a court of record, where the effect of its application would be to impeach and destroy its effect as a valid and binding estoppel of record." Applicable cases are then cited and discussed by the court, among them being *Stevenson* v. *Murray,* 87 Ala. 442, 6 So. 301; *Garwood* v. *Garwood,* 29 Cal. 515; *Darente* v. *Sullivan,* 7 Cal. 279; *Prescott* v. *Tufts,* 7

Mass. 209; *Campbell* v. *Wallace,* 46 Mich. 320, 9 N. W. 432; *Wilson* v. *Benedict,* 9 Mo. 209, 2 S. W. 283.

Distinguishing *Gitt* v. *Watson,* 18 Mo. 274; and *Jackson* v. *King,* 5 Cow. (N. Y.) 239, 15 Am. Dec. 468. The court say that these cases differ materially from the one at bar in this: "That the rule *idem sonans* was invoked therein in aid of land title by showing the identity of a grantee in one instrument to be the same as the grantee in another instrument, or the identity of a patentee of land and the ancestor of one setting up title to the same.

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